

Class of works: subscription based services that offer DRM-protected streaming video where the provider has only made available players for a limited number of platforms, effectively creating an access control that requires a specific operating system version and/or set of hardware to view purchased material

Platform requirements harm consumers in three measurable ways. First, acquiring the necessary platform is often expensive since older hardware isn't fast enough to support streaming video requirements and it's difficult to find one platform which will hit most consumers. Second, platform requirements are primarily used as an anti-competitive tool in the marketplace to support the dominance of one platform over another. Third, there is no reasonable, non-infringing way to replace the activity prevented by platform requirements.

Access controls that enforce platform and hardware requirements are expensive for the consumers because there is no one platform that represents more than 69% of consumers. According to data available at <http://marketshare.hitslink.com/>, while Windows XP has 68.11% percent market share, the remainder of the market share is broken up among several other platforms. As a consequence, any platform restriction that only uses one operating system will at most represent 69% of consumers. Assuming the second OS is not another version of windows, any platform restriction that that only allows two operating systems will at most represent 76% of consumers. Any company may fairly choose to concentrate their development efforts on a specific platform for the sake of efficiency, but it is unfair to prohibit consumers from building or using other tools that would grant them access to the material they have purchased. The cost for acquiring another platform – including the required software licenses – costs hundreds of dollars at minimum, and more than a thousand at worst, depending on which platform is necessary. This is an expensive and unreasonable burden to place on consumers. Playing content a consumer has purchased is a non-infringing use under current law, and the lack of an anti-circumvention exception for streaming services prevents consumers from doing this without undue financial burden.

For the reasons above and to prevent monopolies, Congress rightly decided that such restrictions are antithetical to competition and unfair to consumers when applied to the case of cable subscriptions. Cable companies would like to restrict subscribers to only using the set top boxes they provide, but the Telecommunications Act of 1996 required that cable companies allow their subscribers to access content with devices provided by other companies. Among other positive effects of this law, it opened the door to allowing TiVo to compete with cable companies in the digital video recorder business.

In another case of DRM being used as an anti-competitive tool, Netflix's VP of Corporate

Communications Steve Swasey stated in an interview at CES (posted at <http://www.hackingnetflix.com/2008/01/netflix-blames.html>) that the reason non-Intel based Macs are unable to take advantage of the Netflix 'Watch Instantly' feature is because Apple refuses to license its DRM to Netflix. Apple is likely refusing because they have a movie rental feature of their own, through iTunes, and Netflix would be competition. This is often the case with DRM, touted as a way to prevent copying, it is instead used as a way to prevent competition.

There is no easy way to accomplish the non-infringing activity of watching the volume of shows and movies available on Netflix if you don't have one of the approved platforms. Hulu.com has a wide selection, but past seasons of current shows are not generally available and movie selection is much more limited. At the time of this writing, of the top 50 picks on Netflix 'Watch Instantly', only one was replicated in full on Hulu, and two other DVDs were partially represented (see table at end). Netflix's library is not replicated at any other service. Furthermore, a Netflix subscription could conceivably replace a cable subscription for many consumers at a significant cost savings, but only if you have one of the approved platforms. With an approved platform you can watch as many hours on the 'Watch Instantly' feature as you like, without one the most you can receive is about 18 DVDs a month – assuming you live in a place where the DVDs ship quickly.

One might argue that consumers should just purchase the platform that is most useful for home entertainment purposes in general, except that few such platforms exist. Apple TV will let you rent HD movies and play them on your TV, but has no DVR capabilities. Windows Vista Media Center Edition can be used as a DVR and to use Netflix 'Watch Instantly', but the DRM can be cumbersome for the non-techie to navigate. There have been numerous reports of HD content not playing after display or other hardware upgrades. If you'd like to buy a Mac for your home entertainment center, you'll get the benefit of having an easy-to-use DVD player that comes with the computer but unless you have a new Intel-based Mac, Netflix 'Watch Instantly' won't work. If you'd like to play DVDs on your home entertainment PC, any Mac with OS X will do, but not all versions of Windows Vista come with the necessary DVD decoder. Review the table below, which summarizes some of the desired capabilities of a home entertainment center, you can see that few systems satisfy most common needs. The only that does has become known for restrictive and confusing DRM, hardly the optimal choice for the average consumer. Not exempting streaming subscription-based services complicates an already difficult marketplace for consumers.

In summary, platform restrictions unduly limit the non-infringing use of copyrighted works on streaming video subscription-based services. Since this non-infringing activity cannot easily be replaced by any other service, it is reasonable to make an exception to the anti-circumvention rule.

	Compatible with Netflix 'Watch Instantly'	Play DVDs without additional software	Can be used as a DVR without additional software	Compatible with Hulu.com
Windows XP	Yes	No	No	Yes
Windows Vista Home Basic	Yes	No	No	Yes
Windows Vista Home Premium	Yes	Yes	No	Yes
Windows Vista Media Center Edition	Yes	Yes	Yes	Yes
Windows Vista Business	Yes	No	No	Yes
Windows Vista Ultimate	Yes	Yes	No	Yes
Apple TV	No	No	No	No
Mac OS X (on non-Intel chip)	Yes	Yes	No	Yes
Mac OS X (on Intel chip)	Yes	Yes	No	Yes
TiVo	No	No	Yes	No
TiVo HD	Yes	No	Yes	No
KnoppMyth	No	No	Yes	Yes
Linux	No	No	No	Yes
BSD	No	No	No	No
Roku	Yes	No	No	No

Top 50 'Watch Instantly' picks on Netflix	Available on Hulu?
National Treasure: Book of Secrets (2007)	No
Heroes: Season 3 (2008)	Some
Ratatouille (2007)	No
30 Rock: Season 1 (2006)	No
Then She Found Me (2007)	No
Dan in Real Life (2007)	No
Superbad (2007)	No
The 13th Warrior (1999)	No
Meet the Robinsons (2007)	No
Enchanted (2007)	No
30 Rock: Season 2 (2006)	Yes
Next (2007)	No
First Sunday (2008)	No
The Office: Season 4 (2007)	No
CSI: Season 9 (2008)	Some
Underdog (2007)	No
The Game Plan (2007)	No
No Country for Old Men (2007)	No
Spider-Man 3 (2007)	No
Surf's Up (2007)	No
Walk Hard: The Dewey Cox Story (2007)	No
Mad Money (2008)	No
Resident Evil: Extinction (2007)	No
Expelled: No Intelligence Allowed (2008)	No
Pirates of the Caribbean: At World's End (2007)	No
Caillou: Caillou's Winter Wonders (2008)	No
The Office: Season 1 (2005)	No
Naked Fear (2007)	No
The Neighbor (2008)	No
Super High Me (2007)	No
Gone Baby Gone (2007)	No
Bigger, Stronger, Faster (2008)	No
Cashback (2006)	No
Ghost Rider (2007)	No
Wedding Daze (2007)	No
The Illusionist (2006)	No
P2 (2007)	No
Outsourced (2006)	No
Wild Hogs (2007)	No
Cyborg Soldier (2008)	No
Heroes: Season 1 (2006)	No
Apocalypto (2006)	No
Becoming Jane (2007)	No
Zoom: Academy for Superheroes (2006)	No
Eight Miles High (2007)	No
The Office: Season 3 (2006)	No
Unbreakable (2000)	No
Boiler Room (2000)	No
Six Days, Seven Nights (1998)	No
Heroes: Season 2 (2007)	No