

This document is a response to a comment on the Digital Millenium Copyright Act (Public Law 105-304 (1998), henceforth DMCA). The response is by Bernard HP Gilroy; the comment is by Time-Warner, Inc., authored by Benjamin Sorkin. (The original comment can be found at <http://lcweb.loc.gov/copyright/1201/comments/043.pdf>.)

Mr. Sorkin poses the question

Hence, the critical necessity for effective protection both technological and legal against unauthorized uses of copyrighted works and for effective prohibition against circumventing such protections. Will such protections and prohibitions adversely affect users as described above? Certainly, at present and for the foreseeable future, the answer is “no”.

But it is clear that Mr. Sorkin is in error. For example, imagine a film reviewer who sets out to review the special edition DVD of a film. This reviewer, let us posit, happens to utilize a desktop system that exists only on the Linux operating system. As it currently stands, that reviewer -- despite being entitled to access and quote from the DVD material under the doctrine of Fair Use -- would be prohibited by Section 12 of the DMCA from exercising these rights. As it stands, right now, there exists no DVD drivers for Linux systems, and a court has ruled (preliminarily) that a program designed to allow access (so-called DeCSS) stands in violation of the anti-circumvention provision. We see that a reasonable hypothetical immediately demonstrates the harm potentially lurking in Section 12. I believe it to be obvious that interference with the Fair Use doctrine threatens to undermine the entire justification and operation of the copyright system -- far from protecting his employers, Mr. Sorkin is undermining their own long-term interests.

Mr. Sorkin offers the following non-technical analogy to the Copyright Office's interpretation of Section 12:

The Copyright Office, in its summary of the DMCA, said that the section “...does not prohibit the act of circumventing a technological protection measure that prevents copying. By contrast, since the fair use doctrine is not a defense to the act of gaining unauthorized access to a work, the act of circumventing a technological measure in order to gain access is prohibited”. To put it in less technical terms, a fair use defense might allow a user to quote a passage from a book but it does not follow that the user is allowed to break into a bookstore and steal a book.

But this analogy is flawed. The purchaser of a work has already paid for access to it and thus cannot be considered "unauthorized". Using Mr. Sorkin's analogy as a model, let me propose this one: A publisher releases a book wherein, for whatever reason, the twelfth chapter is entirely in code. It happens to be a relatively simple code, but that isn't strictly necessary. A special supplement, including colored glasses, must be purchased before one can read Chapter 12.

Reader A buys the book, reads it, and works through Chapter 12 to figure out the code. Having done that, Reader A decides to post the code (A=1, B=2, etc.) on her Web site. Sensitive to issues of copyright, Reader A does NOT post the decrypted text; rather she posts ONLY the system to convert the coded text back to plaintext. Reader B purchases the book as well. Upon reaching Chapter 12, Reader B is greatly dismayed because he doesn't have the time, energy, or knowledge to decode the chapter and thus cannot read that portion, nor make sense of the rest of the book. Luckily, Reader B comes across Reader A's posting of the code and uses it to decode Chapter 12. Now he can read the chapter and is happy.

Unfortunately, according to Time-Warner's interpretation, Reader B is a criminal and Reader A is a felon. You see, the code certainly controls access to the content of Chapter 12. By decoding it, Reader A is "hacking". By posting the system, she becomes a "pirate". And Reader B, by finding and using this system, becomes a "criminal facilitator". Never mind that BOTH readers have purchased the book and have the right to the content in Chapter 12. By merely investigating the content of their LEGALLY PURCHASED book, they have violated the DMCA, according to Time Warner.

Mr. Sorkin continues:

Secondly, it is not the case that access control measures "adversely affect" users in their "ability to make non-infringing uses". Such measures may require users to pay for access to a work; the users, however, are not prevented from making non-infringing uses or uses as to which fair use would be a defense.... Anyone wanting to make "fair use" of a copyrighted work need only follow the same steps as he or she would in the absence of technological protections: buy or rent a copy, subscribe to a transmission thereof or borrow a copy from a library.

Again, unfortunately, Mr. Sorkin is in error. If the material is access-controlled, and all circumvention is prohibited, then the reader will need to do more than borrow a copy. He/she will have to borrow a reader, player, what have you. For example, to return to the first hypothetical, our reviewer (using a Linux system) is currently prevented from using the DVD on his computer. To exercise his right of Fair Use, he must purchase or rent a Windows-capable computer, pay high license fees (and not even to the original copyright holder!), and sacrifice time, energy, and effort in learning a system not of his choosing. This imposes a heavy burden on a person for simply exercising a right of Fair Use.

One must also worry about the extent to which this new protection will be applied. Consider a book published in English. The publisher certainly has a vested interest in selling translations of this book in, say, Spanish, if it proves popular. Under an admittedly broad – but, sadly, consistent – reading of Section 12, that publisher could sue each and every other publisher who happens to publish Spanish-English dictionaries. After all, to a Spanish-speaker, English is essentially a code, and publication in English

restricts access to the work to speakers of English. It is therefore possible to view it as an access-control mechanism. Dictionaries serve to allow one to translate from English to Spanish, without “authorization” from the publisher of our notional book. Thus, these dictionaries “circumvent” the access-control technology of the book.

I will admit that this example is far-fetched ... but accordingly to Time-Warner, Inc., it is not very far-fetched.

Mr. Sorkin states:

In this light, I cannot point to any “class” of works (assuming one can be defined) or particular works the availability of which for non-infringing uses or for uses as to which the fair use defense would be available has been adversely affected or to any adverse impact on criticism, comment, news reporting, teaching, scholarship or research.

But as I have mentioned above, it is easy to imagine such a restriction. (Mr. Sorkin repeats this point several times but I will not belabor it.)

Mr. Sorkin exposes his predilection to providing copyright-holders rights and privileges that far exceed those of legal users, by stating that, regarding potential restrictions, [17]. Before there is any movement in the direction of exempting certain works or “classes” of works from the prohibition against circumvention, those who support such exemption should come forward with proof that users who desire to make non-infringing uses or avail themselves of the fair use defense are prevented from doing so by the technological protections.

but regarding potential economic harm,

19. I know of no impact on the price of copyrighted works caused by such circumvention. One can reasonably predict, however, that if circumvention is permitted on a broad scale, there will be a negative impact on price or a reduction or elimination of works released in the market .

I believe that the import of this disingenuous attempt to define the rules of evidence differently for copyright holders speaks for itself.

To summarize, I believe that Mr. Sorkin and his allies have misrepresented the potential use and impact of the DMCA, especially the anti-circumvention provision.

Thank you for your time and efforts. If further input is required I am happy to help.

With respect,
Bernard HP Gilroy

citizen, U.S.A.