Making Room for Consumers under the DMCA

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Outline

- What is the best way to limit post-purchase control enabled by DRMs & DMCA?
- Conclusions:
  - Limit anti-circumvention to copyright scope
  - Develop the notion of Consumers under copyright law
- Consumer-Shopper/Consumer-Author
- Consumer-as-Participant
- Access for Consumers-Participants
- Why copyright is a better strategy?
Chamberlain v. Skylink
Lexmark v SCC

Toner Loading Program

Mimics authentication sequence

Printer Engine Program
Why?

- **But,**
  - *Reimerdes & Corley* (2001)
Consumers under Copyright Law

- Consumer – Shopper
  - Negative connotations
  - Economic remedies

- Consumer – Author
  - Copyright productive ethos
  - Transformative v. Non-transformative uses
  - Does not cover use for one’s own benefit
Consumers-as-Participants

- The virtues of consumption
  - Promoting Creativity
  - Nurturing Human Capital
  - Creating a Cultural Language
  - Consumption of informational works, is never a passive behavior
  - Promoting progress by *Access*
Access for Consumers-as-Participants

- The freedom to use a product
  - The freedom to use a copy
  - The freedom to use copies in conjunction with competing products

- Intellectual freedom
  - The freedom to choose what they watch
  - The freedom to choose where & how to experience
  - Freedom of surveillance
  - Freedom to experiment and share
Making Room for Consumers

- **External –balance**
  - Copyrights v. competition law, consumer protection regulation

- **Internal – construction**
  - "The DMCA cannot allow Chamberlain to retract the most fundamental right that the Copyright Act grants consumers: the right to use the copy of Chamberlain's embedded software that they purchased." (Fed Cir.)
**Courts**

- *Chamberlain*
  - Circumvention is illegal only if it enables infringing copying
  - Consumers have a right to use a copy (so far as copyright law does not explicitly restrict it).

- *Lexmark*
  - It is not illegal to circumvent a technological measure that is blocking access to an unprotected idea
Consumers’ Perspective in Copyright Law

- Legitimacy
- Power Relations
- Market perspective
- Politics
- Consumers’ Interest and Public Welfare
  - A notice is insufficient
  - Legalizing self-help