No. 04-1118

In The
United States Court of Appeals
For The Federal Circuit

THE CHAMBERLAIN GROUP, INC.,
Plaintiff-Appellant,

v.

SKYLINK TECHNOLOGIES, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois
(Civil Action No. 02-CV-6376)

**BRIEF *AMICUS CURIAE* OF
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION
IN SUPPORT OF SKYLINK TECHNOLOGIES, INC.
AND URGING AFFIRMANCE**

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April 1, 2004

CERTIFICATE OF INTEREST

Pursuant to Federal Rule of Appellate Procedure 26.1 and Federal Circuit Rule 47.4, counsel for *amicus curiae* Computer and Communications Industry Association certifies the following:

1. The full name of every party or *amicus* represented by me is: Computer and Communications Industry Association.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is: None.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or *amicus curiae* represented by me are: None.

4. The names of all law firms and the partners or associates that appeared for the party or *amicus* now represented by me in the trial court or agency or are expected to appear in this court are:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

INTEREST OF AMICUS

Computer & Communications Industry Association ("CCIA") members

participate in many sectors of the computer and telecommunications industry and

range in size from small entrepreneurial firms to the largest in the industry.[1] CCIA

members believe that computer programs deserve effective intellectual property

protection to give developers sufficient incentive to create new programs. At the

same time, CCIA is concerned that improper extension of intellectual property law

will impede innovation and inhibit fair competition in the computer industry.

CCIA has long supported interpreting the intellectual property laws to

permit the development of interoperable products. CCIA filed an *amicus* brief

with the U.S. Court of Appeals for the Ninth Circuit in *Sega Enterprises, Ltd. v.*

Accolade, Inc., 977 F.2d 1510 (9th Cir. 1992), which held that the reverse

engineering technique known as disassembly was a fair use as a matter of law

when it was the only way to obtain functional elements such as the information

necessary for achieving interoperability. CCIA also filed an *amicus* brief with that

court in *Sony Computer Entertainment, Inc. v. Connectix Corp.*, 203 F.3d 596 (9th

Cir.), *cert. denied*, 531 U.S. 831 (2000), which affirmed its earlier holding in *Sega*.

Additionally, when Congress was considering the Digital Millennium Copyright

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[1] CCIA's current roster of members is available at
www.ccianet.org/membership.php3#members.

Act (DMCA), CCIA advocated the inclusion of an exception permitting

circumvention of technological measures for the purpose of achieving

interoperability.

Neither CCIA nor its members have a direct financial interest in the outcome

of this litigation. However, one of Skylink's defenses to Chamberlain's motion for

summary judgment was the interoperability exception to the DMCA, 17 U.S.C. §

1201(f). Because an improper interpretation of the DMCA's interoperability

exception could have serious anticompetitive consequences for CCIA members

and the computer industry as a whole, CCIA submitted an *amicus* brief to the

district court in support of Skylink's 1201(f) defense. CCIA now respectfully

submits that Section 1201(f) offers a viable, alternate ground for affirming the

district court's decision.

ARGUMENT

In this case, Chamberlain attempts to use Section 1201 of the DMCA to

thwart competition between its transmitters and the Model 39 transmitters

manufactured by Skylink Technologies. Chamberlain argues that in order to

communicate commands to Chamberlain garage door openers, Skylink's

transmitters circumvent a technological protection measure designed to prevent

non-Chamberlain transmitters from interacting with the software in Chamberlain

receivers. Chamberlain asserts that by manufacturing transmitters capable of this circumvention, Skylink has violated 17 U.S.C.§ 1201(a)(2).

The district court rejected this proposition in denying Chamberlain's motion for summary judgment on the Section 1201 claim. *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 292 F. Supp. 2d 1023, 1040 (N.D. Ill. 2003); Joint Appendix ("J.A.") at 15-41. The court did not reach arguments raised by CCIA and the Consumer's Union in separate *amicus* briefs supporting Skylink, but noted that Skylink may be entitled to summary judgment on that claim "for reasons identified by Skylink or *amici*." *Id.* Skylink so moved, and the district court granted the motion, holding that Skylink's circumvention was authorized by Chamberlain's conduct and by consumers' reasonable expectation of access to their own garage. *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 292 F. Supp. 2d 1040, 1046 (N.D. Ill. 2003); J.A. at 3-12.

While the district court's decision may be affirmed upon the grounds stated therein, this Court may also affirm that decision upon other any other ground "the law and the record will support so long as that ground would not expand the relief granted." *Glaxo Group. Ltd. v. Torpharm, Inc.*, 153 F.3d 1366, 1371 (Fed. Cir. 1998).   Thus, even if this Court should find that Skylink's circumvention was not authorized by Chamberlain, the district court's decision may nevertheless be

affirmed upon the ground that circumvention to achieve interoperability is protected by the DMCA.

Congress anticipated that companies would attempt to employ the DMCA in the anticompetitive manner that Chamberlain proposes. Accordingly, Congress crafted an exception in Section 1201(f) for the express purpose of permitting the circumvention necessary to achieve interoperability between two software components. Section 1201(f) provides Skylink with a complete defense against Chamberlain's DMCA claims.

This brief first addresses the importance of interoperability to the computer industry. It then explains how jurisdictions throughout the United States and around the world have specifically permitted reverse engineering, a process essential to the development of interoperable products. Next, the brief discusses the Section 1201(f) exception inserted by Congress into the DMCA to promote interoperability. This exception absolves Skylink from liability under Section 1201 of the DMCA. For this reason, this Court should affirm the district court's decision.

I. INTEROPERABILITY IS CRITICAL TO COMPETITION AND INNOVATION IN THE COMPUTER INDUSTRY

In most copyright industries, there is little relation between intellectual property protection and competition. A film producer, for example, has no

justification and little motivation for copying from another film (except in certain special cases, such as parody).

Computer products, however, are different. Unlike a film or novel, which stands by itself, a computer product can function only in conjunction with hardware and other software. For example, an application program, such as a word processor, must work together with an operating system in order to perform its task; otherwise, it is a useless set of magnetic impulses. Two computer products can work together—*interoperate*—only if they conform to the same set of rules, or *interface specifications*.

If a company could exercise proprietary control over the interface specifications implemented by its products, that company could determine which products made by other firms – if any – could interoperate with its software. And should that company have a dominant position in a particular market, it could use its control over interoperability to expand its dominant position into adjacent markets.[2] Moreover, such authority would extend the rights under copyright beyond what is necessary to protect the original expressive elements that have traditionally been offered protection under American copyright law.

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[2] Dan L. Burk, *Anticircumvention Misuse*, 50 UCLA L. Rev. 1095, 1113, 1133 (2003).

Such a broad monopoly would have serious implications for consumer welfare.[3] In the absence of competition during the effective lifespan of the product, the first developer would have little incentive to develop more innovative and less costly products. These negative consequences would be compounded by the fact that the personal computer revolution and the emergence of the Internet have produced an overwhelming need for interconnection between different elements of computer systems. Within a given large corporation, literally thousands of personal computers and workstations scattered across the globe need to interact with each other and with the company's mainframes. Moreover, with the advent of the Internet, users around the world need to exchange vast quantities of data through their computers.[4] Prohibiting competitors from accessing the *de facto* standard interface specifications would lock users into a particular operating system or network software environment, and would inhibit the transfer of data between users with different computing environments. *See Lotus Dev. Corp. v. Borland Int'l, Inc.*, 49 F.3d 807, 821 (1st Cir. 1995), *aff'd by an equally divided Court*, 516 U.S. 233 (1996)(J. Boudin, concurring).

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[3] *See, e.g.*, Peter S. Menell, *An Analysis of the Scope of Copyright Protection for Application Programs*, 41 Stan. L. Rev. 1045, 1082, 1097 n.281 (1989).

[4] *See* President's Information Infrastructure Task Force, *Global Information Infrastructure: Agenda for Cooperation* (U.S. Government Printing Office, Washington, D.C., Feb. 1995) at 14-16.

It should be stressed that interoperable products often are *not* mere "clones" that offer only the same functionality as the products of the first comer, but at a lower price. Even interoperable products that offer similar functionality as the original product typically offer additional features not found in the first comer's products. Thus, they compete with the first comer's products not only in terms of price (indeed, sometimes the interoperable products may be more expensive), but also in terms of innovation. Furthermore, many products that interoperate with other computer products do not mimic the functionality of the original product at all, but fulfill entirely different purposes or needs. In many cases – such as with a computer operating system and applications – these new products rely on the underlying program as a platform. In these respects, interoperable developers' use of preexisting interface specifications is a transformative use of the sort accredited by the Supreme Court in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

In short, in the computer industry, overly broad intellectual property protection directly restricts competition and innovation. For this reason, U.S. courts in recent years have held that interface specifications fall on the idea (or unprotected) side of copyright's idea/expression dichotomy.[5] Significantly, the U.S. government took this position in its case against Microsoft.[6]

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[5] *See, e.g.*, *Computer Assocs. Int'l v. Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992); *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 49 F.3d 807 (1st Cir. 1995), *aff'd by an equally divided Court*, 516 U.S. 233 (1996); *Mitel, Inc. v. Iqtel, Inc.*, 124 F.3d

But even though the interface specifications are not protected by copyright, a

company seeking to interoperate must still learn what those interface specifications

are. Because computer programs typically are distributed to the public in a form

readable only by computers, a program's interface specifications usually are not

readily apparent. In some instances, the developer of the program may be willing

to provide the interface information to other companies. All too often, however,

developers are not willing to provide the information, or the information they

provide is tardy or incomplete.[7]

In these cases, the companies seeking to develop interoperable products have

no choice but to perform painstaking research on the original program to discern

the interface specifications. This research, known as *reverse engineering*, is a

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1366 (10th Cir. 1997); *Sega*, 977 F.2d at 1524-25; Jonathan Band & Masanobu
Katoh, *Interfaces on Trial*, 131-146 (1995); 1 Paul Goldstein, Copyright
§ 2.15.2.1-2.15.2.2 (2d ed. 1998).

[6] Jonathan Band & Taro Isshiki, *Peace at Last? Executive and Legislative
Branch Endorsement of Recent Software Copyright Case Law*, Computer Lawyer,
Feb. 1999 at 1. Additionally, the D.C. Circuit condemned in harsh terms
Microsoft's attempt to justify anticompetitive actions by asserting its right to use
its intellectual property as it saw fit, so long as those rights were lawfully obtained.
United States v. Microsoft Corp., 253 F.3d 34, 63 (D.C. Cir. 2001)(*per
curiam*)("That is no more correct than the proposition that use of one's personal
property, such as a baseball bat, cannot give rise to tort liability.")

[7] Jeanette Bozo, *Bristol Has June 1 Date for Microsoft Lawsuit,* InfoWorld
Daily News, Jan. 4, 1999; Richard Wolffe, *FTC says Intel Lawsuit 'Vital to Stop
Abuse'*, Financial Post, June 18, 1998, at 19.

basic tool of software product development. Without reverse engineering, interoperability can be difficult, if not impossible, to achieve.

II.   JURISDICTIONS THROUGHOUT THE WORLD HAVE ADOPTED EXCEPTIONS PERMITTING SOFTWARE REVERSE ENGINEERING

The U.S. Supreme Court has long recognized that there is nothing inherently wrong with studying a competitor's product to understand how it works and to figure out how to make a better product. Thus, in *Kewanee Oil Co. v. Bicron Corp.,* 416 U.S. 470, 476 (1974), the Court stated that "trade secret law … does not offer protection against discovery by fair and honest means, such as … by so-called reverse engineering, that is by starting with a known product and working backward to divine the process which aided in its development or manufacture."

The Court has also recognized the benefits of reverse engineering: "Reverse engineering … often leads to significant advances in technology." *Bonito Boats, Inc., v. Thunder Craft Boats, Inc*., 489 U.S. 141, 160 (1989). Further, the Court has noted that "the competitive reality of reverse engineering may act as a spur to the inventor, creating an incentive to develop inventions that meet the rigorous requirements of patentability." *Id*.

Copyright law, however, has the potential of raising obstacles to software reverse engineering. Because of the nature of computer technology, software reverse engineering almost always requires the making of a reproduction or

derivative work. For example, the reverse engineering method known as *disassembly* involves "translating" the publicly distributed, computer readable program into a higher level, human readable form. In another method referred to as *black box reverse engineering*, an engineer observes a program's behavior and interaction with its environment while executing the program on a computer.[8] The computer automatically copies the program into the computer's random access memory (RAM) in order to run it.

Since the Ninth Circuit's 1992 decision in *Sega v. Accolade*, no less than five U.S. courts have permitted reproduction during the course of software reverse engineering under the "fair use doctrine."[9] Other courts have prevented enforcement under a copyright misuse theory.[10]

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[8] Engineers refer to this method as black box reverse engineering because the externally visible characteristics of the program are observed without looking into the program itself; the actual contents of the program remain unknown.

[9] *Atari Games Corp. v. Nintendo of America, Inc.*, 975 F.2d 832 (Fed. Cir. 1992); *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532 (11th Cir. 1996); *DSC Communications Corp. v. DGI Techs.*, 898 F. Supp. 1183 (N.D. Tex. 1995), *aff'd*, 81 F.3d 597 (5th Cir. 1996); *DSC Communications Corp. v. Pulse Communications, Inc.*, 976 F. Supp. 359 (E.D. Va. 1997), *aff'd in part, rev'd in part, and vacated in part*, 170 F.3d 1354 (Fed. Cir. 1999); *Sony Computer Entertainment, Inc. v. Connectix Corp.*, 203 F.3d 596 (9th Cir.), *cert. denied*, 531 U.S. 871 (2000).

[10] *DSC Communications Corp. v. DGI Techs.,* 81 F.3d 597 (5th Cir. 1996); *Alcatel U.S.A., Inc. v. DGI Techs., Inc.*, 166 F.3d 772 (5th Cir. 1999).

Similarly, the 1991 European Union Software Directive contains a specific exception for software reverse engineering.[11] The Directive has been implemented throughout the European Union, as well as in the EFTA countries and throughout Eastern and Central Europe.[12] Thus, both the United States and the European Union have recognized the central role reverse engineering plays in maintaining legitimate competition in the computer industry.

Pacific Rim countries share this recognition. Recently, Australia, Hong Kong, Singapore, and the Philippines have all amended their copyright laws to permit software reverse engineering.[13]

III. SECTION 1201(f) OF THE DMCA PERMITS CIRCUMVENTION FOR THE PURPOSE OF ACHIEVING INTEROPERABILITY

Section 1201 of the DMCA, passed by Congress in October, 1998, implements the provisions of the World Intellectual Property Organization Internet Treaties relating to technological protection measures. Specifically, Section 1201 restricts the development, distribution, and use of technologies that circumvent other technologies that protect an author's copyrights. While the DMCA was

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[11] Council Directive 91/250/EEC on the Legal Protection of Software Programs, Articles 5 and 6 (May 14, 1991), O.J. No. L122/42,44 (May 17, 1991).

[12] *See Interfaces on Trial*, *supra* note 4, at 258-62.

[13] Ord. No. 92 of 1997 (H.K.); Copyright (Amendment) Bill of 1998 (Sing.); Republic Act 8293 of 1996 (Phil.); Copyright Amendment (Computer Programs) Bill of 1999 (Austl.).

pending before Congress, developers of interoperable computer products, including CCIA, explained to Congress that the act of reverse engineering – the uncovering of the interface specifications – could require the circumvention of a technological protection measure. Moreover, the incorporation of these specifications in competitive products could run afoul of the DMCA's prohibition on the manufacture and distribution of circumvention technologies. This would particularly be the case when a company placed a software "lock" on a program that prevented access to the program, and the competitor circumvented that software lock to achieve interoperability. Thus, Section 1201 could prevent a developer of interoperable products from exercising his fair use privileges recognized in *Sega* and its progeny.

Accordingly, Congress created an exception to Section 1201 explicitly directed at the development of interoperable products. Section 1201(f) allows software developers to circumvent technological protection measures in a lawfully obtained computer program in order to identify the elements necessary to achieve interoperability of an independently created computer program with other programs. A person may engage in this circumvention only if the elements necessary to achieve interoperability are not readily available and the reverse engineering is otherwise permitted under the copyright law.[14] Furthermore, a

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[14] 17 U.S.C. § 1201(f)(1) (1998).

12

person may develop, distribute, and employ the means to circumvent technological

protection measures for the purpose of achieving interoperability.[15] Section

1201(f), therefore, provides a complete defense to Section 1201 liability to

qualifying developers of interoperable products. It also provides a defense to users

of these products.[16]

The Senate Judiciary Committee report on the DMCA explains the policy

underlying Section 1201(f). It states that this exception was "intended to allow

legitimate software developers to continue engaging in certain activities for the

purpose of achieving interoperability to the extent permitted by law prior to the

enactment of this chapter."[17] The Committee evidently understood that if a

company placed on its program a technological measure that prevented

interoperability, a legal prohibition on circumventing that technological protection

could preclude other companies from developing products capable of operating in

that company's computing environment. Citing *Sega*, the Committee states that

"[t]he objective is to ensure that the effect of current case law interpreting the

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[15] 17 U.S.C. § 1201(f)(2) and (3) (1998).

[16] Section 1201(f) provides an exception to all the prohibitions of Section
1201: Section 1201(a)(1)'s prohibition on the circumvention of access controls,
Section 1201(a)(2)'s prohibition on the manufacture and distribution of devices
which circumvent access controls, and Section 1201(b)'s prohibition on the
manufacture and distribution of devices which circumvent copy controls.

[17] S. Rep. No. 105-190, at 32 (1998).

Copyright Act is not changed by enactment of this legislation for certain acts of identification and analysis done in respect of computer programs."[18] The Committee concludes by noting that "[t]he purpose of this section is to foster competition and innovation in the computer and software industry."[19]

CCIA obviously is not familiar with the technical details of the products at issue in this case. Based only on Chamberlain's allegations, however, Skylink qualifies for the Section 1201(f) exception. Chamberlain controls access between its transmitter computer program and its receiver computer program by means of a "protective measure… that does not execute if an improper identification code… is received from a transmitter." Chamberlain Brief at 7. Skylink evidently analyzed the Chamberlain products to identify how they operate, and then programmed its chips to "mimic the Chamberlain resynchronization procedure… [and] circumvent Chamberlain's rolling code technology… that prevents unauthorized access to Chamberlain's copyrighted software." *Id.* at 10. By mimicking the resynchronization procedure, the program in the Skylink transmitter can interoperate with the program in the Chamberlain garage door opener.

Congress intended Section 1201(f) to permit precisely this sort of activity. Subsection 1201(f)(2) provides that notwithstanding subsection 1201(a)(2) – the

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[18] *Id.*

[19] *Id.*

subsection Chamberlain alleges Skylink to have violated – "a person may develop

and employ technological means to circumvent a technological measure … for the

purpose of enabling interoperability of an independently created computer program

with other programs, if such means are necessary to achieve such

interoperability…." Subsection 1201(f)(3) then provides that these means "may be

made available to others … solely for the purpose of enabling interoperability…."

These provisions permit Skylink to manufacture and distribute programs that

mimic the resynchronization procedure.

     The recent decision in *Lexmark International, Inc. v. Static Control*

Components, Inc., 253 F. Supp. 2d 943 (E.D. Ky. 2003), does not undermine this

analysis. The *Lexmark* court acknowledged the existence of the Section 1201(f)

interoperability exception, but concluded that it did not apply under the specific

facts before it. The *Lexmark* court observed that

> Sections 1201(f)(2) and (3) provide that a person may develop a
> circumvention device and make that circumvention device available to
> others 'solely for the purpose of enabling interoperability *of an*
> *independently created computer program* with other programs, and *to*
> *the extent that doing so does not constitute infringement under this title*
> *or violate applicable law other than this section.*'

Id. at 970 (emphasis in original). The court then noted that SCC's

"SMARTEK microchips cannot qualify as independently created when they

contain exact copies of Lexmark's Toner Loading Programs." Moreover,

"SCC's exact copying of Lexmark's Toner Loading Programs into its

15

SMARTEK microchips constitutes copyright infringement." Accordingly,

the *Lexmark* court concluded that "Section 1201(f) of the DMCA does not

offer any protection to SCC." *Id*. at 971.

Applying the *Lexmark* court's holding to this case, Skylink would lose

1201(f) immunity only if the chip in its Model 39 transmitter infringed

Chamberlain's copyright in its software. It does not appear, however, that

Chamberlain is even alleging such an infringement.

In fact, the *Lexmark* dispute has reaffirmed the purpose of the

interoperability exception. In its triennial order on Section 1201 exemptions,

mandated by 1201(a)(1)(C) and (D), the Copyright Office considered a petition by

SCC for copying "embedded" software such as that of Lexmark. Specifically,

SCC asked for an exemption that would permit two embedded programs to

interoperate so that the hardware in which they are embedded can interoperate.[20]

The Copyright Office concluded that an exemption was not necessary; section

1201(f)(3) permitted the incorporation of interface information in products for the

purpose of achieving interoperability. Not only does Section 1201(f) permit

achieving interoperability by the reverse engineer, the Office determined, but

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[20] Recommendation of the Register of Copyrights, Rulemaking on Exemptions
from Prohibition on Circumvention of Copyright Protection Systems for Access
Control Technologies, at 172 (Docket No. RM 2002-4, Oct. 27, 2003) *available at*
http://www.copyright.gov/1201/docs/registers-recommendation.pdf.

Section 1201(f) also has the effect of "enabling competitive choices in the marketplace."[21]

The Office observed that SCC's "goal was not merely to privately circumvent, but rather to facilitate the <u>distribution</u> of competitive toner cartridges to others"[22] – a goal embraced by 1201(f)(3):

> if reverse engineering to achieve interoperability is conducted under the statutory exemption, a competitor may not only reverse engineer a computer program in order to create an independently interoperable computer program, but may also make the information or means of interoperability available to others if the sole purpose is the enabling of interoperability of an independently created computer program with other programs, to the extent that doing so is a noninfringing use....[23]

Thus, the Copyright Office determined that Congress "comprehensively addressed the important concern of interoperability for competition and functionality,"[24] and therefore no exemption was necessary.

Acting upon the Office's recommendations, the Librarian of Congress declined to establish an exemption for remanufacturers seeking to achieve interoperability, because the "existing exemption in section 1201(f) addresses the

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[21] *Id.* at 178.

[22] *Id.* at 180-81.

[23] *Id.* at 181.

[24] *Id.* at 183.

concerns of remanufacturers, making an exemption under section 1201(a)(1)(D) unnecessary."[25]

Other authorities also confirm that Chamberlain seeks to apply Section 1201 in a manner not intended by Congress. As the Senate Judiciary Committee report makes abundantly clear, Section 1201 is aimed at preventing the dissemination of infringing copies of works over the Internet, because the threat of such dissemination will cause "copyright owners [to] hesitate to make their works readily available on the Internet…."[26] By providing additional protection for works, Section 1201 "creates the legal platform for launching the global digital online marketplace for copyrighted works. It will also make available via the Internet the movies, music, software, and literary works that are the fruit of American creative genius."[27]

Congress did not intend for Section 1201 to be used to prevent competition in the garage door opener transmitter market. This court should employ Section 1201(f) to prevent Chamberlain from manipulating copyright law to lock its garage door opener customers into purchasing Chamberlain transmitters.

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[25] Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 68 Fed. Reg. 62,011, at 62,017 (Oct. 31, 2003).

[26] S. Rep. No. 105-190, at 8 (1998).

[27] *Id*. at 2.

IV. CONCLUSION

Interoperability is critical to competition in the computer industry. In turn, reverse engineering and subsequent use of the interface specifications learned through reverse engineering are critical to achieving interoperability. Congress inserted Section 1201(f) into the DMCA to insure that the prohibition of circumvention of technological protection measures did not interfere with interoperability. The Court should not interpret and apply the interoperability exception in a manner that frustrates Congress's intent. Therefore, CCIA respectfully requests the Court to affirm the district court's decision.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B) and (C), and Federal Circuit Rule 32 (B), I hereby certify that this brief uses the proportionally-spaced 14-point typeface "Times New Roman," and therefore complies with Fed. R. App. P. 32(a)(5). This brief contains 3,996 words, excluding the parts exempted by Fed. R. App. R. 37(a)(7)(B)(iii) and Federal Circuit Rule 32(b), and therefore complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B).

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Matthew Schruers

CERTIFICATE OF SERVICE

I hereby certify that on this first day of April, 2004, I caused two (2) copies

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