

No. 2006-1441

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

MACROVISION CORPORATION,
Plaintiff-Appellee

v.

SIMA PRODUCTS CORPORATION,
Defendant-Appellant

On Appeal from the United States District Court
For the Southern District of New York
Senior Judge Richard Owen, Case No. 05-CV-5587

**BRIEF *AMICI CURIAE* OF COMPUTER & COMMUNICATIONS
INDUSTRY ASSOCIATION, AMERICAN LIBRARY
ASSOCIATION, ASSOCIATION OF RESEARCH LIBRARIES,
AMERICAN ASSOCIATION OF LAW LIBRARIES, MEDICAL
LIBRARY ASSOCIATION, SPECIAL LIBRARIES ASSOCIATION,
CONSUMER ELECTRONICS ASSOCIATION, HOME RECORDING
RIGHTS COALITION, AND ELECTRONIC FRONTIER
FOUNDATION IN SUPPORT OF SIMA PRODUCTS
CORPORATION AND URGING REVERSAL**

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August 14, 2006

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CERTIFICATE OF INTEREST

Pursuant to Federal Rule of Appellate Procedure 26.1 and Federal Circuit Rule 47.4, counsel for *amici curiae* certifies the following:

1. The full name of every party or amicus represented by me is: Computer & Communications Industry Association; American Library Association; Association of Research Libraries; American Association of Law Libraries; Medical Library Association; Special Libraries Association; Consumer Electronics Association; Home Recording Rights Coalition; Electronic Frontier Foundation.

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: Jonathan Band, see below.

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STATEMENT OF INTEREST

The Computer & Communications Industry Association (CCIA) is dedicated to open markets, open systems, and open networks. CCIA members participate in many sectors of the computer, information technology, and telecommunications industries and range in size from small entrepreneurial firms to the largest in the industry. CCIA member companies together employ nearly one million people and generate annual revenues exceeding \$200 billion.¹

The Medical Library Association (MLA) is a nonprofit, educational organization with more than 4,500 health sciences information professional members worldwide. Founded in 1898, MLA provides lifelong educational opportunities, supports a knowledge base of health information research, and works with a global network of partners to promote the importance of quality information for improved health to the health care community and the public.

The American Association of Law Libraries (AALL) is a nonprofit educational organization with over 5,000 members nationwide. AALL's

¹ Sima Products Corporation is a member of the Computer & Communications Industry Association and the Consumer Electronics Association. Ilana Diamond, President of Sima Products Corporation, is a member of the CEA Board of Industry Leaders.

mission is to promote and enhance the value of law libraries to the legal and public communities, to foster the profession of law librarianship, and to provide leadership in the field of legal information and information policy.

The Association of Research Libraries (ARL) is a nonprofit organization of 123 research libraries in North America. ARL's members include university libraries, public libraries, government and national libraries. ARL influences the changing environment of scholarly communication and the public policies that affect research libraries and the communities they serve. ARL pursues this mission by advancing the goals of its member research libraries, providing leadership in public and information policy to the scholarly and higher education communities, fostering the exchange of ideas and expertise, and shaping a future environment that leverages its interests with those of allied organizations.

The Special Libraries Association (SLA) is a nonprofit global organization for innovative information professionals and their strategic partners. SLA serves more than 12,000 members in 83 countries in the information profession, including corporate, academic and government information specialists. SLA promotes and strengthens its members through learning, advocacy and networking initiatives.

The American Library Association (ALA) is the oldest and largest library association in the world, with over 66,000 librarians, library trustees, and other friends of libraries dedicated to improving library services and promoting the public interest in a free and open information society.

The Consumer Electronics Association (CEA) is the preeminent trade association of the U.S. consumer electronics industry. CEA members lead the consumer electronics industry in the development, manufacturing, and distribution of audio, video, mobile electronics, communications, information technology, multimedia and accessory products, as well as related services, which are sold through consumer channels. Its more than 2,100 corporate members contribute over \$125 billion to the U.S. economy.²

The Home Recording Rights Coalition (HRRC) is a leading advocacy group for consumers' rights to use home electronics products for private, non-commercial purposes. Its members include retailers, manufacturers, consumers, and professional servicers of consumer electronics products.

The Electronic Frontier Foundation (EFF) is a member-supported, nonprofit public interest organization devoted to maintaining the traditional balance that copyright law strikes between the interests of copyright owners and the interests of the public. Founded in 1990, EFF represents more than

² See note 1, *supra*.

11,000 contributing members, including consumers, hobbyists, computer programmers, entrepreneurs, students, teachers, and researchers united in their reliance on a balanced copyright system that ensures adequate protection for copyright owners while ensuring broad access to information in the digital age.

Amici are creators and users of digital products. The District Court's cursory analysis of the Digital Millennium Copyright Act (DMCA) suggests that a technology that digitizes analog content violates 17 U.S.C. §1201(b) if the digitization happens to eliminate copyright protection measures.

Interpreting Section 1201(b) this broadly threatens a wide range of legitimate technologies, and by extension, a wide range of legitimate uses.

Accordingly, this Court should reverse the District Court's application of Section 1201(b). *Amici* seek leave to file under Fed. R. App. P. 29(b).

ARGUMENT

This case is the latest chapter of the ongoing saga of efforts to use the DMCA to prevent innovation and competition. In *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, 381 F.3d 1178 (Fed. Cir. 2004), and *Storage Technology Corporation v. Custom Hardware Engineering & Consulting, Inc.*, 421 F.3d 1307 (Fed. Cir. 2005), this Court was called upon to interpret the proper scope of Section 1201(a) of the DMCA. This Court rejected the

expansive interpretations urged by the plaintiffs, and held instead that “a copyright owner alleging a violation of section 1201(a)...must prove that the circumvention of the technological measure either infringes or facilitates infringing a right protected by the Copyright Act.” *Id.* at 1318 (citations and quotations omitted).

Now this Court must reject an overly expansive interpretation of Section 1201(b). The District Court below overlooked significant facts concerning the operation of Macrovision’s technological measures as well as Sima’s products. Application of a properly interpreted Section 1201(b) to these facts compels the conclusion that Macrovision’s technological measures do not effectively protect the rights of copyright owners. Moreover, Sima’s products do not circumvent these measures within the meaning of Section 1201(b). The interpretation of Section 1201(b) advanced by Macrovision and the District Court would ban many products with lawful uses, such as digital photocopiers with automatic page-turning functionality.

I. THE DISTRICT COURT’S OPINIONS OMIT FACTS CRITICAL TO THE PROPER RESOLUTION OF THIS CASE.

In neither opinion below did the District Court make the detailed findings of fact necessary in complex technology cases. While it noted that

the practical effect of Macrovision's Analog Copy Protection (ACP) was "to render videotaped copies of the analog signal so visually degraded as to be unwatchable," it did not explain how ACP produced this result. Similarly, the District Court found that Sima sold products that "eliminate Macrovision's ACP from an analog signal," but it failed to discuss how Sima accomplished this. *Macrovision v. Sima Prods. Corp.*, 2006 U.S. Dist. LEXIS 22106, *2 (S.D.N.Y. 2006). Thus, the District Court overlooked the two most important facts in this case: how the technological measure at issue worked, and how Sima's products allegedly circumvented it.

Fortunately, Sima has provided these facts in its papers filed in this Court, and Macrovision has not contradicted them. *See* Sima Products Corporation's Emergency Motion for Stay of Preliminary Injunction Pending Appeal at 5-6; Opposition of Appellee to Emergency Motion for Stay of Preliminary Injunction Pending Appeal at 1-3; Sima Products Corporation Brief at 5-6, 14-16.

Companies with a license from Macrovision imprint some Digital Versatile Discs (DVDs) with "trigger bits" that cause a DVD player to generate ACP. ACP introduces waveform distortions in the DVD player's analog output signal that viewers cannot discern on many televisions when they view the analog signal directly, but that degrade the quality of a

recording made by most analog video cassette recorders (VCRs).

Manufacturers could easily redesign their analog VCRs not to respond adversely to ACP, but Section 1201(k) prevents them from doing so.

However, since Section 1201(k) does not apply to digital recorders, they remain free to disregard ACP.³

The Sima product enhances the quality of the analog signals produced by a DVD player by digitizing them. ACP disappears when the digitization occurs. The Sima product can also reconvert that digital signal into an analog signal. In the normal operation of the product, ACP remains absent when this conversion occurs. As a result, the signal does not interfere with picture quality of those television models that ACP adversely affects.⁴ Nor

³ Section 1201(k)'s applicability only to analog recorders is evident from its plain language. Additionally, Senator Hatch, then-Chairman of the Judiciary Committee, stated: "It is also my understanding that the intent of the conferees is that these provisions apply only to analog video recording devices.... In addition, because innovation and technological development thrive in unregulated environments, this section should not be misconstrued as providing any impetus or precedent for regulating or otherwise dictating to the computer software industry technological standards. I agree fully with the assessment of the conferees that technology develops best and most rapidly in response to marketplace forces. For these reasons, this section applies to analog technologies only, and it is entirely without prejudice to digital technologies." 144 Cong. Rec. S11889-91 (1998) (remarks of Sen. Hatch). *See also* 144 Cong. Rec. S11890-91 (remarks of Sen. Leahy); 144 Cong. Rec. H10620-21 (remarks of Rep. Goodlatte); 144 Cong. Rec. H10618-19 (remarks of Rep. Stearn).

⁴ As Macrovision concedes, ACP does interfere with the picture quality on some television sets in certain circumstances. Macrovision Opposition at

does it distort VCR recordings.

The District Court did not explain that ACP successfully degrades the quality of videotaped copies only because Section 1201(k) prevents analog VCR manufacturers from correcting the characteristic exploited by ACP to degrade the copies. The District Court also did not explain that ACP only interferes with analog videotape copies; it has no impact whatsoever on higher quality digital copies, whether made by consumer “DVRs” or by personal computers. Finally, the District Court did not explain that Sima products “eliminate Macrovision’s ACP from an analog signal” simply by digitizing that signal. Properly understood, these facts leave no room for the conclusion that Sima’s products circumvent a technological measure that effectively protects a right of a copyright owner.

II. ACP IS NOT A TECHNOLOGICAL MEASURE THAT EFFECTIVELY PROTECTS A RIGHT OF A COPYRIGHT OWNER.

Section 1201(b)(2) provides that a “technological measure ‘effectively protects a right of a copyright owner under this title’ if the measure, in the ordinary course of its operation, prevents, restricts, or otherwise limits the

12. For example, in addition to “the visible defects” cited by Macrovision, ACP can introduce distortions or limit viewing resolution when the format of the picture is “upconverted,” as for viewing on a high definition display, or “downconverted,” as occurs within a “picture in picture” television. In today’s viewing environment these conversions are increasingly necessary.

exercise of a right of a copyright owner under this title.” ACP does not meet this statutory definition for three reasons.

First, ACP does not prevent or limit the exercise of a right of a copyright owner. ACP does not prevent a VCR from making a copy of the content stored on a DVD; rather, it prevents the VCR from making a *good* copy of the content. But it nonetheless is a copy. Undoubtedly, the owner of the copyright in that content would argue that the low quality copy still infringes the reproduction right in the content, unless the copy is permitted under one of copyright’s exceptions and limitations, *e.g.*, fair use.

Second, the ACP does not, “in the ordinary course of its operation,” prevent or limit the exercise of a copyright owner’s right. ACP does not distort analog recordings on its own; it only distorts the analog recordings by exploiting a characteristic of VCRs that Section 1201(k) prevents manufacturers from correcting. Without this technology mandate, VCRs could, and many did, ignore ACP. As Sima correctly explains, ACP is a “passive” form of protection, and the DMCA prevents circumvention only of “active,” self-implementing protection measures. *See* Sima Brief at 17.

Macrovision in its Opposition to Sima’s Motion for Stay dismisses the active/passive distinction, observing that the words “passive” and “active” do not appear in Section 1201. Macrovision Opposition at 10. But as

Sima’s detailed analysis of Section 1201’s plain language and legislative history demonstrates, the active/passive distinction is fundamental to the DMCA’s structure. The “no mandate” clause in Section 1201(c)(3) makes sense only if it means that manufacturers need not respond to “passive” signals. Otherwise, manufacturers would have to comply with a plethora of potentially inconsistent signals.⁵

The fact is that, in the context of digital devices, ACP operates only as a “flag,” not a “measure.” It can be read or ignored by a digital device, but does not itself affect the ordinary operation of the device. Recognition of such analog data, in the digital context, as a “technological measure” would be novel, and contrary to the general understandings on which policy-making is based. For example, Congress now is debating whether to authorize the Federal Communications Commission to require

⁵ “[T]he so-called no mandate provision[] marks an important distinction between circumvention and the normal operation of devices that handle copyrighted materials. [...] [C]ircumvention is not the same thing as nonresponse. This provision is particularly relevant to nonaccess control marking technologies where the content is in the clear (like an audio compact disk or an over-the-air television broadcast) and the technology only works if a device reads and responds to the mark. The provision was included because of manufacturers’ concern that their products not be obligated to respond to every possible mark that any copyright owner might choose to use. Those marks might not only be unknowable, but the marks could be inconsistent.... Even absent any direct conflicts, and even if it were possible to build devices to respond to every conceivable [mark], the cost would be prohibitively expensive for consumers.” Bruce Joseph & Scott Bain, *Copyright in the Digital World: Basics, Law, and Policy* 22-23 (2005).

manufacturers of receivers of over-the-air digital television signals to respond to a “broadcast flag” embedded in the signal stream. *See* Communications, Consumer’s Choice, and Broadband Deployment Act of 2006, S. 2686, 109th Cong. § 452 (2006). Under the plan, receivers would permit users to retransmit unflagged content, but not flagged content. If the DMCA required the receivers to respond to “passive” measures such as the broadcast flag, then Section 452, and the entire FCC proceeding on which it is based, would be obviated. *See American Library Ass’n v. Federal Communications Comm’n*, 406 F.3d 689 (D.C. Cir. 2005).

The “no mandate” rule represents such a fundamental principle of U.S. copyright policy that it has been enshrined in no less than seven international free trade agreements. Each reaffirms that the U.S. Government has not undertaken to regulate the design of consumer electronics worldwide by restating the principle that there is no obligation to design products or select components so as to “provide for a response to any particular technological measure.”⁶ To construe Section 1201(b) as

⁶ *See, e.g.*, Central America-Dominican Republic-United States Free Trade Agreement art. 15.5(7)(b), May 28, 2004, 43 I.L.M. 514, United States-Chile Free Trade Agreement n.19, June 6, 2003, 42 I.L.M. 1026, United States-Australia Free Trade Agreement art. 17.4(7)(c), May 18, 2004, 43 I.L.M. 1248, United States-Morocco Free Trade Agreement, art. 15.5(8)(b), June 15, 2004, 44 I.L.M. 544, United States-Bahrain Free Trade Agreement art. 14.4(7)(c), Sept. 14, 2004, 44 I.L.M. 544, United States-

obligating Sima's product to provide for a response to the ACP signal would thus not only violate Section 1201(c)(3) but would be flatly inconsistent with the United States' international obligations embodied in these agreements.

Third, ACP does not effectively protect a right of a copyright owner because it does not prevent digital copying. The Sixth Circuit in *Lexmark International, Inc. v. Static Control Components, Inc.*, 387 F.3d 522 (6th Cir. 2004), considered whether an authentication sequence effectively controlled access to Lexmark's Printer Engine Program (PEP). The court concluded that it did not, because there were other ways of accessing the PEP: "anyone who purchases a Lexmark printer may read the literal code of the [PEP] directly from the printer memory, with or without the benefit of the authentication sequence...." *Id.* at 547. The court acknowledged that the authentication sequence "may well block one form of access [...] [b]ut it does not block another relevant form of access...." *Id.* The court then offered the following powerful analogy:

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

Peru Trade Promotion Agreement art. 16.7(4)(c), Apr. 12, 2006, *available at* http://ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/, Proposed United States-Colombia Trade Promotion Agreement art. 16.7(4)(c), *available at* http://ustr.gov/Trade_Agreements/Bilateral/Colombia_FTA/Draft_Text/.

contain a lock..., it does not make sense to say that this provision of the DMCA applies to otherwise readily accessible copyrighted works.

Id. The court stressed that “the fact that the DMCA not only requires the technological measure to ‘control access’ but also requires the measure to control that access ‘effectively,’ 17 U.S.C. 1201(a)(2),” makes “clear that this provision does not naturally extend to a technological measure that restricts one form of access but leaves another route wide open.” *Id.*

The reasoning that the *Lexmark* court applied to Section 1201(a)(2) applies with equal force to 1201(b)(2). A technological measure that restricts one form of copying cannot “effectively protect[] a right of the copyright owner” if it does nothing to prevent another form of copying of the same content by the same consumer with products purchased at the same store. While the ACP may discourage the making of analog copies by degrading their quality, ACP does nothing whatsoever to prevent the making of digital copies. Accordingly, ACP does not meet the statutory requirements of Section 1201(b)(2).

III. SIMA PRODUCTS DO NOT CIRCUMVENT ACP.

The *Lexmark* court concluded that a technological measure that prevents one form of access to a work, but permits another, does not “effectively control access” to the work under Section 1201(a). This Court

could conceivably adopt a different interpretation with respect to the neighboring subsection, Section 1201(b), and find that a technological measure that prevents one form of copying while permitting another “effectively protects” the work with respect to one form of copying. But even if the Court were to adopt this different interpretation for Section 1201(b), Sima’s products still would not “circumvent” ACP. Consider the analogy used by the *Lexmark* court. Although the lock on the back door may effectively protect the back door, a person who enters the house through the unlocked front door obviously does not “circumvent” the lock on the back door; he would circumvent the lock only if he picked it. Similarly, Sima products do not circumvent ACP by creating a digital copy, which ACP is not designed to prevent.

The District Court compounded its error by basing in part its circumvention finding on Sima’s failure to purchase a Philips chip that could reinstall ACP into an analog signal made from the digital copy. This is like requiring the person in the *Lexmark* analogy to install a lock on the unlocked front door. In short, the District Court got Section 1201 exactly backwards. While Section 1201 prohibits a manufacturer from creating breaches in a technological protection measure, it does not prevent the manufacturer from exploiting gaps left by the developer of the technological measure, and it

certainly does not obligate the manufacturer to fill those gaps.

IV. THE DISTRICT COURT'S SWEEPING INTERPRETATION OF SECTION 1201(b) THREATENS A WIDE RANGE OF LEGITIMATE PRODUCTS AND USES.

ACP is a passive technology that discourages the making of analog copies by triggering the degradation of their quality and that has no impact whatsoever on digital copies. If Sima products violate Section 1201(b) by digitizing analog signals and thereby erasing ACP, then Section 1201(b) covers a wide range of products with significant educational and research uses.

For example, a publisher could decide to distribute a novel in a bound analog format – a book – instead of in a digital format. Under the District Court's interpretation of Section 1201(b), the publisher would employ at least two effective technological measures. First, the analog format prevents clean reproduction; photocopies are of lower quality than a printout of a digital copy. Additionally, the analog format prevents rapid redistribution. While a digital copy can be disseminated globally with the press of a button, the analog copy would first have to be scanned into a digital file.

Second, the binding prevents the book from being fed into a photocopier or scanner unless the binding is broken. If the owner of the book did not want to destroy the binding, he would have to photocopy one

page at a time, and the binding would further distort the quality of the image near the binding's crease. For many years, the cost of photocopying combined with its relatively low quality discouraged large-scale preservation projects by libraries.

Recently, however, technology firms have developed copiers with automatic page-turning capability.⁷ These copiers use sophisticated digital imaging that can produce high quality digital copies. Because they can produce high quality digital copies of books at low cost, these copiers have enabled libraries across the country, including the Library of Congress, to embark upon massive digitization projects. Yet, under the District Court's interpretation of Section 1201(b), these copiers would violate the DMCA. They are designed, produced, marketed, and used for the purpose of defeating what the District Court would consider technological measures that effectively protect a right of a copyright owner: bound pages of paper.

Just as in *Skylink* and *Custom Hardware*, this Court must interpret the DMCA in a rational manner that does not chill the development of innovations such as the page-turning copier or Sima products.

⁷ See, e.g., <http://www.kirtas-tech.com/uploads/other/1200.pdf>.

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court's grant of a preliminary injunction.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and (C) and Federal Circuit Rule 32(b). It is proportionally spaced, has a typeface of 14 points or more, and contains 3,490 words.

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I hereby certify that on August 14, 2006, I caused two (2) copies of the foregoing **BRIEF *AMICI CURIAE* OF COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, AMERICAN LIBRARY ASSOCIATION, ASSOCIATION OF RESEARCH LIBRARIES, AMERICAN ASSOCIATION OF LAW LIBRARIES, MEDICAL LIBRARY ASSOCIATION, SPECIAL LIBRARIES ASSOCIATION, CONSUMER ELECTRONICS ASSOCIATION, AND HOME RECORDING RIGHTS COALITION, AND ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF SIMA PRODUCTS CORPORATION AND URGING REVERSAL** to be served via the overnight service of Federal Express on:

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