



IP JUSTICE

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**RE: Docket No. RM 2002-4
Exemption to Prohibition on Circumvention of Copyright
Restriction Systems for Access Control Technologies**

IP Justice is grateful for this opportunity to remind the US Copyright Office about the important legal principles at stake in these proceedings.

IP Justice requests crafting exemptions to the Digital Millennium Act's (DMCA) general ban on circumvention that permit individuals to bypass the technological restrictions on their DVDs, CD's, and Ebooks in order to engage in lawful use of their media.

Each of the exemptions requested by IP Justice involve situations in which lawful uses of media are impossible because technological restrictions are used. Without the issuance of exemptions that permit lawful possessors to take advantage of their ownership rights in digital media, consumers will have lost their traditional rights under the copyright bargain.

IP Justice believes it is a mistake to focus these proceedings on the particular workings of DVD encoding technologies or the marketing plans of Hollywood studios and technology companies in determining the scope of the public's rights. Rather, consideration should be paid to the underlying legal principles at issue in light of the constitutional purposes behind Copyright.

Personal Property/Ownership Rights in DVDs, CDs, and Ebooks Support Principled Approach to Creating Exemptions

Often over-looked by over-zealous copyright owners are the individual's rights in her personal property, such as the CD, DVD, or Ebook that she lawfully purchased. While the copyright to the underlying work belongs to the media company, the tangible hunk of plastic or other physical object that embodies the work belongs to its purchaser. Through imposing technological restrictions, publishers are controlling her use of her property in ways that are outside of scope of copyright, thus impinging on her property interest in her own media collection.

Since none of the rights granted to copyright owners under Section 106 of the Copyright Act are triggered by the exemptions IP Justice requests, there is nothing in copyright law to prevent an

owner of a DVD from examining or accessing her own property in any way she desires.¹ She may experience it on a studio-controlled player, an independently created DVD player, software of her own creation, access the data by smashing it into pieces with a sledgehammer, she may even consume her DVD by eating it, despite its lack of being an “authorized” access². After all, it is her personal property and she has rights to use it and to control her own experience with it.

Since consumers never even see, let alone consent, to a license that restricts their rights to use their property, purchasers of CDs, DVDs and Ebooks enjoy full ownership rights in them. Proponents of the media giants have no legal ground to claim that copyright holders have the after-sale right to impose restrictive terms on someone’s use of her own property without her consent. Not only is such a proposition legally unprecedented, it is also dangerous and contrary to the public policy of several legal doctrines.

Copyright Law Supports Principled Approach to Creating Exemptions

Traditional principles of copyright law also support permitting an owner of a DVD, CD, or Ebook to bypass restrictions that prevent lawful uses. Under the US Constitution, copyright is designed to promote progress in science and useful arts. Each one of the rights granted to copyright holders comes with an important limiting principle that ensures copyright owners cannot have complete control over a work. Limitations as to the scope and duration of copyrights are also part of the “copyright bargain” designed to ensure the public is the ultimate beneficiary of the special monopoly grant.

Unless individuals are permitted to bypass the restrictions on their media, the copyright bargain is completely destroyed and replaced by a regime of publisher controlled terms of use. Permitting copyright holders to replace our liberty with a license violates core copyright law principles by giving total control to one side to set all terms and conditions of use. The US Supreme Court has been very clear in holding that fair use is the necessary breathing space required for copyright restrictions to square with First Amendment guarantees of free speech. Several copyright legal scholars have argued the DMCA calls for a right of “fair access” to permit individuals to engage in lawful uses with their media.³ Accordingly, the traditional principles of copyright law support a ruling that permits circumvention of DVDs, CDs, and Ebooks for lawful uses.

¹ Only access for lawful personal use is at issue under IP Justice’s exemptions since there are no public performances or displays implicated (only private performances), no reproductions that wouldn’t be permitted by fair use, and no public distributions, nor adaptations implicated.

² Although possibly unappealing, a variety a ways of “accessing” a DVD can be imagined, all of which exist outside the scope of a copyright owner’s rights under Section 106, and most of which are not “authorized” by the copyright owner. They are, nonetheless, perfectly legal.

³ See Jane Ginsburg, *Copyright Legislation for the “Digital Millennium,”* 23 Colum-VLA J.L. & Arts 137, 140-43 (1999) (arguing that the DMCA creates a new “right of access”).

Copyright Misuse Legal Doctrine Supports Principled Approach to Creating Exemptions

The legal doctrine of copyright misuse also supports a principle-based approach to creating exemptions to permit individuals to bypass the controls on their own media. The copyright misuse doctrine recognizes that copyright law grants powerful rights to authors that can be used to extend their copyright monopoly beyond the scope of copyright or that violate the public policies underlying copyright law.

Courts in several circuits have recognized copyright misuse as a means of policing the constitutional and statutory limitations on copyright holders' exclusive rights. Copyright holders who try to leverage their copyrights in the underlying content in order to obtain control over the market for ancillary devices have been found liable for copyright misuse and punished by courts.⁴ Copyright holders have been found liable for copyright misuse for attempting to use their copyrights to prevent licensees from independently creating competing products.⁵

Copyright misuse prevents copyright holders from exercising a stranglehold on ancillary technologies and from using their copyrights to extend the scope of their limited grant. As a counter to the broad new power the DMCA grants to dictate technological formats and prevent interoperability, copyright misuse supports exemptions that limit the copyright holder's ability to control devices and uses outside of the scope of the copyright grant.

Antitrust Law Supports Principled Approach to Creating Exemptions

The public policy goals behind antitrust law also support a principled approach to crafting exemptions that would mitigate the anti-competitive effects of the DMCA. The DMCA gives copyright holders control over technical standards and compatibility that can be used to curtail innovation and prevent the development of alternative technologies in violation of antitrust law.⁶ This practice is essentially a form of tying: to use the technical control standards and the legal sanctions backing it to force individuals to use only certain DVD players.

Hollywood studios have little incentive to "authorize" access to movies on DVD players made by their competitors. Since the DMCA can be used by industry dominators to prevent smaller companies from building compatible devices, an exemption is warranted that would permit

⁴ *Alcatel USA, Inc. v. DGI Technologies, Inc.* 166 F.3d 772 (5th Cir. 1999) (finding that a license limiting the use of operating system software to hardware produced by the copyright owner constituted a copyright misuse.) *See also* Dan L. Burk, *Anti-Circumvention Misuse*, Univ. of Minn. Public Law and Legal Theory Research Paper Series, Research Paper No. 02-10 available at http://ssrn.com/abstract_id=320961.

⁵ *Lascomb America, Inc. v. Reynolds* 91 F.2d 970 (9th Cir. 1990). *See also Practice Management Information Corporation v. American Medical Association* 121 F. 3d 516 (9th Cir. 1997) where the court held public policy was offended by the AMA's attempt to license its code by imposing anti-competitive exclusivity clauses.

⁶ *See US v. Microsoft Corp.*, 253 F.3d 34, 54-58 (D.C. Cir. 2001) (finding that Microsoft held monopoly power in the operating system mark for personal computers).

circumvention in order to promote open competition and innovation among device manufacturers.

The DMCA itself provides a hint on the traditional limitations of copyright holders to dictate design and technical engineering choices to player manufacturers. Section 1201(c)(3) plainly supports exemptions that allow for open competition:

“Nothing in this section shall require that the design of, or design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure, so long as such part or component, or the produce in which such part or component is integrated, does not otherwise fall within the prohibitions of subsection (a)(2) or (b)(1).”

Traditional values that promote free and open competition are threatened by the DMCA’s ability to create monopolies. When innovators build new devices that are capable of a variety of functions, including playing entertainment, there should not be an assumption that the device is illegal, as copyright owners suggest during these proceedings. At one point in time, most people probably never imagined that clocks would also play music, but when someone was clever enough to build a nifty new device called the “clock/radio” there was no argument at that time as to whether the device was a violation of copyright law. And if someone is imaginative enough to build a new device that toasts your bread while it plays your DVD movies, there is no basis in law for assuming such a device is illegal today. Coincidentally, the same copyright owners who want such innovative devices deemed illegal are the same companies who license the manufacture and sale of competing DVD players.

Conclusion

Media giants misuse technological controls and the anti-circumvention laws to force a widened scope and duration to their rights. The Copyright Office can begin to correct this imbalance by recommending exemptions that restore traditional consumer freedoms. The legal principles behind antitrust law, property law, and copyright law, particularly copyright misuse, all support issuing exemptions that curtail copyright holders’ over-reaching controls.

Because of the important constitutional and legal principles at stake in these proceedings, IP Justice encourages the Copyright Office to adopt a principle-based approach in its determination as to whether exemptions should be created to the DMCA’s general ban on circumvention. Specifically, we encourage the Office to recommend exemptions that would permit individuals to circumvent the excessive controls on their DVDs, CDs, and Ebooks in order to make lawful use of their media collections.

Thank you,

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