DRM & INTEROPERABILITY

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©, DRM & Consumer Protection

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SOFTWARE INTEROPERABILITY

- Several challenges in late 1980's/early 1990's in US case law to interoperable software on © grounds:
  - Nintendo claimed infringement of derivative work right because Galoob's Game Genie interoperated with its games and modified some aspects of game play
  - Computer Associates claimed © infringement because of copying of internal interfaces as part of program "SSO"
  - Sega initially won preliminary injunction vs. Accolade reverse-engineering to make interoperable games for Sega platform; also vs. games as "fruit of poisonous tree" of unlawful RE

RESOLUTION AS TO SW

- But ultimately, in all of these cases, courts rejected the © claims:
  - Specifications for achieving interoperability deemed unprotectable by © as too functional, as constrained by external factors, as more suitable for patent than © protection
  - Reverse engineering in order to achieve interoperability = fair use
  - BUT no obligation to reveal interfaces; many software interfaces remain trade secrets
  - Same basic rule in EU and elsewhere

DATA INTEROPERABILITY?

- Do the same © principles apply to data-to-software or data-to-data as to hardware-to-software or software-to-software interoperability, as in *Altai* and *Accolade*?
- If so, then DRM interfaces should be beyond (c) and RE to get access to them should be OK
- DMCA anti-circumvention rules create an exception for bypassing access controls and even making tools, but it speaks of hardware-to-software, software-to-software interoperation
  - Was this an oversight? Was it intentional?

DMCA CASELAW

- *Universal v. Reimerdes*: 1201(f) only applies to software-to-software, not software-to-data; no right to circumvent to try to make DVDs playable on Linux
- *RealNetworks v. Streambox*: software authentication “handshake” with data treated as access control, bypassing of which violated anti-circumvention rules
- Apple charged RealNetworks with violating the anti-circumvention rules for reverse engineering the iTunes software to enable interoperability with iTunes music, although no lawsuit

IS DATA DIFFERENT?

- Possibly so:
  - *Reimerdes* & *RealNetworks* cases seem to say so, but do not explain why
  - In *Reimerdes* & *RealNetworks* cases, courts thought that the interoperability defenses were bogus
- Possibly not:
  - Seems to be the premise of European consumer authorities pressing Apple to open the interfaces for iTunes software
  - Computer scientists would question legal rules based on distinction between data & software
  - Many examples of data interoperability OK (XML)
  - What about sw to bypass region coding on DVDs?

MY PREDICTIONS

- Outside of the anti-circumvention context, courts would likely say that data interoperability is fine under © law; RE to obtain information necessary to achieve interoperability
- If Apple had sued RealNetworks for anti-circumvention violations for trying to interoperate with iTunes, RealNetworks would have had a good defense
- Forcing Apple to disclose its interfaces to enable interoperability by other vendors is a different matter; maybe if antitrust violation
  - Barnett speech suggests not; Rosch speech, not yet
- More plausible consumer protection approach in the US would be to require notice of DRM restrictions affecting interoperability

DRM RESTRCTIONS ON INTEROPERABILITY

- 1st manifestation of consumer protection concerns about lack of interoperability arose as to copy-protected CDs
- Some new releases were copy-protected so that they wouldn't
  - play on computers, walkman devices, or some CD players
  - allow back-ups or other personal use copies
- Frustrated consumers who had purchased these CDs expected portability and personal use copying
- Many complained to retailers and manufacturers because consumers thought players were defective
- Many insisted on refunds, putting a burden on retailers
- No notice of region-coding restrictions for DVDs either

LEGAL CHALLENGES

- Lawsuits in US and France challenged copy-protected CDs as “defective” products
  - Lack of notice about copy-protection one aspect of this
- To call a product a “CD,” one is supposed to meet “red book audio” portability specifications
  - Philips thinks notice should be required if disks are not compliant with specifications
- Labeling would give purchasers notice of restrictions, may create some competition among vendors, as consumers prefer less restricted products
- Lack of interoperability of iTunes has become a big consumer issue in EU

NOTICE PROBLEM NOTICED

- INDICARE Report identifies lack of transparency about TPMs as a significant legitimate consumer protection issue, may violate EU consumer protection rules
- UK's Gower Review of Intellectual Property recommends requiring notice of TPM restrictions
- Center for Democracy & Technology identifies transparency of TPM restrictions as a significant consumer protection issue
- Several bills introduced in Congress to require notice of TPM restrictions
- FTC Commissioner Rosch spoke of failure to disclose material limitations on usage rights, such as DRM, as an unfair trade practice
  - Clear & conspicuous notice BEFORE sale made

WYDEN BILL

- Digital Consumer Right to Know Act
- FTC would be authorized to issue rules to require disclosure of technical features that limit purchasers' ability to play, copy, transmit, or transfer digital content
  - Able to provide for exceptions where burden of notice outweighs consumer benefit
- Annual review of effectiveness of notice rules by FTC

CONCLUSION

- FTC is an appropriate agency to conduct hearings & develop rules for notice about TPM restrictions
  - But FTC may not be able to do all necessary oversight
- Wyden right that notice of TPM restrictions and capabilities should be given as to more than copy-protected CDs, as Boucher's bill would have done
- Notice should pertain not just to interoperability restrictions, but also as to privacy-intrusive, security, altered functionality, self-help features
- More direct approach: no or inadequate notice = unfair trade practice, = no 1201 enforcement
  - Would give firms strong incentives to provide adequate notice