Comments on DMCA Hearings

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I can't reply to everything about the hearings but as a Linux user there are some statements that I feel deserve a response, particularly some misleading remarks made by the MPAA and others in the May 19 hearing.

First, Steve Metalitz says about allowing the user the right to play a copy of a work on a machine of his choosing:

It's kind of like saying if you bought a Betamax tape, you have to be able to play it on a VHS machine, and vice versa.

However, this is a misleading comparison. A Betamax tape can't be played in a VHS machine in the sense that the tapes aren't physically compatible; to say that you "have to be able to play it" means that the manufacturers would be forced to produce compatible hardware. This requirement would, of course, be silly. But to say that you "have to be able to play"a DVD in an unlicensed software Linux DVD player does not mean that the manufacturers would be forced to produce compatible products–it just means granting permission to the user to try. One is about hardware, and the other is about not being sent to jail.

Dean Marks for Time-Warner says:

From what I have read and heard during the course of this inquiry, no concrete evidence has been adduced that any user has been prevented from making non-infringing uses of a work due to the presence of technological protection measures.

If playing a DVD under Linux is a non-infringing use of a work, the fact that people have been prevented from doing so is fairly concrete.

Much confusion, I would even say misconception and misinformation, surrounds the issue of DVD, CSS and Linux. First, there is no legal or technical barrier to building an open source interface between the Linux operating system and a CSS compliant application that will play DVDs encrypted with CSS on the Linux system.

He says this as if it answers objections made by Linux users that an open-source player is prohibited. It does not. It's as if you were banned from painting your house white and told that there is no barrier to painting your doorknob white and attaching it to your house. Just because both sentences contain the word "painting" doesn't make the two activities the same.

Making an open-source driver, let alone a full open-source player, when CSS is done in software is not allowed by the MPAA's interpretation of the DMCA.

Second, the CSS technology and manufacturer's license necessary to build any CSS compliant application or device is available on a non-discriminatory basis. The current license requires a one-time fee of $10,000.

Does he honestly expect a hobbyist writing programs in his garage to pay ten thousand dollars for the privilege of doing so? And even then, the license has restrictions on it. The DVD-CCA won't license out CSS to anyone who doesn't agree to the restrictions.

None of the technical or legal conditions of the CSS license prevent implementation in the Linux environment. And indeed, two CSS licensees have in fact developed CSS implementations for the Linux operating system. One, called Sigma Systems, is hardware-based and another – whose name I unfortunately don't have with me

– is software- based. But both of these implementations are available on the market.

Neither of these implementations is available on the market yet. They have been announced, but aren't yet available to consumers. And a Linux user should not have to purchase an additional piece of hardware or software (which cannot be open-source) to do something that he already could do, but which the DMCA has made illegal. (Which is what this amounts to.)

He then says, of the current court case:

That case involves violations of Section 1201(a)(2) – the prohibitions concerning circumvention devices, products or services and therefore that case is not directly relevant to the issue at hand in this hearing, namely Section 1201(a)(1) and the prohibition on circumvention conduct.

The two prohibitions are, for DVDs under Linux, inextricably linked. The only viable way for a user to personally circumvent is to work with other people. Reverse engineering is a time-consuming, difficult, task, and even if it were not, it would be ridiculous to expect each user to write his own program from scratch and be unable to use a program written by another person.

First, as the number of Linux users grows, the market will naturally fill the demand for CSS compliant applications that will play DVDs on Linux.

The market cannot fill the demand for open-source software players or for players that allow skipping commercials, region codes, or Macrovision, because the DVD-CCA won't license CSS unless the licensees agree not to implement those.

For example, if circumvention of CSS were allowed solely to permit access to content on DVDs to Linux users for home viewing, such circumvention would likely involve a copy of the content being made in the hard drive of the Linux user's computer. Once a copy is readily available in the hard drive, it is easily subject to massive replication and distribution for unlimited purposes.

This is misleading in two ways:

First, *all* DVD decoding, licensed or unlicensed, involves making a copy of the content somehow. In order to display the content, the content must be decrypted somewhere, and the decrypted data must be available. There are in fact programs which work with Windows DVD players and grab the data that has been decrypted; there is nothing about unlicensed players which make them a particular threat in this regard.

Second, the copy would not be subject to massive distribution; there is no consumer-level equipment which allows writing DVDs that run in standard players, and just the cost of the hard disk space needed to store the DVD data is more than the cost of purchasing a DVD in a store. And copying DVDs over the Internet would take prohibitive lengths of time. The comparison to Napster is misleading; MP3 files are small enough that they can be traded over the Internet and permanently kept on a hard drive. DVDs cannot.

He next goes on to compare region coding to the NTSC/PAL difference:

This situation has existed since the introduction of video in the early or mid- 80s with no complaint. So I find it a little bit interesting that now this issue of regional coding has become such a hot button for certain communities.

It's not true that this situation has existed without complaint. It's actually quite common for Europeans to have ways to play NTSC tapes. It's also been very common for video game systems, which have similar region lockout, to be modified or to have adaptors made to enable playing games from other countries that would not normally play; and such activity has been going on since the mid 1980's.

Riley Russell of Sony says:

In this brave new digital, networked world, the traditional arrangements among copyright owners, copyright works, and the consumers of those works have already been radically transformed by a single unprecedented fact: every consumer, with a single touch of a button, is now potentially a global distributor – or a receiver – of an unlimited number of perfect copies of any copyrighted work which may come into his or her possession in digital form.

The user cannot make an unlimited number of copies for a reason that is fundamentally similar to the reason

why the photocopy machine doesn't allow making an unlimited number of copies of books: making copies consumes resources (in this case, disk space and time). In fact, in the MPAA vs. Reimerdes case, the MPAA was unable to produce *any* example of a user copying a DVD.

Effective access control measures are of great utility in our ongoing campaign against counterfeiting and other pirated works with respect to our products.

What Mr. Russell does not mention is that the access control measures don't just prevent piracy, they also prevent a person from using a legally purchased copy of a Playstation disk from another country.

It is also absurd to suggest, as he then does, that Sony's ability to produce promotional disks with limited versions of Sony games has anything to do with access controls. It is not possible to convert a promotional disk to a full one by circumventing access control–the data from the full version isn't on the disk in the first place, and you can't access what's not there.