

The Expanding Reach of Copyright Protection Systems: An Update on the DMCA and Similar Provisions

OUTLINE

I. Introduction

With the rise of the Internet, the specter of digital piracy became a concern for content industries. As a result, these industries sought and are seeking protection at State, National, and International levels, and have spurred such legislation as the DMCA, Super DMCA laws, WIPO Copyright and Phonograms Treaties, and U.S. Bilateral Treaties. Now industries are taking advantage of the broad wording of one set of legislation, the DMCA, to stifle competition. This is likely an unintended result and may prove problematic as this type of legislation continues to spread.

II. Forms of Legislation Inspired by the Content Industry

A. WIPO Copyright Treaty and Phonograms and Performances Treaty

- Active U.S. participation in the treaties and its proposed anti-piracy provisions.
 - Goals of the treaties
 - Relevant text of the treaties
 - Each Member Nation allowed to implement the minimum standards of the treaties in its own fashion.
 - Current number of countries that have ratified the treaties
 - Provisions adopted in various countries (especially EU and Japan).
- Segue into section B: U.S.'s implementation.

B. Digital Millennium Copyright Act of 1998

- WIPO Treaty Implementation Act, particularly § 1201
- Congressional intent was to implement the WIPO treaties (and their accompanying goals) – also intended as a model for other WIPO Member Nations.
- However, there is some dispute as to whether such broad legislation was really necessary to achieve this end; DMCA provisions are broader than required under WIPO treaties.
- In any event, the main goal was to protect U.S. content industries.
- § 1201 text and explication
- Congress adopted broad language proscribing circumvention, and carved out seven limited exceptions, also requiring Librarian of Congress to periodically update the list of exceptions.

C. State “Super DMCA” Provisions

- MPAA and the Broadband & Internet Security Taskforce are pushing for state-level legislation that is similar to the DMCA in certain respects.
- Although provisions are purportedly aimed at preventing signal theft, their wording is very broad.
- Example Bill/Model Legislation text
- Concerns over the broad language: it could prevent otherwise legal activities such as security research, using firewalls, and even connecting a VCR to a cable box.

D. Bilateral Free Trade Agreements

- The U.S. is exporting DMCA provisions via F.T.A.s.
- Relevant Singapore and Chile F.T.A. texts.
- By 2005, such treaties could span most of North & South America.
- There are concerns that once these agreements are approved, it would be difficult to change the DMCA without violating them.
- As DMCA-like provisions become more widespread, the importance of their application and misapplication also increases.

III. New Applications of the DMCA: The Danger of Broadly Worded Legislation

A. DMCA Cases Prior to Lexmark

- Brief discussion of Sony Computer Entm’t Am. Inc. v. GameMasters, Real Networks v. Streambox, Universal Studios, Inc. v. Corley.
- These cases were likely the kind envisioned by Congress, where protection is being sought for the copyrighted content itself.
- Now manufacturers of durable goods are applying the DMCA in a manner that protects business models and stifles competition.

B. Lexmark International, Inc. v. Static Control Components, Inc.

- Facts
- Holding
- Court’s rejection of 1201(f), misuse, and legislative intent arguments.

C. Chamberlain Group, Inc. v. Skylink Techs., Inc.

- Facts
- Holding

IV. Discussion

A. Legislative Intent

- The new applications of the DMCA are likely contrary to the legislative intent behind this act.
- The main goal of the DMCA was to protect independently marketable copyrighted works, not software that is not independently marketable and that creates a monopoly for after-market durable goods.
- §1201(f) evidences Congress’s concern in preserving competition

B. Revisions to the DMCA are Probably not Needed

1. SCC’s Proposition for New Exemptions

- There are fears that other after-markets will be affected.
- Proposition: copyrighted work must be independently marketable
 - +This exemption would yield a result more in line with legislative intent
 - +Drawback: Would create negative inferences that the DMCA has not already prohibited these types of suits, and there are good arguments that it has.

2. DMCA Already Proscribes Such Suits

a. §102(b)

- §1201 prohibitions are only with respect to “work[s] protected under this title”
- §102(b) of “this title” lists many things, such as ideas and procedures, for which copyright protection is not afforded.
- Analysis of Lexmark and Chamberlain facts under §102(b).

b. §1201(f)

- Analysis of Lexmark and Chamberlain under § 1201(f)

3. Equitable Defense of Misuse

- Discussion of both Copyright misuse and “Paracopyright” misuse (Burk article)
- In summary, although the DMCA’s broad net seems to ensnare defendants such as SCC and Skylink, a careful reading of the statutory language and legislative history reveals their protection from anti-competitive behavior, especially in connection with the doctrine of misuse.

V. Conclusion

[NOTE: This outline had the same problem as my briefing paper – I had not yet decided on the scope of my Note. If I had actually covered everything I put in this outline, my final product would have been over forty pages long. I ended up cutting parts of section II.A, and all of sections II.C and II.D.]