

**The Expanding Reach of Copyright Protection Systems: An Update on the DMCA, “Super-DMCA” State Statutes, and Anti-Circumvention Provisions in International Treaties**

**BRIEFING PAPER**

**I. Background**

By the mid 1990s, digital piracy had become a major concern for software and content industries.<sup>1</sup> The advent of personal computers and growth of the Internet facilitated the copying and distribution of perfect duplicates of copyrighted works.<sup>2</sup> In order to hamper the efforts of would-be infringers, content owners developed technological measures for securing their works.<sup>3</sup> These protection systems were capable of controlling access to, preventing the copying of, and otherwise securing the bundle of rights that inhere in copyrighted works.<sup>4</sup>

However, content protection systems proved to be imperfect barriers and were subject to side-stepping or removal.<sup>5</sup> Aware of the limitations of the technological measures they developed, content owners lobbied both national and international authorities for legal protection of their systems.<sup>6</sup>

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<sup>1</sup> See Peter S. Menell, *Envisioning Copyright Law's Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 133 (2003).

<sup>2</sup> See Albert Sieber, *The Constitutionality of the DMCA Explored: Universal City Studios, Inc. v. Corley & United States v. Elcom Ltd.*, 18 Berkeley Tech. L.J. 7 (2003).

<sup>3</sup> See Menell, *supra* note 1, at 134.

<sup>4</sup> See WIPO, *Current Developments in the Field of Digital Rights Management*, available at <http://www.wipo.org/news/en/>.

<sup>5</sup> See, e.g., *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000) (describing the DeCSS program that was designed to circumvent the CSS system which protects DVD content).

<sup>6</sup> See Menell, *supra* note 1, at 134.

## II. World Intellectual Property Organization Treaties

Shortly after the United States ratified the Berne Convention in 1989, the Berne Union appointed the World Intellectual Property Organization (WIPO) to clarify the scope of this treaty and to possibly add to it.<sup>7</sup> WIPO thereafter organized a diplomatic conference on copyright and similar intellectual property rights.<sup>8</sup> The United States representative and the representatives from many U.S. content industries were influential at this conference,<sup>9</sup> which culminated in the adoption of two treaties: the “WIPO Copyright Treaty” and the “WIPO Performances and Phonograms Treaty.”<sup>10</sup>

Both treaties contain provisions requiring Member States to “provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by” copyright owners.<sup>11</sup> Although these provisions give Member States a good deal of latitude in establishing laws that conform to the treaty, content owners are ensured some form of legal protection for their security devices in each country that ratifies the treaty.

## II. The Digital Millennium Copyright Act of 1998

At the time the WIPO treaties were adopted, United States copyright law needed little revision to make it conform with their provisions.<sup>12</sup> One commentator thus speculated that the U.S. might take a minimalist approach in adopting legislation to ratify the treaties.<sup>13</sup> In the end, however, Congress fashioned an act that represented the largest

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<sup>7</sup> See S. REP. NO. 105-190, at 4-5 (1998).

<sup>8</sup> See *Id.*

<sup>9</sup> See David Nimmer, *Time and Space*, 38 IDEA 501, 508-09 (1998).

<sup>10</sup> See S. REP. NO. 105-190, at 5 (1998).

<sup>11</sup> See WIPO Copyright Treaty, art. 11; WIPO Performances and Phonograms Treaty, art. 18.

<sup>12</sup> See Dan L. Burk, *Anticircumvention Misuse*, 50 UCLA L. REV. 1095, 1103 (2003).

<sup>13</sup> See David Nimmer, *A Tale of Two Treaties*, 22 COLUM.-VLA J.L. & ARTS 1, 20 (1997).

ever amendment to the Copyright Act of 1976: the Digital Millennium Copyright Act (DMCA).

The DMCA was the result of much Congressional deliberation, including several hearings involving such varied entities as the Motion Picture Association of America (MPAA) and the Home Recording Rights Association (HRA). Congress was particularly persuaded by the argument that because of “the ease with which digital works can be copied and distributed worldwide virtually instantaneously, copyright owners will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy.”<sup>14</sup> Congress thus adopted broad prohibitions against circumventing technical measures used for protecting copyrighted works, and carved out specific, limited exceptions. Many commentators state that the DMCA provisions are overbroad,<sup>15</sup> and one in particular states that accurate statutory interpretation of the Act requires an appeal to legislative history.<sup>16</sup>

One of the DMCA provisions adopted under the banner of conforming U.S. laws to the WIPO treaties is 17 U.S.C. § 1201, which addresses the subject of circumvention. Section 1201 provides three new causes of action for copyright owners, and as these rights are distinct from those that inhere in copyrights, some have dubbed them “paracopyright.”<sup>17</sup> These rights are outlined here in general terms. Under § 1201(a)(1)(A), circumvention of a technical measure that controls access to a copyrighted work is illegal. Under § 1201(a)(2), the manufacture, import, or any other trafficking

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<sup>14</sup> S. REP. NO. 105-190, at 8 (1998).

<sup>15</sup> See, e.g., Burk, *supra* note 12; Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L.J. 519 (1999).

<sup>16</sup> See David Nimmer, *Appreciating Legislative History: The Sweet and Sour Spots of the DMCA's Commentary*, 23 CARDOZO L. REV. 909 (2002).

<sup>17</sup> H.R. REP. NO. 105-551, at 24 (1998).

activity in devices that are primarily designed to circumvent technological measures that control access to a copyrighted work, or, under § 1201(b), that protect any right of a copyright owner, is illegal.

The legislative history of the DMCA indicates that the purpose of these rights is to protect content industries from unauthorized access to, copying of, or other infringement of their copyrighted works.<sup>18</sup> Specifically, sections 1201(a)(2) and 1201(b) were aimed “fundamentally at outlawing so-called ‘black boxes’ that are expressly intended to facilitate circumvention of technological protection measures for purposes of gaining access to a work.”<sup>19</sup>

#### **IV. New Applications of the DMCA**

Initial suits brought under the DMCA are of the variety Congress likely envisioned. For example, in Universal City Studios, Inc. v. Corley,<sup>20</sup> a group of motion picture studios sought injunctive relief against Internet web site owners who made available DeCSS, a computer program designed to decrypt digital versatile disk (DVD) movies from their digitally encrypted format. Here, the DMCA acted as a shield for content owners, defending their copyrighted works from unauthorized access.

However, in recent cases, plaintiffs have wielded the DMCA as a sword. Unlike the movie industry, where the object to be protected is the copyrighted work itself, these new plaintiffs place copyrightable computer programs as barriers around their non-copyrightable products and then invoke the DMCA to stifle their competition.

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<sup>18</sup> See David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673 (2000).

<sup>19</sup> H.R. REP. NO. 105-551, Part 2 (1998).

<sup>20</sup> 273 F.3d 429 (2d Cir. 2001).

In Lexmark International, Inc. v. Static Control Components, Inc.,<sup>21</sup> a District Court Judge granted a laser printer manufacturer's request for a preliminary injunction against an accused violator of the DMCA. Lexmark installed semiconductor chips that contained copyrighted software on its toner cartridges. The laser printers also contained copyrighted software. In order for a toner cartridge to function in a laser printer, both programs needed to be accessed via a startup sequence. Static Control Components (SCC) developed a microchip capable of mimicking the startup sequence and running both copyrighted programs. In a strictly textual analysis, the District Court Judge determined that SCC's microchip violated the DMCA by circumventing a technological measure that protected copyrighted works.

A similar set of facts is present in Chamberlain Group, Inc. v. Skylink Technologies, Inc.<sup>22</sup> Here Defendant Skylink Technologies sold replacement transmitters that were designed to work with Chamberlain garage door openers (GDOs). Chamberlain asserted that by circumventing its copyrighted "rolling code" computer program within the GDOs, Skylink's transmitters violated the DMCA.

Such applications of the DMCA appear to be at odds with the legislative intent behind this Act, which was "designed to protect copyright owners, and simultaneously allow the development of technology."<sup>23</sup> Indeed, on July 16, 2003, SCC filed a complaint against Lexmark alleging, *inter alia*, civil conspiracy, antitrust violations, and unfair competition.<sup>24</sup>

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<sup>21</sup> 253 F. Supp. 2d 943 (E.D. Ky. 2003).

<sup>22</sup> 2003 WL 22038638 (N.D. Ill Aug. 29, 2003).

<sup>23</sup> H.R. REP. NO. 105-551, pt. 1, at 18 (1998).

<sup>24</sup> Static Control Components, Inc. v. Dallas Semiconductor Corp., 2003 WL 21666582 (M.D.N.C. July 16, 2003).

## V. “Super-DMCA” Statutes

The MPAA and other content industries continue to lobby for protection of the technological measures they use to protect their works. The MPAA and the Broadband and Internet Security Taskforce drafted model legislation designed to protect cable and broadband providers.<sup>25</sup> Several states have enacted bills based on this model legislation, and other states are considering doing the same. Some of these bills, and the original draft legislation on which they are based, are worded very broadly.

A good example of this legislation can be found in Colorado Bill HB 03-1303, which was eventually vetoed:

A person commits a violation ... if he or she possesses, uses, manufactures, develops, assembles, distributes, transfers, imports into this state, licenses, leases, sells, offers to sell, promotes or advertises for sale, use or distribution any communication device ... to conceal or to assist another to conceal from any communication service provider ... the existence or place of origin or destination of any communication that utilizes a communication device.

As a result of this broad language, some legitimate activities, such as using firewalls, could be found to be illegal.

## VI. Foreign Treaties

### A. WIPO Treaties

As of April 1, 2003, thirty-nine countries had ratified the two WIPO treaties discussed in Part II.<sup>26</sup> As a result of the general language set forth in these treaties, each country’s provisions implementing the treaties vary in scope.<sup>27</sup> For example, only twenty-two countries prohibit the act of circumvention itself, as the DMCA does in 17

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<sup>25</sup> Kevin Poulsen, ‘*Super-DMCA*’ Fears Suppress Security Research, SECURITYFOCUS, Apr. 14, 2003.

<sup>26</sup> See WIPO, Survey on Implementation Provisions of the WCT and the WPPT, at 4, available at [http://www.wipo.org/news/en/index.html?wipo\\_content\\_frame=/news/en/documents.html](http://www.wipo.org/news/en/index.html?wipo_content_frame=/news/en/documents.html).

<sup>27</sup> *Id.* at 5.

U.S.C. § 1201(a)(1)(A).<sup>28</sup> While many countries' provisions are less expansive than the DMCA, some provisions, such as the Directive under ratification in the European Union, provide more protection to copyright owners.<sup>29</sup>

## **B. U.S. Treaties**

Via private treaties, the U.S. is now exporting its DMCA provisions to those countries who are not Member Nations of the WIPO treaties as well as those who are Members but did not adopt as expansive protection.<sup>30</sup>

[NOTE: This Briefing Paper is less than ideal because I should have better selected only those topics that I planned to cover in my final Note. At this point in time, I had not selected a final format for my Note, which is part of the goal of the briefing paper. I ended up cutting sections V and VI from my final product.]

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<sup>28</sup> *Id.*

<sup>29</sup> See WIPO, Current Development in the Field of Digital Rights Management, at 68.

<sup>30</sup> Declan McCullagh, *DMCA Gives Blueprint for Chile Deal*, CNET NEWS.COM, July 15, 2003, available at [http://news.com.com/2100-1025\\_3-1026116.html](http://news.com.com/2100-1025_3-1026116.html).