UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C. 20436

BEFORE THE HONORABLE CHARLES E. BULLOCK

In the Matter of: CERTAIN UNIVERSAL TRANSMITTERS FOR GARAGE DOOR OPENERS	Investigation No. 337-TA-497

CONSUMERS UNION'S SUBMISSION IN SUPPORT OF RESPONDENT SKYLINK, INC.'S MOTION FOR SUMMARY DETERMINATION

Interested Person:

Consumers Union
1666 Connecticut Ave, NW
Suite 310
Washington, DC 20009-1039

Counsel for Consumers Union:

Jennifer M. Urban
Samuelson Law Technology and
Public Policy Clinic
Boalt Hall, School of Law
University of California
392 Simon Hall
Berkeley, CA 94720-7200
(510) 642-7561
fax: (510) 643-4625

On the submission:
Milena J. Spencer and Amalie M. Weber
Student Interns
Samuelson Law Technology and
Public Policy Clinic

I. Introduction and Statement of Interest of *Amicus Curiae*

Consumers Union presents this submission with the instant motion attached hereto in response to Respondents' September 15, 2003 Memorandum of Points and Authorities Supporting Summary Determination of Chamberlain's DMCA Claim ("Skylink's Memo"). For the reasons stated below, Consumers Union asks that the public policy interest favoring unfettered competition be acknowledged by granting the Respondent, Skylink's, motion for summary determination and finding that consumers are implicitly authorized to use non-Chamberlain replacement universal remotes with their Chamberlain garage door openers ("GDO's").

Consumers Union, publisher of *Consumer Reports* magazine, is a non-profit, independent testing and consumer protection organization serving only consumers. Since 1936, Consumers Union has been a comprehensive source of unbiased reporting about goods, services, health, personal finance, and other consumer concerns. The organization is funded from nonrestrictive, noncommercial contributions, grants, and fees as well as from the sale of *Consumer Reports* and other services. Consumers Union is committed to securing for consumers the innovation, competitive prices, range of choices, and product interoperability that result from an open marketplace and proper use of the copyright laws, and it engages regularly in consumer advocacy on these and other issues before the executive, judicial, and legislative branches of government.

Consumers Union recognizes the important responsibilities of the International Trade Commission ("ITC") in protecting domestic industry against imported products that infringe U.S. intellectual property rights. As noted by 17 C.F.R. 210.50, ITC actions necessarily implicate the public interest because the contemplated remedies exclude products from the U.S. market. Consumers could be doubly affected in this case; first, by its effect on the market for GDO

universal transmitters; and then, by its precedential effect on other markets.[1] Consumers have historically been able to choose among replacement parts offered by various manufacturers. An interpretation by the ITC of "without the authority of the copyright owner," 17 U.S.C. § 1201(a)(3)(A), to require explicit authorization to use peripheral products, could lead to the exclusion of the majority of such products from the U.S., resulting in higher prices, less product innovation, and reduced consumer choice. It would allow companies to exercise unprecedented control over peripheral product markets, and would be at odds with Congressional intent that these provisions be construed narrowly.

II. Requiring Explicit Authorization Would Undermine Competition and Contravene Consumers' Legitimate Expectations to Use and Repair Lawfully Purchased Products.

Under the reading of 17 U.S.C. § 1201(a) advanced by Chamberlain in the Northern District of Illinois**,** a Chamberlain GDO customer would be liable under 17 U.S.C. § 1203(c)(3) for at least $200 each time she opens her garage door with a Skylink remote because Chamberlain has not explicitly authorized her to do so. *See* Skylink's Memo at 7 *citing* Transcript SS ¶ 6; Exh. 1 at 26.

If the Digital Millennium Copyright Act ("DMCA") is interpreted to require consumers to obtain explicit authorization to be able to circumvent the codes in their appliances, product manufacturers will be able to limit consumers' ability to engage in routine consumer behavior such as product repair or aftermarket part use by inserting small bits of code into all of their

[1] A substantial portion of replacement and other aftermarket parts are manufactured and imported by foreign manufacturers. For example, the Automotive Aftermarket Industry Association ("AAIA"), a nonprofit trade association whose 2,700 member companies conduct business worldwide in the motor vehicles aftermarket industry, lists among its members 64 manufacturers from Korea, alone. *See* http://www.appa.org/information/diretories/members. Foreign manufacturers of consumer electronics products such as Sony, Nokia and Samsung are household names.

products.[2] Consumer product manufacturers will be able to obtain monopolistic control over the relevant aftermarkets to the detriment of consumers. For example, automakers could easily re-tool tires, wiper blades, and oil filters to include an inexpensive chip running a simple authentication program. If a replacement part does not send a signal authorized by the automaker to the chip, the car could reject it. Under Chamberlain's reading of "authority," no consumer could use a competitor's replacement part that worked by mimicking or circumventing the signal chip without permission from the manufacturer. The list of potentially affected markets is endless.[3]

Consumers would be significantly harmed by this situation since their main power in the marketplace derives from the freedom to shop around. Competition keeps prices down and encourages manufacturers to innovate and spend money on research and development.

---

[2] A further concern is the possible use of "shrink wrap," "click wrap," or even "browse wrap" licenses to rescind implicit authorization to use third party aftermarket parts. Prebate contracts were used in *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 253 F. Supp. 2d 943 (E.D. Ky. 2003). Judge Pallmeyer hints at this possibility in *Chamberlain Group, Inc. v. Skylink Tech., Inc.*, 2003 WL 22038638, *14-15 (N.D. Ill. 2003) (quoting *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d at 294, 317 n. 137 (S.D.N.Y. 2000)). Although not at issue here, Consumers Union notes that the law recognizing the legitimacy of shrink-wrap licenses is not settled, but this risk is substantial. *See, e.g. ProCD, Inc. v. Zeidenberg,* 86 F.3d 1447 (7th Cir, 1996) (holding that a shrink wrap license was enforceable) *and Pollstar v. Gigmania Ltd.*, 170 F. Supp. 2d 974 (E.D. Ca., 2000) (referencing the policy considerations articulated in the context of shrink wrap licenses under *ProCD* and stating that browse wrap licenses might be enforceable given that consumers sometimes enter contracts without seeing their terms). If Chamberlain prevails in this case, the troubling considerations surrounding these contracts of adhesion would be magnified through liability under the DMCA.

[3] Technological protection measures of the kind employed by Chamberlain are merely small bits of embedded code, which are now inexpensive and widely incorporated into many product. For example, you can get a Sony RM-V302 Universal Commander Remote Control on Amazon.com for $12.88. *See* http://www.amazon.com/exec/obidos/search-handle-url/index=electronics&field-keywords=universal%20remote&search-type=ss&bq=1/104-2420225-0144726 (last checked October 1, 2003). If the film canister included an inexpensive microchip, simple code in the camera could prevent consumers from using off-brand film. Similarly, computer manufacturers could prevent consumers from buying keyboards, monitors, or other peripherals from third parties. These products often already contain bits of computer code; a little additional effort could ensure that the processor could reject a non-brand mouse or set of speakers. Mobile phone makers could prevent the use of generic replacement batteries, ring tones, or other products. The entire consumer electronics industry could change to protect the major producers at the expense of consumers and smaller competitors.

Producers' use of the DMCA to control aftermarkets would work a sea change in the balance of power the market has struck between producers and consumers. Consumers have developed a legitimate expectation to be able to freely choose among various suppliers of aftermarket parts to repair the consumer electronics and automobiles that they purchase and to buy aftermarket peripheral appliances and products.[4] An interpretation of the DMCA that presumes a lack of implicit authorization to repair or properly use a product not only calls into question consumers' ability to access their own garages using an aftermarket GDO transmitter, but also ultimately challenges the right of consumers to use their own property.

III. Requiring Affirmative Authorization Would Contradict the Legislative Intent and Unjustifiably Expand the Scope of the DMCA.

Congress did not intend for the DMCA to be used by upstream product manufacturers to control consumers' ability to buy the replacement products of their choice. The DMCA was enacted as a legal platform to promote the development of the digital on-line marketplace for creative works. The legislature was concerned that copyright owners would refuse to make their works readily available on the Internet without "reasonable assurance that they will be protected against massive piracy." 144 Cong. Rec. S4884 (May 14, 1998) (statement of Sen. Hatch); *See*

---

[4] *Cf. Chamberlain Group, Inc. v. Skylink Technology, Inc.*, 2003 WL 22038638, *15 (N.D. Ill. 2003) (stating that consumers continue to have a legitimate expectation to be able to access their garage when their GDO malfunctions). This expectation is self evident from traditional consumer use of products and aftermarket parts, and also derived in part from U.S. intellectual property laws. Patent law recognizes a doctrine of repair or replacement that protects consumers from infringement liability for making use of the products they have purchased. *See e.g.* Cannon Group, Inc. v. Better Bags, Inc., 250 F.Supp.2d 893 (S.D. Ohio. E. Div., 2003) (holding that grocery stores did not infringe patent, covering combination of plastic grocery bags and dispenser, by using competitor's bags instead of those provided by patent holder, precluding claim that competitor was liable for contributory infringement; under doctrine of repair or replacement, stores could replace original bags with unpatented bags without infringing patent.) In addition, the doctrines of patent and copyright misuse arose in response to situations very similar to this case. *See e.g.*, *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 793 (5th Cir. 1999) (disallowing a software company from using its copyright to force its consumer base to buy its hardware components) *and Morton Salt Co. v. G.S. Suppinger Co.*, 314 U.S. 488, 491 (1942) (finding that a salt-tablet machine patentees' requirement that its customers use only its salt was grounds for invalidating the patent).

also, *e.g.,* 144 Cong. Rec. S4439 (May 6, 1998) (statement of Sen. Leahy); Staff of House Comm. on the Judiciary, 105th Cong., Section-by-Section Analysis of H.R. 2281, 2 (Comm. Print 1998); S. Rep No. 105-190, at 2 (1998) ("[T]he law must adapt in order to make digital networks safe places to disseminate and exploit copyright materials.").

As noted by copyright law expert Professor Jane Ginsburg in her testimony before the U.S. Copyright Office, the DMCA was never intended to protect products like ballpoint pen cartridges, printer cartridges, and garage door openers. Anti-Circumvention Rulemaking Hearing before the U.S. Copyright Office, May 9, 2003, at 39-40.

Not only does the legislative history of the DMCA lack a single suggestion that Congress considered Section 1201 to apply to the circumstances at issue, but the drafters of the DMCA expressed significant concern that § 1201(a) might be misused and warned against such abuse. The Chairman of the House Committee on Energy and Commerce, Congressman Bliley, stated that because of "the unfortunate proclivity of some in our society to file spurious lawsuits," there should not be "any misunderstanding about the scope of this legislation, especially the very limited scope of the device provisions in Title I and the very broad scope of the exceptions to section 1201 (a)(1)." 144 Cong. Rec. E2136t (October 13, 1998) (Statement of Cong. Bliley).[5] Forcing consumers to obtain Chamberlain's permission to purchase aftermarket GDO's requires an expansive reading of the DMCA that was not intended by its drafters. Such a broad reading is at odds with the goals of the legislation and would wreak havoc on the settled expectations of consumers.

---

[5] In addition, at the urging of the House Commerce Committee, Congress adopted several specific exemptions to section 1201(a), allowing the development of interoperable software and other pro-consumer activities including educational uses and encryption research. Moreover, realizing the impossible task of being able to anticipate everything, Congress provided in Section 1201(a)(1)(B) for a process by which the Copyright Office can exempt from the Section 1201(a) prohibition a particular class of works whose non-infringing use of the works in the succeeding 3-year period is likely to be adversely affected by prohibition.

IN THE MATTER OF CERTAIN UNIVERSAL TRANSMITTERS FOR GARAGE DOOR OPENERS THEREOF **INV. NO. 337-TA-497**

CERTIFICATE OF SERVICE

I hereby certify that, on October 2, 2003, one original and six copies of the foregoing

CONSUMERS UNION'S SUBMISSION IN SUPPORT OF RESPONDENT SKYLINK TECHNOLOGIES, INC.'S MOTION FOR SUMMARY DETERMINATION

were filed with U.S. International Trade Commission Secretary Marilyn R. Abbott along with two copies each for Administrative Law Judge Charles E. Bullock and Investigating Attorney Karin Norton by **HAND DELIVERY** via **COURIER.**

_____

Chris Murray, Legislative Counsel
Consumers Union
1666 Connecticut Ave, NW
Washington, DC 20009-1039

IN THE MATTER OF CERTAIN UNIVERSAL TRANSMITTERS FOR GARAGE DOOR OPENERS THEREOF **INV. NO. 337-TA-497**

CERTIFICATE OF SERVICE

I hereby certify that, on October 2, 2003, two copies of the foregoing

CONSUMERS UNION'S SUBMISSION IN SUPPORT OF RESPONDENT SKYLINK TECHNOLOGIES, INC'S MOTION FOR SUMMARY DETERMINATION

were served upon the following parties by **OVERNIGHT COURIER**, by causing each envelope, with postage fully prepaid, to be sent by Federal Express.

_____

Milena J. Spencer, Student Intern
Samuelson Law, Technology and Public Policy Clinic
392 Simon Hall,
Boalt Hall, School of Law
Berkeley, CA 94720

FOR COMPLAINANT CHAMBERLAIN GROUP, INC.:

Tom M. Schaumberg, Esq.
Michael L. Doane, Esq.
S. Alex Lasher, Esq.
ADDUCI, MASTRINAI & SCHAUMBERG, LLP
1200 K Street, NW
Washington, D.C. 20036-3006

Karl R. Fink, Esq.
John F. Flannery, Esq.
Rudy I. Kratz, Esq.
FITCH, EVEN, TABIN & FLANNERY
120 South LaSalle Street
Suite 1600
Chicago, Illinois 60603

IN THE MATTER OF CERTAIN UNIVERSAL TRANSMITTERS FOR GARAGE DOOR OPENERS THEREOF **INV. NO. 337-TA-497**

Ramon R. Hock, Esq.
FITCH, EVEN, TABIN & FLANNERY
1801 K Street, NW
Suite 401L
Washington, DC 20006- 1201

FOR RESPONDENTS SKYLINK TECHNOLOGIES, INC., CAPITAL PROSPECT, LTD., AND PHILIP TSUI:

F. David Foster, Esq.
Sturgis M. Sobin, Esq.
Charles F.B. McAleer, Esq.
Patrick de Gravelles, Esq.
Laura C. Farhang, Esq.
MILLER & CHEVALIER CHARTERED
655 Fifteenth Street, NW
Suite 900
Washington, DC 20005-5701

Andra Bannash Greene, Esq.
David Nimmer, Esq.
Richard De Bodo, Esq.
Peter Christensen, Esq.
David Djavaherian, Esq.
IRELL & MANELLA, L.L.P.
840 Newport Center Drive
Suite 400
Newport Beach, CA 92660-6324