

DMCA –POLITICS, LAW and TECHNOLOGY

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Topic – circumvention rules

- **Three law means of enforcement**
 - **Contract breach**
 - **IP infringement remedy**
 - **Digital rights management infringement**
- **Numerous questions about interaction and dependence**
- **We focus on the third one**

Grand Conflict

- **Rights Protection**
 - **New technologies alter ability of traditional incentives to function**
 - **New technologies also offer new means of distribution**
- **Perspective:**
 - **Change in technology requires change in protection**
 - **Society interest in promoting innovation via incentives**

Grand Conflict: Rights Restrictors

- **Narrowing rights or allowing technology to do so**
- **Innovation will be stifled by expanded rights**
- **Other values prevails over copyright**
- **Corporate control is bad**
- **Markets do not work**

Application

- **Converted to different themes:**
 - **“First Sale”:** sacred or a default rule
 - **“Fair use”:** sacred or a defense
 - **First Amendment** infringed or enhanced
- **Myths as argument**
 - **All incentives gone**
 - **The motion picture sold but not useable**
 - **The garage door opener that cannot work**
 - **The work no one can read**

(B) a technological measure “effectively controls access to a work” if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.

“circumvent a technological measure” means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner; and

- framing**
- **Copyright management info**
 - **1201(a)(1): “No person shall circumvent a technological measure that effectively controls access to a work protected under this title.”**

Trafficking Rules

- **Trafficking in technology or devices that**
 - **circumvent technology that controls access, or**
 - **circumvent technology that enforces rights**
- **Analogy to contributory infringe or to laws that regulate communications/ cable devices**

Trafficking Rule: Text

- **1) no person shall *manufacture, import, offer to the public, provide, or otherwise traffic* in;**
- **2) a *technology, product, service, device, component, or part thereof*, that**
- **3)**
 - **is *primarily designed* or produced for the purpose of circumventing,**
 - **has *only limited* commercially significant purpose or use other than to circumvent, or**
 - ***is marketed ... for use in circumventing,***
- **4) a technological measure that effectively controls access to a work protected under [copyright].**

Exemptions

- **Nonprofit libraries, archives, and educational institutions**
- **Reverse engineering**
 - **sole purpose: elements of the program that are necessary to interoperability of an independently created program with other programs, and not readily available**
- **Encryption research**
- **Protection of personally identifying information**
- **Security testing**

Others

- (1) Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.
- (2) Nothing in this section shall enlarge or diminish vicarious or contributory liability for copyright infringement in connection with any technology, product, service, device, component, or part thereof....
- (4) Nothing in this section shall enlarge or diminish any rights of free speech or the press for activities using consumer electronics, telecommunications, or computing products.

Technology to prevent copying

- **Early cases apply without problem**
- **Query: effective or not?**
- **Corley: Enforces injunction against dissemination**
- **First Amendment challenge rejected**

Argued

- **Access controls limit fair use**
 - **Fair use as a right**
 - **Optimal fair use as a right?**
- **Marketing rules affect speech because of the nature of the technology**
 - **Prior Restraint?**
 - **Intermediate scrutiny: programs are speech, but this is content neutral regulation**

DMCA and Other

- **Separate cause of action or a new property right of controlling access to a protected environment**
- **1201(a)(1): “No person shall circumvent a technological measure that effectively controls access to a work protected under this title.”**
- **Copyright defenses apply?**
 - Not directly
 - Possible indirect impact

Chamberlain

- **Garage doors – sales without restriction on use of openers**
- **Technology, however, designed to preclude use of other brand to access the software that runs the door opener.**
- **Defendant markets universal opener**
- **The claim: you have marketed a device that circumvents the technology that we use to block access to the software**

Circumventi

(A) to "circumvent a technological measure" means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner; and

- "Without authority of copyright owner"
- Who must prove unauthorized?
- Unconditional sale creates implicit authority
- Not a property right, but a remedy for protecting property
- Plaintiff bears burden.

Ruling

- Further analysis: must there be a relation to infringement
- Here, no risk of copying and no actual copying – just causing it to run
- "We conclude that § 1201 prohibits only forms of access that bear a reasonable relationship to the protections that Copyright Act otherwise affords copyright owners. While such a rule ... may create some uncertainty ... it is the only meaningful reading of the statute.
- 1201(a)(1): "No person shall circumvent a technological measure that effectively controls access to a work protected under this title."

All access barred

- **“Chamberlain's proposed construction of § 1201(a) implies that in enacting the DMCA, Congress attempted to "give the public appropriate access" to works by allowing copyright owners to deny all access to the public. Such a redefinition borders on the irrational.”**

Storage Technology

- **Fed Circuit: 2005 WL 2030281**
- **Markets hardware that uses software to control shifting between library of tapes**
- **Licensed use of management system, but not of diagnostic**
- **Third party uses diagnostic**
- **Court holds use protected either by license or by Section 117(c)**
- **DMCA? Use of diagnostic is controlled by Get Key**

DMCA and infringement

- **No violation because use does not lead to or facilitate infringement**
- **The maintenance code was already loaded**
- **Parties conceded that copying within machine would be infringement**
- **But here, the copy occurred by starting it, not by accessing the software.**
- **DMCA as a design issue and a notice issue?**

Lexmark

- **Single use cartridges**
- **Software lock out code**
- **Circumvented to allow other use**
- **No violation:**
- **Cannot use it this way**
- **Purchase, not circumvention leads to access**
- **Did I leave my door unlocked**

- **It is not Lexmark’s authentication sequence that “controls access” to the Printer Engine Program. It is the purchase of a Lexmark printer ... Anyone who buys a Lexmark printer may read the literal code of the Printer Engine Program directly from the printer memory, with or without the benefit of the authentication sequence, and the data from the program may be translated into readable source code after which copies may be freely distributed.... The authentication sequence, it is true, may well block one form of “access”—the “ability to . . . make use of” the Printer Engine Program [but] it does not block another relevant form of “access” Because the statute refers to “control[ling] access to a work protected under this title,” it does not naturally apply when the “work protected under this title” is otherwise accessible.**

DMCA as a design problem

- **Physical access**
- **When loaded/ copied**
- **Just as one would not say that a lock on the back door of a house “controls access” to a house whose front door does not contain a lock ... it does not make sense to say that this provision of the DMCA applies to otherwise-readily-accessible copyrighted works. Add to this the fact that the DMCA requires the measure to control that access “effectively,” and it seems clear that this provision does not naturally extend to a technological measure that restricts one form of access but leaves another route wide open.**

Davidson case: 8th circuit

- **Shrinkwrap prevents reverse engineering – enforceable**
- **No preemption**
- **Party can waive fair use and other rights by agreeing to contract**
- **See also Baystates case**
- **DMCA: Circumvent to allow use in online mode**
- **Violates DMCA**
- **Reverse engineering exception not applicable**

Fair use issue

- **“Chamberlain's proposed construction would allow copyright owners to prohibit *exclusively fair* uses even in the absence of any feared foul use. It would therefore allow any copyright owner, through a combination of contractual terms and technological measures, to repeal the fair use doctrine with respect to an individual copyrighted work--or even selected copies of that copyrighted work.”**

Corely

- **We know of no authority for the proposition that fair use... guarantees copying by the optimum method or in the identical format of the original. ... DMCA does not impose even an arguable limitation on the opportunity to make a variety of traditional fair uses of DVD movies, such as commenting on their content, quoting excerpts ... and even recording portions of the video images and sounds on film or tape by pointing a camera ... at a monitor...**

THE BEGINNING

