IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THE CHAMBERLAIN GROUP, INC., a Connecticut corporation, *Plaintiff/Counterdefendant,* vs. SKYLINK TECHNOLOGIES, INC., a foreign corporation, *Defendant/Counterclaimant*.	Civil Action No. 02 C 6376 Judge Rebecca R. Pallmeyer Magistrate Judge Edward A. Bobrick
AND RELATED COUNTERCLAIMS	

BRIEF OF *AMICUS CURIAE* CONSUMERS UNION SUPPORTING SKYLINK TECHNOLOGIES, INC.'S OPPOSITION TO THE CHAMBERLAIN GROUP, INC.'S MOTION FOR SUMMARY JUDGMENT

CORPORATE DISCLOSURE STATEMENT

Pursuant to L.R. 3.2, *amicus curiae* Consumers Union states that it is a not-for-profit 501(c)(3) corporation. It has no parent corporation and issues no stock.

Dated: May 8, 2003.

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STATEMENT OF INTEREST OF *AMICUS CURIAE* CONSUMERS UNION

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 for unbiased reporting about goods, services, health, personal finance, and other consumer concerns. The organization is funded solely from the sale of *Consumer Reports* (in print and online) and other services, and from nonrestrictive, noncommercial contributions, grants, and fees. Consumers Union engages regularly in consumer advocacy before the executive, judicial, and legislative branches of government. 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.

Skylink Technologies, Inc. ("Skylink") has consented to Consumers Union filing this amicus brief. Consumers Union has also attempted to obtain consent from The Chamberlain Group, Inc. ("Chamberlain"), but Chamberlain has indicated that it will not consent.

SUMMARY OF ARGUMENT

Chamberlain seeks to employ the Digital Millennium Copyright Act ("DMCA") to prevent its sole competitor in the market for aftermarket garage door universal remotes from developing products that interoperate with Chamberlain's garage door openers. Consumers Union is concerned that consumers could face long-term, serious harm if Chamberlain's claim succeeds. Consumers are likely to face higher prices in this market and may be prevented from buying innovative, new products from Skylink or anyone else. Without competitors, Chamberlain would be able to charge more for the products consumers need and will have little incentive to improve its products.

Chamberlain seeks to control the market for these remote controllers, not through the legitimate exercise of intellectual property rights, but through misuse of the rights granted by the DMCA's anti-circumvention provisions. Much like the misuse doctrines in the copyright and patent contexts, Chamberlain is attempting to "leverage" the intellectual property rights in its garage door openers in order to control the market for universal or replacement remote controllers. Such control would close the market to competition—injuring consumers for the private benefit of one producer. Moreover, success for Chamberlain would likely encourage other producers,

from car manufacturers to telephone companies, to use the DMCA to exert control over peripheral markets. The familiar harms stemming from lack of competition could afflict consumers in virtually every market for interoperable or replacement consumer goods.

This is not the result Congress intended when considering the DMCA. By passing the anti-circumvention provisions, Congress sought simply to encourage digital distribution of copyrighted content such as music, movies, and books in order to provide consumers with more choice and to stimulate the on-line market. Congress's inclusion of exemptions to liability for reverse engineering and interoperable product development, as well as legislative history explaining the anti-piracy purpose of the anti-circumvention provisions, weigh heavily against Chamberlain's anti-competitive use of the DMCA. Moreover, Congress expressly warned against use of the law by copyright owners seeking to gain control over other markets and stifle legitimate competition.

ARGUMENT

I. CONSUMERS WOULD BE INJURED BY CHAMBERLAIN'S USE OF THE DMCA'S ANTI-CIRCUMVENTION PROVISIONS TO SUPPRESS COMPETITION.

Like the consumer harm resulting from antitrust violations and intellectual property misuse, Chamberlain's misuse of the DMCA, Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998) (codified in scattered sections of 17 U.S.C.), threatens to suppress consumer options, raise prices for a range of products, and diminish the interoperability of common household tools. Though several companies manufacture garage door openers, only Chamberlain and Skylink make universal remote controllers for these devices. Defendant's Rule 56.1 Statement (public version) ("Df.'s 56.1"), ¶ 60. Like an extra set of house keys, these products are valuable for those who need additional or replacement controllers, who use more than one garage door, or who use garage doors made by different manufacturers. Deposition of Richard A. Gregory (public version) ("Gregory Dep."), 83-84. Some of Chamberlain's newer garage door openers contain simple computer software that generates codes to control the opening and closing of consumers' garage doors. Chamberlain did not invent this system or method of garage door operation. Df.'s 56.1, ¶ 42. Skylink's universal remote controllers, like those that work with television and stereo equipment, learn the codes necessary to activate the consumer's garage door, and replay those codes when the consumer wishes. Df.'s 56.1, ¶¶ 71-72, 76-78.

Consumers Union is concerned that, if Chamberlain succeeds in misusing the DMCA to oust Skylink and other potential competitors from the market, consumers of aftermarket products for garage door openers will face substantial harm. With healthy competition, consumers receive the benefit of choice in remotes, are able to pay a price that is influenced by competition, and can expect the product innovations inspired by a competitive market. Without competitors, Chamberlain will be able to charge higher prices for remote control devices and will have little incentive to develop new, innovative products. Moreover, under the precedent Chamberlain seeks, other producers could similarly use the DMCA to leverage control in *their* peripheral markets. Any maker of consumer goods, from Daimler-Chrysler to Kodak, could leverage bits of functional computer code and the DMCA to gain illegitimate market power.

A. Much Like Traditional Intellectual Property Misuse or Inefficient Monopolies, Chamberlain's Claim Would Increase Prices, Stifle Innovation, and Impede Interoperability.

Chamberlain's DMCA claim is a new twist on an old tale—using legal or economic market power to stifle competition and increase profits at consumers' expense. Federal antitrust laws punish those who misuse their market power to suppress competition, and the courts censure misusers of intellectual property rights by refusing to enforce their patents and copyrights. In both cases, consumers face higher prices and fewer product choices. Though Chamberlain asserts the DMCA rather than traditional intellectual property rights, consumers face precisely these same harms should the claim succeed.

Consumers benefit from fully functioning markets. As one court noted with respect to the telephone equipment market, "[t]he American economic system proceeds on the basis of the assumption . . . that competition is far more likely to lead to the production of more and better products and their distribution to consumers at affordable prices than a market dominated by a monopoly." *United States v. Western Elec. Co.*, 714 F. Supp. 1, 4 (D.D.C. 1988). Yet, firms often attempt to leverage existing rights to control other markets, including markets in interoperable aftermarket products; courts thus have repeatedly stepped in to stop unscrupulous producers from using such tactics. For example, during the height of the AT&T telephone monopoly, consumers were only allowed to use expensive and bulky "official" telephones when making calls over Bell's telephone lines. *United States v. Western Elec. Co.*, 673 F. Supp. 525, 600-01 (D.D.C. 1987), *aff'd in part, rev'd in part*, 900 F.2d 283 (D.C. Cir. 1990). Since the Bell

breakup, the "cost of telephone instruments is down dramatically" and "competition has brought about innovations in telephone features." *Id.* (internal citations omitted).[1] It was just these types of consumer harm and inefficiencies that led federal antitrust authorities and the Federal Communications Commission to initiate the Bell breakup. *See United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 195 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

Consumers also benefit from intellectual property grants to producers. *See, e.g., Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."). For this public benefit to accrue, intellectual property rights must not be abused—for instance, by using such rights to deny consumers access to interoperable goods. *C.f. Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 160-61 (1989) (describing benefits of interoperability); Pamela Samuelson & Suzanne Scotchmer, *The Law and Economics of Reverse Engineering*, 111 Yale L.J. 1575, 1590 (2002) (noting that protection for interoperabilty "has a salutary effect on price competition and on the dissemination of know-how that can lead to new and improved products"). Courts have accordingly looked disapprovingly at producers' attempts to use intellectual property rights to increase profits at the expense of consumers. Until the Fifth Circuit stopped the practice, a software company with a heavily-invested consumer base tried to force buyers of its software to also buy its hardware components. *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 793 (5th Cir.

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[1] The court noted further that:

> When the Bell System monopoly had full control, it refused to sell its telephones to consumers, or to permit anyone else to sell them, preferring to charge rentals in the neighborhood of $5-7 per month or more, for a total in, say thirty years, of over $2,000. Today, telephone instruments can be purchased in retail stores everywhere for $25-30 and up. . . . There are now on the market at reasonable prices such by now commonplace features as residential telephones that are able to memorize dozens or hundreds of different phone numbers; telephones that repeat the last number called until it is no longer busy; cellular phones for business and emergency use; cordless phones; instruments that can be instructed by voice (e.g., in an automobile) to call a certain individual, office, or number; and many others. . . .
>
> It is surely not a coincidence that these features, and many more, have become available since the Bell monopoly was ended by divestiture and competition began to reign in the telecommunications marketplace.

Western Elec. Co., 673 F. Supp. at 601, n.329, n.330.

1999); *see also qad. inc. v. ALN Assoc., Inc.*, 781 F. Supp. 561, 564-65 (N.D. Ill.), *aff'd in part, dismissed in part*, 974 F.2d 834 (7th Cir. 1992) (refusing to enforce plaintiff's copyright based on misuse in an infringement suit). Another software maker attempted to leverage its trademark rights to prevent competitors from developing interoperable software. *See Sega Enters. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992) (dismissing Sega's copyright and trademark claims as illegitimate intrusions on Accolade's right to create interoperable products). And the Supreme Court found that a salt-tablet machine patentee's requirement that its customers use only its salt was grounds for invalidating the patent. *See Morton Salt Co. v. G.S. Suppinger Co.*, 314 U.S. 488, 491 (1942). These intellectual property "misuse" doctrines evolved out of economic concerns that inappropriate use of intellectual property rights stifles competition and inhibits the very innovation intellectual property laws and free markets were intended to encourage. *See id.* at 492.

The consumer harm presented by this case is similar to that caused by traditional intellectual property misuse and monopolists' anticompetitive behavior. Chamberlain's use of the DMCA's anti-circumvention provisions is the newest effort of a producer to lock out competition. Chamberlain, like monopolists and intellectual property misusers before it, is attempting to leverage an intellectual property right to gain control of a peripheral market.[2] Its claim attempts to use the DMCA to assert control over the aftermarket for replacement or interoperable remote controllers for garage door openers. Chamberlain's customers, having invested in Chamberlain's devices, cannot cheaply switch to a new garage door opener when they lose a remote controller or need to buy an extra one. If no other producer can compete in the aftermarket for remote controllers, then Chamberlain can take advantage of its captive customers as Bell did with telephone users, *see Western Elec. Co.*, 673 F. Supp. at 600-01, or as software makers have done with buyers of their software. *See Alcatel*, 166 F.3d at 793. The illegitimate market power Chamberlain would gain from its claim threatens healthy competition and product interoperability. Further, while patent and copyright misuses certainly harm consumers, they are at least limited by the

[2] Chamberlain's claim also evokes the "leveraging" problem in antitrust law, which is related to the misuse doctrine in patent and copyright. In antitrust cases, courts have held that a producer violates the law by illegitimately "leveraging" power over its customer base in order to induce customers to buy another product they would not otherwise buy. *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 14 n.20 (1984). *See also* Mark R. Patterson, *When Is Property Intellectual? The Leveraging Problem*, 73 S. Cal. L. Rev. 1133, 1136 (2000).

eventual expiration of the intellectual property monopolies.[3] The DMCA's anti-circumvention rights, in contrast, never expire. *See* 17 U.S.C. § 1201(a). The potential consumer harm caused by an inappropriate claim is thus greater than in the patent and copyright contexts, as it can continue in perpetuity.[4] Chamberlain's claim rests on the DMCA rather than on rights granted by copyright or patent, but it uses the law to effect the same harm proscribed by those other doctrines.

B. If Chamberlain Prevails, Other Producers Will Likely Attempt Similar Misuse of the DMCA.

This precedent would almost certainly have an adverse effect on other industries. Based on a positive precedent in this case, a producer of almost any consumer good could assert a DMCA claim regardless of the status of the underlying copyrighted content or the consumer harm at stake.[5] The aftermarket for motor vehicle parts, for example, is a $185 billion dollar industry encompassing independent repair shops, replacement parts manufacturers and retailers, and producers of interoperable car accessories. Industry Trends, Automotive Aftermarket Industry Association (AAIA) website, *at* http://www.aftermarket.org/Masthead/About_AAIA/market.asp (last visited May 5, 2003). The existence of a robust aftermarket provides consumers with choices for repairs or parts. *Id.* Competition in these markets keeps prices down and encourages producers to develop new, innovative products. *See id.* Yet under the reading of the DMCA advanced by Chamberlain, automakers could easily retool tires, wiper blades, and oil filters to include an inexpensive chip running a simple authentication program. If a replacement

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[3] Indeed, the leveraging of a patent monopoly to extend control beyond its expiration date is *per se* misuse. *See Brulotte v. Thys Co.*, 379 U.S. 29, 32 (1964); *Scheiber v. Dolby Labs., Inc.*, 293 F.3d 1014 (7th Cir. 2002) (Posner, J.).

[4] In response to the harms posed by such leveraging of the DMCA's anti-circumvention provisions, at least one commentator has called for the creation of a new anti-circumvention misuse doctrine, similar to copyright or patent misuse, to address this situation. *See* Dan L. Burk, *Anti-Circumvention Misuse*, 50 U.C.L.A. L. Rev. (forthcoming July 2003), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=320961 (updated July 31, 2002).

[5] This would not be the only secondary effect of a finding for Chamberlain; even the fear of lawsuits may discourage development and introduction of new products. Even if enterprising start-ups are willing to face the risk, investors may be reluctant to fund beneficial new technologies that face possible legal threats. Katie Dean, *Summit: DMCA Blocks Tech Progress*, Wired News, Feb. 20, 2003, *at* http://www.wired.com/news/digiwood/0,1412,57740,00.html,.

part does not send a signal authorized by the automaker to the chip, the car could reject it. Any aftermarket producer of replacement parts seeking to create interoperable products by mimicking or circumventing the signal chip could face a DMCA suit much like the suit faced by Skylink. Such power in the hands of automakers could destroy the aftermarket industry and its 3.7 million jobs, *see id.*, and injure consumers by allowing automakers to charge monopoly prices for anything from oil filters to wiper blades. Additionally, without the threat of competition, automakers would be less likely to spend money on research and development into new innovations. Much as in Chamberlain's case, producers would profit at consumers' expense.

The list of potentially affected markets is endless. Other aftermarket remote controllers, such as those for televisions and stereo equipment, are easy targets. Sony or RCA could simply include an authentication algorithm on the computer chips already in their remote controllers and televisions and prevent access by off-brand or universal remotes. A consumer's cable television remote could no longer legally control the volume on her television unless she was willing to pay the higher price for an "authorized" universal remote. And because each of her electronic devices (stereo, television, VCR, cable, etc.) could have individual access controls, she would be unable to control all of them with one remote without buying only components "authorized" by one producer.

Other consumer electronics producers could exert similar control over their aftermarkets. Camera makers could ensure that consumers only bought licensed film—at a hefty markup. If the film canister included an inexpensive microchip, simple code in the camera could prevent consumers from using off-brand film. If courts find claims like Chamberlain's to be a valid use of the DMCA, camera manufacturers could prevent their cameras from working unless customers use brand-name film in their cameras—regardless of the price or quality of the film. Similarly, computer manufacturers could prevent consumers from buying keyboards, monitors, or other peripherals from third parties.[6] 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.

[6] 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.

Until recently the idea of using the copyright laws to stop universal garage door remote controller manufacturers from offering competing products seemed improbable,[7] but cases such as the recent *Lexmark* case show that producers of manufactured goods that include small amounts of operational code seem to be testing how far the courts are willing to take the DMCA's anti-circumvention provisions. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 2003 U.S. Dist. LEXIS 3734 (E.D. Ky.). Successful DMCA claims in either case could injure consumers by sheltering certain producers from competition and encouraging other producers to act similarly. Even more than in the *Lexmark* case, however, the precedent of a successful suit by Chamberlain would invite a broad range of actions harmful to consumers. Chamberlain, unlike Lexmark, does not even assert direct or indirect copyright infringement to back up its DMCA claim. *Compare Lexmark*, 2003 U.S. Dist. LEXIS at *73, *with* Amended Complaint, ¶¶ 16-25. As such, Chamberlain's claim strays further from the realm of protecting traditional copyrighted works than any DMCA claim before it, including Lexmark's.

As *Lexmark* illustrates, these examples are not just hypothetical; the capabilities to implement these examples already exist or can easily be developed. Most companies have intense economic incentives to protect their markets from competition, and these incentives will encourage adoption of the technologies and legal strategies outlined above, should DMCA claims like Chamberlain's succeed. Many successful producers earn brand loyalty through good service, better products, and competitive pricing. Unfortunately, history provides ready examples of companies who would rather force brand loyalty on customers than earn it. *See supra*. Should Chamberlain succeed in turning the DMCA into a lever to ensure "loyalty," the long-term effects for consumers would be devastating.

C. The Consumer Harm Likely to Result from Chamberlain's DMCA Claim Outweighs the Unsubstantiated Security Benefits Asserted by the Plaintiff.

Perhaps to deflect attention from the anti-consumer implications of its DMCA claim, Chamberlain warns that Skylink's products allow burglars to overcome the strong security protections built into Chamberlain's garage door openers. Plaintiff's Rule 56.1 Statement (public version) ("Pl.'s 56.1"), ¶¶ 24-25. Consumers Union is deeply concerned about consumer security, but Chamberlain's concerns regarding the safety of its garage door openers have no place in

[7] Certainly this use was not envisioned by Congress when passing the DMCA. *See infra*, section II.

a claim based on the DMCA. Even if code-grabbing was a demonstrable concern, copyright law is not the tool to address it.

While Consumers Union is concerned about any purported security problems created by Skylink's replacement remote, those claims seem so far to be largely unsubstantiated. *See infra*. Consumers Union thus has far graver concerns about consumer harm from the effects of curtailing competition in the market for universal garage door remote controllers. Top marketing and engineering executives at Chamberlain could not recall a single incident of someone gaining unauthorized access to a garage using a Skylink product. Df.'s 56.1, ¶ 81. Nor could they recall any incident where a burglar was prevented access because of Chamberlain's "security" code. Df.'s 56.1, ¶ 82. In addition, research indicates that Chamberlain's own universal garage door remote controllers are as susceptible to misuse by burglars as Skylink's. Df.'s 56.1, ¶ 85. And while no one at Chamberlain is able to point to an instance of "code-grabbing" by a burglar, Df.'s 56.1, ¶ 81, examples of consumer harm through misuse of intellectual property rights or monopoly power abound. *See supra*. In short, the consumer harm alleged by Chamberlain to be caused by Skylink's universal remote seems largely unsubstantiated in fact, and is far removed from the remedy Chamberlain is seeking by pressing a claim under the DMCA.

II. SKYLINK'S READING OF THE ANTI-CIRCUMVENTION PROVISIONS ACCORDS WITH THE CONGRESSIONAL INTENT BEHIND THE DMCA: TO PROTECT INTEROPERABILITY, COMBAT DIGITAL PIRACY, AND ENCOURAGE DIGITAL DISTRIBUTION OF CREATIVE CONTENT.

A. The Proper Reading of the DMCA's Anti-Circumvention Provisions and the Interoperability Exception Prevent a Finding for Chamberlain.

Skylink makes clear in its brief that § 1201(a) of the DMCA does not apply to the interaction of Skylink's universal remotes with Chamberlain's products as Chamberlain's technology does not "control access to a work" protected by copyright. *See* § 1201(a); Skylink Technologies, Inc.'s Opposition to The Chamberlain Group, Inc.'s Motion for Summary Judgment (public version) ("Df.'s Memo."), 17-22. Such a statutory conclusion accords with Congress's intent when passing the DMCA. Congress sought foremost to promote "a thriving electronic marketplace for copyrighted works on the Internet." *See* H.R. Rep. No. 105-551 Part 1, 105th Cong. 2d Sess. at 9-10 (May 22, 1998). Section 1201 protects copyright owners against tools designed to circumvent technical protection measures employed to "protect their works from piracy . . . ."

Universal City Studios, Inc. v. Corley, 273 F.3d 429, 435 (2d Cir. 2001). Nowhere does the statute or the legislative history mention, let alone express a desire to create, anti-circumvention liability where copyright infringement is not alleged or even relevant.

Skylink also notes that, even if § 1201(a) applied here, § 1201(f)'s interoperability exception prevents Chamberlain from thwarting distribution of legitimate, interoperable products. *See* Df.'s Memo., 15. This, too, is in harmony with the legislative history of the DMCA. Congress feared that the consumer benefits resulting from a "thriving electronic marketplace" would be offset by harms caused by abuse of § 1201. *See infra*. Congress was specifically concerned that consumer benefits created by development of interoperable products might be jeopardized unless interoperability was specifically protected. *See* 144 Cong. Rec. E 2136 (daily ed. Oct. 13, 1998) (statement of Rep. Bliley). Rep. Tom Bliley, Chairman of the House Commerce Committee, noted that his committee added the interoperability provisions to help consumers:

> [C]onsumers will enjoy additional benefits if devices are able to interact, and share information. Achieving interoperability in the consumer electronics environment will be a critical factor in the growth of electronic commerce. . . . In the Committee's view, manufacturers, consumers, retailers, and professional servicers should not be prevented from correcting an interoperability problem or other adverse effect resulting from a technological measure causing one or more devices in the home or in a business to fail to interoperate with other technologies.

Id. at E 2138.

B. Applying the DMCA to Garage-Door Openers in the Absence of Any Underlying Copyright Infringement Undermines Congress's Goal of Thwarting Piracy and Encouraging Digital Distribution of Creative Content.

From its very inception, the legislation which developed into the DMCA was aimed primarily at stimulating the creation and distribution of creative digital content. The World Intellectual Property Organization Copyright Treaty, which was the impetus behind the DMCA, sought to protect the "plethora of works [that] will be distributed and performed over the Internet." H.R. Rep. No. 105-551 Part 1 at 10. Commentators have firmly concluded that combating Internet piracy and encouraging digital distribution of creative works were the primary goals behind § 1201. *See, e.g.*, 3-12A *Nimmer on Copyright* § 12A.04 (2003); Samuelson & Scotchmer, *Reverse Engineering*, *supra* at 1634-1638. Indeed, Congress was "somewhat repetitious on this point." Burk, *supra* note 4 (manuscript at 55). As the Second Circuit noted: "Fearful [of] the

ease with which pirates could copy and distribute a copyrightable work in digital form . . . , Congress sought to combat copyright piracy in its earlier stages, before the work was even copied." *Corley*, 273 F.3d at 435. Yet, Chamberlain makes no claim that it implemented its garage-door opener system for the purpose of thwarting illicit reproduction of its copyrighted content—in fact, Chamberlain does not complain of direct, contributory, or vicarious copyright infringement, at all. *See* Amended Complaint, ¶¶ 16-25. If copyright infringement cannot result even from the downstream effects of the claimed "circumvention," then the harm feared by Congress cannot be present. Instead of using the statute as Congress intended, Chamberlain is employing § 1201 to enforce control over adjacent products. *See* Burk, *supra* note 4 (manuscript at 56).

In passing the DMCA, Congress intended to encourage the distribution of digital content, which increases options for consumers.[8] The Senate Judiciary Committee hoped that § 1201 would "facilitate making available quickly and conveniently via the Internet the movies, music, software, and literary works that are the fruit of American creative genius." S. Rep. No. 105-190, 105th Cong. 2d Sess. at 8 (May 11, 1998). Congress wanted to ensure the "continued growth" of the content industry through these new channels, in the hopes that consumers in the United States and elsewhere would profit along with content owners.[9] *Id.* Enforcement of § 1201 for Chamberlain's code in the absence of any threat of piracy would not open up new markets or increase consumer choice; on the contrary, it would likely to shut down competition in the market for replacement or universal remote controllers and limit the choices of consumers.

[8] It should be noted that many have questioned the efficacy of the DMCA in meeting this goal. Commentators are concerned that, even in the market for movies, music and other creative content, the anti-circumvention provisions do not allow for many of the traditional liberties provided under traditional copyright law. *See, e.g.*, Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 15 Harv. J.L. & Tech. 41 (2001); David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. Pa. L. Rev. 673 (2000); Pamela Samuelson, *Why the Anti-Circumvention Regulations Need to Be Revised*, 14 Berkeley Tech. L.J. 519 (1999); Electronic Frontier Foundation, *Unintended Consequences: Four Years Under the DMCA*, Jan. 9, 2003, *at* http://www.eff.org/IP/DMCA/20030103_dmca_consequences.pdf.

[9] The growth of the digital content sector itself was also a goal of the DMCA. Congress pointed out the value of the industry to the American economy and warned of the economic dangers if digital distribution channels stagnated. *See* H.R. Rep. No. 105-551 Part 2, 105th Cong. 2d Sess. at 22 (July 22, 1998); S. Rep. No. 105-190 at 10.

Chamberlain's claim thus strays from Congressional intent in both the characteristics of the copyrighted work at issue *and* in the goals of the application.[10]

Congress not only lacked any desire to extend anti-circumvention protection to software processes in consumer goods like Chamberlain's, but it openly expressed fear that the provision might be abused. "[G]iven the unfortunate proclivity of some in our society to file spurious lawsuits," noted House Commerce Committee Chairman Tom Bliley (D-Va.), "I don't want there to be any misunderstanding about the scope of this legislation, especially the very limited scope of the device provisions in Title I . . . ." 144 Cong. Rec. E 2136 (re-introducing the DMCA legislation to the House floor and describing the import of the limiting amendments and additions—all of which were accepted—made by the Commerce Committee). To give legal voice to such concerns, the Commerce Committee delayed the effective date of the anti-circumvention provisions for two years, § 1201(a)(1)(A), provided a means for the Copyright Office to review the bounds of anti-circumvention to help stop misuse, § 1201(a)(1)(B), and most importantly added specific exceptions to § 1201 to allow for the development of interoperable software and other pro-consumer activities such as educational uses and encryption research. § 1201(d)-(g); *see* discussion of § 1201(f), *supra*. These safeguards and exemptions demonstrate Chairman Bliley's concern: the DMCA should not countenance parties who file suit under § 1201 to block legitimate competition rather than to protect digital content from piracy. *See* 144 Cong. Rec. E 2136.

In sum, Congress passed the anti-circumvention provisions of the DMCA to combat Internet piracy and to encourage the growth of the digital content industry. *Corley*, 273 F.3d at 435. Lawmakers did not intend, and would wince at the thought of, use of the DMCA to stifle innovation and leverage control over peripheral markets. While consumers can benefit from the availability of digital content encouraged by the DMCA, suits such as Chamberlain's reveal that misuing the DMCA is a tempting strategy for some producers. Consumers Union is concerned about the potential harm to consumers from such an overbroad application of the DMCA, and

[10] Even if Chamberlain's claim could be sustained based on a literal reading of the statute, such an application would be at odds with the clearly expressed intent of Congress. As the *Lexmark* court noted, legislative history is relevant when "literal application of [the] statute will produce a result demonstrably at odds with the intentions of its drafters." *See Lexmark*, 2003 U.S. Dist. LEXIS * 67-68 (citing *Koenig Sporting Goods, Inc.*, 203 F.3d 986, 988 (6th Cir. 2000)) (brackets in original). Though literal application of § 1201 does not include Chamberlain's internal software processes, *see* Df.'s Memo., 15, Congress *also* has evinced an intent contrary to Chamberlain's reading of the statute. *See United States v. Ritsema*, 31 F.3d 559, 566-67 (7th Cir. 1994); *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892).

respectfully requests that this Court refuse to accept the overreaching misinterpretation of the statute advanced by Chamberlain.

CONCLUSION

For the foregoing reasons, *amicus curiae* Consumers Union respectfully requests that Chamberlain's Motion for Summary Judgment be denied.

Dated: May 8, 2003.

Respectfully Submitted,

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CERTIFCATE OF SERVICE

I, Nilda Andrews, declare: I am a citizen of the United States and am employed in the County of Alameda, State of California. I am over the age of 18 years and am not a party to the within action. My business address is Center for Clinical Education, University of California at Berkeley School of Law (Boalt Hall), 396 Simon Hall, Berkeley, CA 94720-7200. I am personally familiar with the business practice of the Samuelson Law, Technology and Public Policy Clinic. On May 8, 2003, I served the following document(s):

BRIEF OF *AMICUS CURIAE* CONSUMERS UNION SUPPORTING SKYLINK TECHNOLOGIES, INC.'S OPPOSITION TO THE CHAMBERLAIN GROUP, INC.'S MOTION FOR SUMMARY JUDGMENT

by placing a true copy thereof enclosed in a sealed envelope addressed to the following parties:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this declaration was executed at Berkeley, California.

Dated: May 8, 2003.

By: _____
Nilda Andrews