# 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



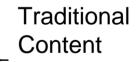
#### **Printer Engine Program**



- *Lexmark v. SCC* (2004)
- Chamberlain v. Skylink (2004)

Consumer Devices

- But,
  - □ Sony v. Gamemaster (2000)
  - □ Reimerdes & Corley (2001)
  - □ RealNetworks v. Streambox (2000)
  - Blizzard v. bnetd (2004)



## 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