
Making Room for Consumers under the DMCA

Niva Elkin-Koren

Haifa Center for Law and Technology

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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?

- *Lexmark v. SCC* (2004)
 - *Chamberlain v. Skylink* (2004)
 - But,
 - *Sony v. Gamemaster* (2000)
 - *Reimerdes & Corley* (2001)
 - *RealNetworks v. Streambox* (2000)
 - *Blizzard v. bnetd* (2004)
- Consumer Devices
- Traditional Content

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
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Consumers' Perspective in Copyright Law

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