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Jailbreaking the DMCA Circumvention Provisions: The Reasonable Relation Between Access and Rights Protection

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Introduction

Since Congress enacted the access and rights provisions of the Digital Millennium Copyright Act (DMCA), they have been a source of constant confusion and misunderstanding in judicial opinions defining them. This confusion created a split in interpretation between the Second and Federal circuits concerning a copyright holder's implicit authorization for the user to circumvent a technological measure meant to protect the copyright. More generally, the question presented to the courts was whether courts should require a reasonable relationship between the technological measure protecting access to the copyright and the underlying copyright that it is protecting.

As the text of the anti-circumvention provisions is written, anyone who uses copyrighted work is held *per se* liable for infringement if she circumvents a technological measure protecting the access to the copyrighted material. This strictly literal interpretation of the provisions is followed by the Second Circuit in *Universal City Studios v. Corley*.[1] However, this literal reading comes with severe implications, such as the potential for abuse of enforcing the provisions instigated by an unprecedented shift of power between copyright holders and users. Under this reading, courts do not evaluate the purpose of the user's utilization, her preexisting rights to the work, or even the target of the technological measure's protection: the copyright user is held liable for the simple act of circumventing the technological measure to gain access to the copyrighted work.

In order to avoid the consequences of such a strict reading, courts can read the provisions like the Federal Circuit did in *Chamberlain Group, Inc. v. Skylink Techs., Inc.*,[2] requiring a reasonable relationship between access circumvention and the underlying copyright protected. A

[1] 273 F.3d 429 (2d Cir. 2001).
[2] 381 F.3d 1178 (Fed. Cir. 2004).

reasonable relationship between the access circumvention and the underlying copyright indicates that where someone is liable for copyright infringement, the work underlying the technological protective measure must have been actually infringed. The concept does now allow for *per se* liability for a copyright user without an underlying infringement, and at the least it does not allow for technological measures that do not actually protect the copyright to be given undue weight.

Recently the Ninth Circuit in *MDY Indus., LLC v. Blizzard Entm't, Inc.*,[3] joined the Second Circuit's interpretation of the anti-circumvention provisions after consideration of a reasonable nexus requirement. The Circuit appreciated the Federal Circuit's policy considerations of adopting the infringement requirement but declined to adopt it. Instead, the Ninth Circuit deferred to Congress and grounded their decision on the plain language of the statute.

This Comment begins by establishing the background of the DMCA and the inception of the anti-circumvention provisions. Part I evaluates the Second and Ninth Circuits' analysis and the reasoning behind their decisions to not require a reasonable nexus between the copyright and technological protective measure, relying on the plain language of the provisions and the spirit of the enacting of the DMCA. Part II explores the analysis of the Federal Circuit and its reasoning for declining to read the anti-circumvention provisions strictly. Part III analyzes the policies behind both interpretations of the anti-circumvention provisions and incorporates recent events in intellectual property, including the Copyright Office's endorsement of the Federal Circuit's interpretation. This Comment then concludes with a proposal to adopt the Federal Circuit's interpretation of the provisions, requiring a reasonable relationship or nexus between the technological protective measure and the underlying copyright involved.

[3] 629 F.3d 928 (9th Cir. 2010).

Background

Rise of the DMCA

The rise of computers has indisputably changed the world. The digitization of the world has resulted not only in greatly increased productivity, but it also has exploded the amount of international commerce and has effectively globalized markets that had not previously been more than local. The very definition of rapid change, the digital revolution quickly passed a point where this globalization could still be ignored by the countries of the world. Thus, in 1996, the World Intellectual Property Organization convened delegates of 150 countries to negotiate two major treaties: the Copyright Treaty[4] and the Performances and Phonograms Treaty.[5] Then in 1998, after many heated debates about its specific provisions and general purpose, Congress passed the DMCA, bringing about the biggest change to Copyright Law since the Copyright Act of 1976.[6] The stated purpose of the DMCA was to implement both international treaties and bring the laws of the United States into agreement with the rest of the world.[7]

However, in true form with American foreign policy, Congress had much more in mind than just compliance with the two treaties. Historically Congress has been much more concerned with domestic policy and the domestic ramifications of its actions than with compliance with international legal conformance.[8] In enacting the DMCA, Congress kept an eye to keeping the appropriate balance of power between copyright holders and users, a concept long entrenched in

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[4] WIPO Copyright Treaty, Dec. 20, 1996, CRNR/DC/94, available at http://www.wipo.int/documents/en/diplconf/distrib/pdf/94dc.pdf.
[5] WIPO Performances and Phonograms Treaty, Dec. 20, 1996, CRNR/DC/95.
[6] Bill D. Herman & Oscar H. Gandy, Jr., *Catch 1201: A Legislative History and Content Analysis of the DMCA Exemption Proceedings*, 24 CARDOZO ARTS & ENT. L.J. 121, 123 (2006).
[7] HOUSE REPORT NO. 105–551(II), H.R. REP. 105-551, 20, 1998 WL 414916.
[8] Evidence of this seeming disregard for perfect international cooperation is easy to find in any parts of law or politics and is not really surprising. However, as the United States is by far the largest exporter of intellectual property and a world leader in intellectual property legislation, Congress cannot deny either minimal cooperation in the treaties or the opportunity to pioneer the field with harsher legislation.

America's theory of intellectual property,[9] with its constitutional roots in the Copyright Clause.[10] Congress began to see digital piracy as a creeping, dark harbinger of the steady breakdown of the copyright system and an unprecedented erosion of the rights of copyright owners,[11] citing, "digital technology enables pirates to reproduce and distribute perfect copies of works–at virtually no cost at all to the pirate."[12] In an attempt to mitigate the damage to and protect the delicate balance of power between copyright holders and copyright users, Congress adopted the core anti-circumvention provisions of the DMCA.[13] Through the adoption of these anti-circumvention provisions Congress's fear of piracy became abundantly apparent, because the United States has actually greatly exceeded the amount of protection that is required under the treaties.[14]

In another unprecedented change from traditional copyright law, by enacting the DMCA, Congress granted the United States Copyright Office broad authority to triennially grant general exceptions to the anti-circumvention provisions.[15] Traditionally, the courts have been allowed to define the scope of copyright law, resulting in concepts like protecting the fair use of copyrighted material on an *ad hoc* basis. The idea of fair use and its judicial protection is integral to copyright law. Generally the judicially created concept of fair use was protective of copyright users and the free flow of ideas, because there was not necessarily *per se* liability for copyright users. However, by wresting the judiciary's traditional power to preside over DMCA cases and giving the Copyright Office the exclusive power to create broad fair use exceptions only every

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[9] *Id.* at 30.
[10] U.S. CONST. art. I, § 8, cl. 8 ("To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").
[11] Steve P. Calandrillo & Ewa M. Davison, *The Dangers of the Digital Millennium Copyright Act: Much Ado About Nothing?*, 50 WM. & MARY L. REV. 349, 357 (2008).
[12] *See supra* n.7.
[13] *Id.*
[14] Yijun Tian, *Problems of Anti-Circumvention Rules in the Dmca & More Heterogeneous Solutions*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 749, 755 (2005).
[15] 17 U.S.C. § 1201(a)(1)(C)-(D).

three years, Congress created a much more rigid and controlled system, swinging the balance of power again to the copyright owner.

The Anti-Circumvention Provisions

The anti-circumvention provisions, codified in Section 1201, have been the most heavily debated sections of the DMCA.[16] But before one can understand the anti-circumvention provisions, one must first understand two underlying concepts at the core of the discussion: the technological protection measure itself and the act of circumventing that measure. The statute defines both concepts.[17] First, a technological protective measure effectively protects or 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."[18] Second, the circumvention of a technological measure means in part to "avoid, bypass, remove, deactivate, or impair a technological measure without authority of the copyright owner."[19]

After understanding the basic ideas, there are three controversial parts of Section 1201, each adding its own restriction on copyright users.[20] The first of these is Section 1201(a)(1), which specifically mentions access to copyrighted work, barring circumvention of technology designed to prevent access: "No person shall circumvent a technological measure that

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[16] Nimmer, *Content Protection And Copyright*, 984 PLI/Pat 81, 117, (2009).
[17] 17 U.S.C. § 1201.
[18] 17 U.S.C. § 1201(a)(3)(B); Though it has been litigated only somewhat, there is not a high threshold for something to be considered an effective technological protection measure by the statutory definition. Steve P. Calandrillo & Ewa M. Davison, *The Dangers of the Digital Millennium Copyright Act: Much Ado About Nothing?*, 50 WM. & MARY L. REV. 349, 395 (2008) ("The Sixth Circuit notes that a TPM need not create an 'impervious shield' protecting the copyrighted work, but that DMCA liability requires that 'the challenged circumvention device ... circumvent something.'"); *See e.g.* Lexmark Int'l, Inc. v. Static Control Components, Inc., 387 F.3d 522 (6th Cir. 2004).
[19] 17 U.S.C. § 1201(a)(3)(A).
[20] *See supra* n.14, at 755.

effectively controls access to a work protected under this title."[21] This construction does not mean that a copyright owner must create a technological protection to access her copyrighted work. Where there is no technological protection measure protecting access to the work, these provisions do not apply.[22] But where a copyright owner *has* created such a technological measure, this section prohibits anyone who would be a copyright user from circumventing that technological measure to gain access to the copyrighted work.[23] This provision does not pertain to what the copyright user will do or has done with the copyrighted work after she receives access.[24] The copyright user then enters the domain of familiar traditional copyright law.[25]

This provision is comparable to breaking a lock to gain access to a room for the purpose of obtaining a copyrighted book or painting.[26] A copyright owner may choose to display his painting in the room with an open door, for all to see. Anyone entering the painting's room would have full access to it.[27] The circumvention provisions would not be applicable in this case, because there is no technological control measure (or lock) guarding access to the painting. However, once the copyright owner decides to lock the room (restrict access), the painting and the copyright owner get the benefit of the protection of the provisions.[28] Anyone that broke the lock to gain access to the room (and consequently the painting) would be in violation of the 1201(a)(1) access provisions.[29] Interestingly enough, anyone who entered the room through a

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[21] 17 U.S.C. § 1201(a)(1).
[22] Raymond T. Nimmer, *Information Wars and the Challenges of Content Protection in Digital Contexts*, 13 VAND. J. ENT. & TECH. L. 825, 870 (2011).
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] Alicia Hoffer, *A Matter Of Access: How Bypassing DRM Does Not Always Violate The DMCA,* 7 WASH. J. L. TECH. & ARTS 13, 16 (2011).
[27] *Id.*
[28] *Id.*
[29] *Id.*

window might be considered as having circumvented the protection of the lock and also be in violation of 1201(a)(1).[30]

The second part of the anti-circumvention provisions is § 1201(a)(2). This section is also aimed at the prevention of access to copyrighted works, prohibiting a copyright user from trafficking in technologies that circumvent that access, stating:

> No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that [is] primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title.[31]

This provision is intended to outlaw what Congress referred to as a "black box," i.e. a specific technology that was explicitly designed for and has no significant use other than to circumvent a copyright holder's technological protection controlling access to their work.[32] Even if the technology created happens to have another function than to circumvent a technological protective device, if the other function is only limited, the technology is still considered to violate 1201(a)(2)[33] This provision punishes both the manufacture of a black box device and the trafficking in the black box device.[34]

In extending the above example of a painting in a locked room, this provision would outlaw a "skeleton key," rather than possibly a simple crowbar to break the lock protecting the

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[30] *Id.*
[31] 17 U.S.C. § 1201(a)(2).
[32] HOUSE REPORT NO. 105-551, H.R. REP. 105-551, 38, 1998 WL 414916, 40.
[33] *See* Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 319 (S.D.N.Y. 2000).
[34] *Id.* ("[F]or a technology, product, service, device, component, or part thereof to be prohibited under this subsection, one of three conditions must be met. It must: (1) be primarily designed or produced for the purpose of circumventing; (2) have only a limited commercially significant purpose or use other than to circumvent; or (3) be marketed by the person who manufactures it, imports it, offers it to the public, provides it or otherwise traffics in it, or by another person acting in concert with that person with that person's knowledge, for use in circumventing a technological protection measure that effectively controls access to a copyrighted work.").

room.[35] This provision would also outlaw any selling of a skeleton key or other such way to circumvent the lock on the door.

Sections 1201(a)(1) and 1201(a)(2) are not exclusive[36]. Thus, if someone both breaks the technological protection of the copyright owner and provides others with the means to do so, she would be liable under both anti-circumvention provisions.[37] Because there is no language referring to fair use in the provisions, a violation of 1201(a)(1) or 1201(a)(2) results in *per se* liability for the copyright user.

The third provision, Section 1201(b)(1), does not deal with access at all, instead protecting the copyright owner's rights once access has been gained to the copyrighted material by saying, "No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that ... [is] primarily designed or produced for the purpose of circumventing a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof."[38] The protected rights that Section 1201(b)(1) affords copyright owners are those of general copyright law, found in section 106 of the Copyright Act (i.e. making copies, allowing derivative works, distribution, etc.).[39] This "rights control" provision can be distinguished from the previous "access control" provisions, even though the same technological measure may be protective of both the rights of a copyright holder and the access to the work.[40]

Analysis

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[35] *See generally supra* n.24 at 16.
[36] 17 U.S.C. § 1201(a).
[37] *Id.*
[38] 17 U.S.C. § 1201(b)(1).
[39] Nimmer, *Content Protection And Copyright*, 984 PLI/Pat 81, 117, (2009).
[40] *Id.* at 126.