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How to Temper The Excesses Of the DMCA

By Jonathan Band

In the six years since its enactment, Title I of the Digital Millennium Copyright Act has generated strong reactions from all sides in the copyright wars.

The motion picture industry credits the DMCA—specifically, Title I's prohibition on the circumvention of so-called access controls—with the enormous success of the DVD. The DMCA has given the studios and their colleagues in the consumer electronics industry the power to prevent widespread distribution of DeCSS, a software program that would enable users to bypass the encryption system that otherwise protects movies on DVD.

Technologists, however, have argued that the DMCA has chilled legitimate research into computer security and the development of innovative products. Libraries and universities contend that the DMCA could prevent uses that are appropriately permitted under the copyright law's fair use doctrine or library exceptions. And consumers have noted with alarm that companies have used the DMCA to threaten competitors in after-markets for printer toner cartridges and garage door openers.

The two rulemakings conducted by the Copyright Office to consider the creation of new exceptions to Title I's anti-circumvention measures have similarly provoked disparate responses. The entertainment industry has pointed to the handful of exemptions granted by the Copyright Office as evidence that the process provided under the DMCA for permitting reasonable exemptions does indeed work. The user community, in contrast, has criticized the Copyright Office's rejection of the vast majority of the applications as evidence that the office is interpreting and applying the rulemaking standards too strictly.

Now, a legislative proposal and a court decision offer the DMCA's foes the chance to temper the excesses of Title I.

In Defense of Fair Use

Agreeing with some of the DMCA's critics, Reps. Rick Boucher (D-Va.) and John Doolittle (R-Calif.) introduced the Digital Media Consumers' Rights Act, H.R. 5544, in the closing days of the 107th Congress in 2002. At the beginning of the 108th Congress, they reintroduced the legislation as H.R. 107, to signify the bill's intent to preserve the fair use doctrine, which is codified at 17 U.S.C. §107.

H.R. 107 contains two main provisions. First, the bill would require record companies to label CDs that are copy-protected or that will not play on certain devices such as the CD drives of personal computers. In 2002, record companies had started to install various forms of copy protections on CDs without warning their customers. When people couldn't burn copies of their new CDs or play them on their computers, they assumed, wrongly, that

either the CDs or the computers were malfunctioning. The labeling requirement in H.R 107 is intended to prevent this form of customer confusion.

Second, H.R. 107 would correct the perceived flaws in §1201 of the DMCA. By its terms, §1201(a)(1) prohibits the circumvention of access controls, regardless of the purpose, unless the circumvention is specifically permitted by one of the exceptions contained in §1201. Likewise, §§1201(a)(2) and 1201(b) prohibit the manufacture and distribution of circumvention devices, even those intended to be used for noninfringing purposes, unless the devices, too, fall within §1201's specific exceptions. In other words, §1201 on its face prohibits circumvention activity and devices *regardless* of whether the circumvention results in infringement.

In introducing H.R. 107, Reps. Boucher and Doolittle recognized that §1201, by divorcing circumvention from infringement, had the effect of prohibiting *lawful* uses of copyrighted works. In fact, although §1201(c)(1) provides that §1201 does not affect traditional defenses to copyright infringement, including fair use, courts have still ruled that fair use is not a defense to a circumvention offense under the DMCA. H.R. 107 would fix that problem.

Specifically, H.R. 107 would amend §1201(c)(1) to provide that "it is not a violation of this section to circumvent a technological measure in connection with access to, or the use of, a work if such circumvention does not result in an infringement of the copyright in the work." Likewise, the legislation would create a new §1201(c)(5) providing that "[i]t shall not be a violation of this title to manufacture, distribute, or make a noninfringing use of a hardware or software product capable of enabling significant noninfringing use of a copyrighted work." This provision borrows the "substantial noninfringing use" standard for defense against contributory infringement claims from *Sony Corporation of America v. Universal City Studios Inc.* (the 1984 Supreme Court decision that saved the VCR) and applies it to the circumvention context.

Further, H.R. 107 would create an exception to the prohibition on manufacturing and distributing circumvention devices when "the person is acting solely in furtherance of scientific research into technological protection measures." This provision would codify an argument made by the Justice Department back in 2001, when Princeton University professor Edward Felten brought a declaratory judgment action against the Recording Industry Association of America.

Felten sought a judicial declaration that his research into music industry encryption standards was lawful. The RIAA responded that the case was moot because it had withdrawn its objections to that research, and the court ultimately agreed with the RIAA.

Prior to the case's dismissal, however, the Justice Department filed a brief in support of the RIAA that argued, *inter alia,* that Felten's research was permitted by the DMCA.

In particular, the Justice Department argued that since Felten developed his software tools in pursuit of research, he obviously did not develop them "for the purpose of circumventing a technological measure that effectively controls access to a work protected by [the DMCA]." In other words, even though Felten's tools were designed to circumvent a technological measure, their true purpose was research, not circumvention.

Heard in Congress

After its introduction, H.R. 107 was referred to the House Energy and Commerce Committee. While Rep. Billy Tauzin (R-La.) remained chairman, the committee took no action on the bill. But H.R. 107's prospects improved dramatically after Tauzin resigned in February 2004, and Rep. Joe Barton (R-Texas) assumed the chairmanship. Barton had signed on as a co-sponsor of the legislation shortly after its introduction, and he reiterated his strong support after becoming chairman.

On May 12, 2004, the House Energy and Commerce Subcommittee on Commerce, Trade, and Consumer Protection held a hearing on H.R. 107. The subcommittee heard from 14 witnesses, including Jack Valenti of the Motion Picture Association of America, Cary Sherman of the RIAA, Robert Holleyman of the Business Software Alliance, Gary Shapiro of the Consumer Electronics Association, Miriam Nisbet of the American Library Association, and noted cyberlaw commentators/ law professors Peter Jaszi (for the Digital Future Coalition) and Lawrence Lessig.

Industry advocates Valenti, Sherman, and Holleyman all testified that the legislation would facilitate piracy. Conversely, many of the other witnesses spoke strongly in favor of the bill, and Chairman Barton indicated his intention to report it out of the committee in the 108th Congress.

But in late August, Rep. Boucher suggested that the bill might not move before the end of the 108th Congress because of the crowded calendar and the need to build consensus on the committee. Nonetheless, he affirmed that Barton remained committed to the legislation and that the bill would be reintroduced in the 109th Congress if it doesn't move this fall.

The Right Decision

On Aug. 31, the judicial branch stepped back into the DMCA fray. The U.S. Court of Appeals for the Federal Circuit that day issued its decision in *Chamberlain Group Inc. v. Skylink Technologies Inc.,* a case in which a manufacturer of garage door openers argued that a competitor's universal transmitters violated the DMCA because they circumvented a technological protection measure so as to obtain unauthorized access to the software embedded in the garage door openers. In affirming the District Court's grant of summary judgment to defendant Skylink, the Federal Circuit interpreted §1201(a) as "prohibit[ing] only forms of access that bear a reasonable relationship to the protections that the Copyright Act otherwise affords copyright owners." This is, the court said, the "only meaningful reading of the statute."

The Federal Circuit noted that in the DMCA, Congress had tried to balance the interests of copyright owners with those of consumers of copyrighted products. Granting copyright owners "carte blanche authority" to preclude uses of their products would undermine congressional intent.

Accordingly, the court said that traf-

ficking in a circumvention device violates §1201(a)(2) only if the circumvention enables access that "infringes or facilitates infringing a right protected by the Copyright Act." Chamberlain, the garage door manufacturer, failed to show "the critical nexus between access and protection." That is, it did not explain how Skylink's transmitters infringed or facilitated infringement of any right protected by the Copyright Act.

The Federal Circuit took great pains to minimize any apparent inconsistency between its holding and the 2001 decision in *Universal City Studios Inc. v Corley*. In that earlier case, the 2nd Circuit held that §1201(c)(1) did not provide a fair use defense to a circumvention violation. The *Corley* plaintiffs provided evidence that the circumvention program at issue, DeCSS, allowed a user to circumvent the encryption system in their product and thereby view or copy a motion picture without legal authorization. In contrast, Skylink's circumvention only permits lawful uses of the software embedded in Chamberlain's garage door opener.

The Federal Circuit acknowledged that some language in the *Corley* decision could be understood to suggest that §1201(a) imposes liability even if the access achieved cannot facilitate infringement. But the Federal Circuit argued that "[i]t is unlikely . . . that the Second Circuit meant to imply anything as drastic as wresting the concept of 'access' from its context within the meaning of the Copyright Act."

Rep. Boucher said that he welcomed the Federal Circuit's decision, but observed that it did not obviate the need for H.R. 107. Indeed, the Aug. 31 decision only reaches the situation where the circumvention is incapable of facilitating infringement; it does not consider the situation where the circumvention facilitates both infringing and noninfringing uses. The Federal Circuit in a footnote stated, "We leave open the question as to when [fair use] might serve as an affirmative defense to a prima facie violation of §1201." H.R. 107 specifically addresses this open question.

Chamberlain v. Skylink demonstrates one court's willingness to interpret the DMCA in a manner that prevents what that court considers to be an absurd result following from a literal application of the DMCA's provisions. But such an interpretation came at a significant litigation cost.

Rather than requiring future noninfringing defendants to bear the burden of convincing courts to engage in creative interpretation of the DMCA, Congress should simply fix the law. The bill is already on the table.

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