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A MATTER OF ACCESS: HOW BYPASSING DRM DOES NOT
ALWAYS VIOLATE THE DMCA

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ABSTRACT

In the last decade, several federal circuit courts have applied the anti-circumvention provisions of the Digital Millennium Copyright Act (DMCA) to determine what forms of unauthorized access to copyrighted work are prohibited. Courts have considered Digital Rights Management (DRM) disputes concerning access to both copyrighted digital-media and manufactured products. The Second and Ninth Circuits have applied the DMCA in digital media cases to protect the owners of digital copyrighted works. The Fifth, Sixth, and Federal Circuits have applied the DMCA in manufactured-product cases, holding that bypassing DRM controls does not violate the DMCA under certain circumstances. These differing conclusions stem from the circuits' interpretations of the need for a nexus between DRM circumvention claims and copyrighted work; the prevailing view is that the DMCA applies in the context of copyrighted digital works but not more traditional manufactured goods. This Article outlines the DMCA provisions applying to DRM and assesses the protections DRM controls can be expected to provide for digital media compared with manufactured products.

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INTRODUCTION

Digital Rights Management (DRM) is technology that copyright holders may use to permit or restrict access to digital content. The Digital Millennium Copyright Act (DMCA) prohibits circumvention of DRM on copyrighted material.¹ Section 1201(a), the basic DMCA anti-circumvention provision, states that “[n]o person shall circumvent a technological measure that effectively controls access to a work protected under this title.”² As courts have dealt with DRM in various circumstances, the question has become whether this DMCA anti-circumvention provision refers only to access related to an underlying act of copyright infringement, or whether the provision refers to all attempts to bypass DRM controls.

The use of DRM technology in consumer products illustrates the difficulty in determining DMCA violations. For example, iTunes has used DRM to prevent the unauthorized copying and distribution of purchased music files.³ An iTunes user who bypasses the iTunes DRM and distributes music files is likely violating the anti-circumvention provision. A more complicated DRM issue arises

¹ 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12A.03(A)(1)(a) (2011).

² 17 U.S.C. § 1201(a)(1)(A) (2006).

³ Christopher Breen, *DRM-free iTunes: What it means for you*, PCWORLD (Apr. 7, 2009, 10:50am), http://www.pcworld.com/article/162732/drmfree_itunes_what_it_means_for_you.html.

when a manufacturer places a computer chip with a copyrighted access code on a product like a garage door opener. Is bypassing that copyrighted code and opening the garage door a DRM infringement?

This Article answers this question by analyzing recent circuit court opinions dealing with the DMCA's anti-circumvention provision. This analysis explores whether DRM must be linked to an underlying copyright interest before those DRM will receive DMCA protections. In several recent opinions, courts have indicated that this link is an important step in securing DMCA protections. Courts tend to find a sufficient link in cases concerning digital media more often than in cases involving manufactured products.

I. BASIC PURPOSE AND OPERATION OF THE DMCA

Digital Rights Management emerged in the late 1990s as digital media proliferated and content providers sought ways to control their rights to digital content such as software or MP3 music files.⁴ Unlike VHS tapes or print materials, digital content can be copied and distributed flawlessly and easily. In order to prevent unauthorized copying, providers developed systems for controlling the distribution of and managing access to content.⁵

In 1998, Congress enacted the DMCA to bring "U.S. copyright law squarely into the digital age" and protect copyrighted material from digital infringement.⁶ Lawmakers, grappling with the rapid advance of Internet technologies, tried to make "digital networks safe places to disseminate and exploit copyrighted materials."⁷ Lawmakers also sought to protect such information from those who might illegally profit by making unauthorized reproductions of copyrighted digital content.⁸

⁴ BILL ROSENBLATT, BILL TRIPPE & STEPHEN MOONEY, *DIGITAL RIGHTS MANAGEMENT: BUSINESS AND TECHNOLOGY* vii (2002).

⁵ *Id.* at x.

⁶ S. REP. NO. 105-190, at 2 (1998). *See generally* Universal City Studios, Inc v. Corley, 273 F.3d 429, 440 (2d Cir. 2001).

⁷ S. REP. NO. 105-190, at 2 (1998).

⁸ H.R. REP. NO. 105-551, at 10 (1998) (expressing further concern about digital piracy, the report notes that "[t]here will be those who will try to profit from the works of others by decoding the encrypted codes protecting copyrighted works, or engaging in the business of providing devices or services

To protect such content, the Act links DRM protections to works protected by the Copyright Act. In particular, Section 1201(a)(1)(A) provides that “no person shall circumvent a technological measure that effectively controls access to a work protected under this title.”⁹ The House Committee report likened these DRM protections for copyright owners to protections against breaking and entering: “The act of circumventing a technological protection measure put in place by a copyright owner to control access to a copyrighted work is the electronic equivalent of breaking into a locked room in order to obtain a copy of a book.”¹⁰ This committee report, by referring to the interest of copyright owners in their copyrighted works, indicates that DRM protections are meant not only to prohibit circumvention, but also to protect copyright owners.

The Act’s provisions also indicate that circumvention was contemplated in relation to copyright interests by defining relevant terms in relation to copyright interests. For example, to circumvent a technological measure means in part to “avoid, bypass, remove, deactivate, or impair a technological measure without authority of the copyright owner.”¹¹ In addition, 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.”¹² These provisions referencing the interests of copyright owners seem to indicate a connection between circumvention and a copyright interest.

Both the comments of lawmakers and the language of the Act indicate that the DMCA’s intent is to protect copyrighted information in the digital age. This has raised questions about what role these DRM provisions play with respect to products that are more traditional. For example, does the DMCA prohibit a generic printer cartridge from pairing with a name-brand printer if a copyrighted access chip protects the printer? Courts have varied in their answers to DRM question. Some find that a copyrighted microchip is not

to enable others to do so”).

⁹ 17 U.S.C. § 1201(a)(1)(A) (2006).

¹⁰ H.R. REP. NO. 105-551, at 17 (1998).

¹¹ 17 U.S.C. § 1201(a)(3)(A) (2006).

¹² 17 U.S.C. § 1201(a)(3)(B) (2006).

enough to invoke DRM protections, while others determine that a copyright interest is not necessary to be protected under the DMCA.

II. DMCA ENFORCEMENT BY JURISDICTION

Initially, parties used the DMCA to protect access to digital media sources like DVDs, CDs, and MP3s.¹³ Generally, the circuits deciding DMCA cases related to digital media have interpreted the Act to protect DRM controls and prohibit circumventions. More recently, plaintiffs have sought to extend DMCA protections to manufactured products like garage door openers, printer cartridges, and uninterruptable power systems. In circuits where these manufacturing cases have been decided, DMCA protections have been construed narrowly to prohibit the circumvention of DRM only where the circumvention would constitute an infringement of an underlying copyright interest.

A. Circuits Considering Access to Digital Media

The Second and Ninth Circuits have applied DMCA protections in cases where DRM limits access to digital media content. The Second Circuit did not conclusively determine what type of connection DRM must have to copyright interests in order to be protected under the DMCA.¹⁴ The Ninth Circuit clarified the issue in a case regarding a popular online video game, holding that the DMCA extends a new form of protection to a copyright holder: the right to prevent circumvention of access controls.¹⁵ In both of these cases, the courts applied DMCA protections.

1. Second Circuit

In *Universal City Studios, Inc. v. Corley*, the Second Circuit

¹³ See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001); *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000), *aff'd*, 273 F.3d 429 (2d Cir. 2001).

¹⁴ *Corley*, 273 F.3d 429 (2d Cir. 2001).

¹⁵ *MDY Industries v. Blizzard Entertainment, Inc.*, 2010 U.S. App. LEXIS 25424, *2 (9th Cir. Dec. 15, 2010).

addressed a DMCA claim seeking to enjoin website owners from distributing DVD decryption software.¹⁶ Universal City Studios, a major distributor of movies on DVD, sought an injunction against Eric Corley, a publisher of a technology magazine who had posted a link to a DVD decryption program on his website.¹⁷ The trial court found that such decryption software bypassed the DRM controls on DVDs and granted a permanent injunction against the website operators in accordance with the DMCA.¹⁸ The Second Circuit affirmed the injunction, holding that bypassing or breaking DRM constitutes an infringement under the DMCA's anti-circumvention prohibition.¹⁹

The court's silence in *Corley* on the link between circumvention and underlying intellectual property interests led commentators to wonder what was necessary to show circumvention under the DMCA. Some commentators argued that in the Second Circuit any circumvention of DRM amounts to a DMCA violation, even if there are no copyright interests at issue.²⁰ However, this approach is likely an oversimplification of the Second Circuit's decision. The Second Circuit case focuses primarily on First Amendment issues. Throughout *Corley*, Judge Newman is concerned with the free speech rights of website owners to post content of their choosing, rather than whether DRM circumventions must be closely linked to underlying copyright interests.²¹ Because of this focus on First Amendment rights rather than on the link between DRM and copyright interests, *Corley* does not provide clear guidance for manufacturers seeking to implement effective DRM.

¹⁶ *Corley*, 273 F.3d 429 (2d Cir. 2001).

¹⁷ *Reimerdes*, 111 F. Supp. 2d 346 (S.D.N.Y. 2000).

¹⁸ *Id.*

¹⁹ *See Corley*, 273 F.3d at 443-60.

²⁰ Mart Kuhn, *Defining 'circumvention': another DMCA case*, PUBLIC KNOWLEDGE (Jul. 23, 2010), <http://www.publicknowledge.org/blog/defining-circumvention-another-dmca-case>; Cory Doctorow, *Federal judge says you can break DRM if you're not doing so to infringe copyright*, BOINGBOING (Jul. 25, 2010), <http://www.boingboing.net/2010/07/25/federal-judge-says-y.html>.

²¹ *See Corley*, 273 F.3d 429 (2d Cir. 2001).

2. Ninth Circuit

The Ninth Circuit's approach more clearly addresses the link between DRM and copyright interests. In *MDY Industries v. Blizzard Entertainment, Inc.*, the court considered a dispute concerning Blizzard Entertainment's immensely popular World of Warcraft (WoW) video game.²² In 2005, MDY Industries developed Glider, a bot (short for robot) program that could automatically play the early levels of the video game for WoW subscribers.²³ In the same year, MDY developed a more advanced bot, Glider Elite, to avoid detection by Blizzard's new anti-bot program, Warden.²⁴ Blizzard claimed that MDY was liable for circumventing DRM because it programmed the Glider Elite to avoid detection by Warden²⁵ and then distributed the bot to more than 120,000 users.²⁶

In order to determine whether the bots were violating the anti-circumvention provisions of the DMCA, the court looked to the language of the statute. The court noted that §§ 1201(a)(1) and (a)(2) refer only to "a work protected under this title,"²⁷ while § 1201(b)(2) refers to "a right of a copyright owner under this title."²⁸ The former provisions include a prohibition of access-control circumvention, while the latter provision prohibits the trafficking of products designed to circumvent controls. The court read the different language as "extending a new form of protection, i.e., the right to prevent circumvention of access controls, broadly to works protected under Title 17, i.e., copyrighted works."²⁹ The court cited three more examples of textual differences and concluded that the DMCA anti-circumvention provision prohibits the bypassing of any DRM that controls access to a protected work.³⁰

The Ninth Circuit joined the Second Circuit and expressly

²² *MDY Industries v. Blizzard Entertainment, Inc.*, 2010 U.S. App. Lexis 25424, *2 (9th Cir. 2010).

²³ *Id.* at *4.

²⁴ *Id.* at *5.

²⁵ *Id.* at *23.

²⁶ *Id.* at *6.

²⁷ 17 U.S.C. § 1201(a)(1)(A) (2006).

²⁸ 17 U.S.C. § 1201(b)(1)(A) (2006).

²⁹ *Blizzard*, 2010 U.S. App. LEXIS 25424 at *31 (9th Cir. Dec. 15, 2010).

³⁰ *Id.* at *30.

rejected the holding of other circuits that the DMCA requires a link between DRM and a copyright interest. Under the view of courts requiring such a link, plaintiffs would be required “to demonstrate that the circumventing technology infringes or facilitates infringement of the plaintiff’s copyright.”³¹ The Ninth Circuit reasoned that requiring such a link would not support the purpose of the DMCA.³² In dicta, the court noted that a linkage requirement would deprive copyright owners of an important enforcement tool, pointing to protections necessary for “copyright owners who make movies or music available online, protected by an access control, in exchange for direct or indirect payment.”³³

The court’s use of this example indicates that, like the legislators who enacted the DMCA, the Ninth Circuit contemplated DRM circumvention in the context of accessing digital media. Because Congress developed the DMCA to protect digital content, its anti-circumvention provisions presumably apply to digital media such as DVDs and video games. A recent line of cases involving manufactured products, however, illustrates how the DMCA might apply in situations not involving digital media.

B. Circuits Considering Interoperable Manufactured Products

Unlike *Corley* and *Blizzard*, other cases have addressed DMCA claims related to manufactured products such as garage door openers and printers. The devices in these cases are somewhat removed from the digital content initially contemplated by lawmakers enacting the DMCA and thus represent a new application of DMCA anti-circumvention provisions. In cases involving manufactured products, where the products are part of an interoperable system, courts have found that DRM controls must be closely linked to the underlying copyright interest in order to have DMCA protection.

In *Chamberlain Group v. Skylink Techs.*, a 2004 Federal Circuit case, a garage door opener (GDO) manufacturer sued a universal remote control manufacturer.³⁴ The GDO manufacturer produced

³¹ *Id.* at *41.

³² *Id.* at *48.

³³ *Id.*

³⁴ *Chamberlain Group v. Skylink Technologies, Inc.*, 381 F.3d 1178 (Fed.

GDOs that incorporated a rolling computer code security system. The system was designed to protect garages from burglary by continually changing the access code required to open or close the garage door. Because the GDO had a continually changing code, its operation required a special remote control to activate it. Some customers who lost their special remote controls would purchase replacement universal remote controls from Skylink. The GDO manufacturer's complaint alleged that these remote controls illegally circumvented a technical measure (i.e., the rolling security system) in order to activate the GDO.³⁵

The *Chamberlain* court held that the DMCA did not protect the GDOs because it only created a new ground for liability (unauthorized access); it did not create any new property interests for copyright holders.³⁶ The court stated, "The plain language of the statute . . . requires a plaintiff alleging circumvention (or trafficking) to prove that the defendant's access was *unauthorized*."³⁷ Copyright laws authorize consumers to access the computer programs in their openers in order to enter their garages. Because consumers had a legal ability to access their garage door openers, Skylink did not violate the manufacturer's copyright when it provided consumers with a new tool for doing so.

Chamberlain held that a successful DRM circumvention claim must show a nexus between the circumvention and an interest protected by the Copyright Act. A copyright owner seeking to impose liability on an accused circumventer must show that the infringement was reasonably related to an interest already protected by the Copyright Act.³⁸ The DMCA provided another means of safeguarding copyrighted property but did not create a new property interest in the safeguards themselves.³⁹ The court noted that "the DMCA emphatically *did not* 'fundamentally alter' the legal landscape

Cir. 2004).

³⁵ *Id.* at 1183.

³⁶ *Id.* at 1193-94 ("The anticircumvention provisions convey no additional property rights in and of themselves; they simply provide property owners with new ways to secure their property").

³⁷ *Id.* at 1193 (emphasis added).

³⁸ *Id.* at 1195.

³⁹ *Id.* at 1193-94.

governing the reasonable expectations of consumers or competitors.”⁴⁰ The court did not specify whether such protections were limited to copyright interests only.

Chamberlain further clarified that the DMCA anti-circumvention provisions prohibit only those types of access that are both unauthorized and connected to an underlying copyright interest.⁴¹ Judge Gajarsa wrote: “Unlike the Second Circuit in *Corley*, which provided only enough of the statutory construction to address constitutional challenges . . . we must construe the full boundaries of anticircumvention and anti-trafficking liability under the DMCA.”⁴² This language shows a clarification of the DMCA as applied to an unanticipated product. Because the DMCA was not originally written with GDOs in mind, the task of the Federal Circuit in this case was to see how the Act’s DRM protections could be stretched to fit a traditional manufactured product. According to the court, the protections could not be manipulated beyond the realm of copyright interests.

In 2005, the Sixth Circuit followed the reasoning of *Chamberlain* when it declined to apply DMCA protections to printer toner cartridges in *Lexmark International, Inc. v. Static Control Components, Inc.* This case involved a claim that defendant Static Control Components (SCC) violated the DMCA by manufacturing a computer chip (with the trademarked brand name “Smartek”) that mimicked Lexmark chips.⁴³ SCC distributed Smartek to generic printer cartridge manufacturers who wanted to make their products compatible with Lexmark printers. Because Lexmark designed its printers to be compatible only with Lexmark-brand toner cartridges, it alleged that SCC’s distribution of Smartek circumvented a technological measure designed to control access to Lexmark printers.⁴⁴

The Sixth Circuit held that Lexmark could not show that SCC

⁴⁰ *Id.* (emphasis added).

⁴¹ *Id.* at 1193.

⁴² *Id.* at 1195.

⁴³ *Lexmark International, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 528 (6th Cir. 2005).

⁴⁴ *Id.* at 529.

infringed upon Lexmark's copyrighted programs.⁴⁵ Explaining why Lexmark couldn't show circumvention, the court wrote, "To the extent the Toner Loading Program is not a 'work protected under the copyright statute' . . . the DMCA would necessarily not protect it."⁴⁶ To be protected under by the DMCA, the unauthorized circumvention must be related to a work protected under the copyrighted statute. This decision illustrates a trend towards a rule that DRM provisions of DMCA protect copyright interests only.

In 2010, the Fifth Circuit heard the case *MGE UPS Systems, Inc. v. GE Consumer and Industrial, Inc.*, affirmed the district court decision, and initially held that DMCA claims must show a connection between an unauthorized circumvention and an underlying copyright interest.⁴⁷ The Fifth Circuit later granted a rehearing and promulgated a superseding opinion that also affirmed the judgment of the district court on the DMCA claim. In the second opinion, the court limited its analysis by determining that nothing indicated that the person who had circumvented the DRM control was a GE employee.⁴⁸ The court reasoned that the DMCA would prohibit GE employees from bypassing the DRM, but would not prevent them from using copyrighted materials subsequent to circumvention.⁴⁹ These two opinions indicate the trouble courts are currently having as they grapple with the DMCA.

Taken together, the cases addressing manufactured products that are part of an interoperable system indicate that in order to obtain DMCA protections, courts will most likely require a link between DRM and underlying copyright interests. While the circuit courts disagree on the plain meaning of the DMCA provisions, they have developed a common-law pattern through their holdings. Courts seem more likely to extend DMCA protections to DRM protecting access to digital content within video games and DVDs than to DRM

⁴⁵ *Id.* at 550 ("Namely, it is not the SCC chip that permits access to the Printer Engine Program but the consumer's purchase of the printer").

⁴⁶ *Id.* (quoting 17 U.S.C. §1201(a)(2)).

⁴⁷ *MGE UPS Systems, Inc. v. GE Consumer and Industrial, Inc.*, 612 F.3d 760, 765 (5th Cir. 2010), *superseded by panel review*, *MGE UPS Systems, Inc. v. GE Consumer and Industrial, Inc.*, 622 F.3d 361, 366 (5th Cir. 2010).

⁴⁸ *MGE UPS Systems, Inc. v. GE Consumer and Industrial, Inc.*, 622 F.3d 361, 366 (5th Cir. 2010).

⁴⁹ *Id.*

protecting digital content built into interoperable manufactured products.

CONCLUSION

Recent decisions applying DMCA protections to interoperable manufactured products indicate that the success of unauthorized circumvention claims will depend on a connection between the circumvention of the DRM and the protections already guaranteed by the Copyright Act. An owner of copyrighted digital materials who uses DRM to control consumer access can certainly use DMCA anti-circumvention provisions to protect against unauthorized use. However, the DMCA provides limited protection for someone using DRM to manage access to a manufactured product having only one copyrighted component, such as a microchip on a printer cartridge. Even the Ninth Circuit, which broadly construed the DMCA to protect DRM regardless of its copyright nexus, issued its ruling in the context of access to digital media. While this reasoning might suggest DMCA protection applies in every context, protection is more likely when DRM is used with copyrighted digital content than with traditional manufactured products. Users of DRM should remember that the more closely DRM can be linked to copyrighted digital content, the more likely it will be protected by the anti-circumvention provisions of the DMCA.

PRACTICE POINTERS

- While the law remains uncertain, producers of goods who can emphasize that their copyrighted content is at risk as a result of circumvention are more likely to succeed in litigation as compared to those who focus on circumvention of interoperation manufactured products.
- Because of the uncertainty in the law, providers of digital media should not assume that the DMCA anti-circumvention provisions will protect their content. Including limitations on use and an explanation of the provider's DRM in a Terms of Use will create additional grounds for suit in the event that DRM circumvention occurs.

- Consumers purchasing manufactured products, playing digital video games, or using other digital media should consider the terms of use for the products and be aware of DRM controls designed to limit their access to the products.

