

# DMCA Tracking Assignment

Adam Mathes  
Libraries, Information, and Society - LIS390  
Graduate School of Library and Information Science  
University of Illinois Urbana-Champaign

February 27, 2004

## Abstract

The Digital Millennium Copyright Act (DMCA) was passed in 1998 in an attempt to modernize US copyright law and its application to newer digital forms of media. Much like the legislation that has consistently expanded the term of copyright, the DMCA's provisions generally favor the interests of copyright holders over other parties that use copyrighted works. For librarians and information professionals, the legislation raises a number of important issues. A provision of the law that outlaws circumvention of copy protection can severely curtail activity that previously was considered fair use. The effect of the DMCA on the applicability of the first-sale doctrine is also of importance as libraries purchase and use more electronic resources.

## 1 Summary

The anti-circumvention clause, section 1201 of the DMCA, generally prevents people from disabling or tampering with technological controls of media. As stated in the law itself:

S 1201. Circumvention of copyright protection systems (a) VIOLATIONS REGARDING CIRCUMVENTION OF TECHNOLOGICAL MEASURES.-(1)(A) No person shall circumvent a technological measure that effectively controls access to a work protected under this title. (DMCA, 1998).

Although there are exceptions to this clause, its general effect is to allow copyright holders to expand their rights beyond what is granted in traditional copyright law through technological fiat. An instructive example is copy-protected CD's. The ability to media-shift music - like transferring a record to a cassette - has traditionally been a fair use right. However, a copy protected CD can prevent shifting of media to a portable MP3 player, for example. The DMCA makes illegal any attempt to circumvent this kind of copy protection, as discussed by the Electronic Frontier Foundation (EFF, 2003). Librarians and information professionals have a vested interest in fair use rights. Their

erosion through technological means is something of grave concern. Preventing fair use technologically inhibits the flow of information, stifles free expression, and impoverishes the commons of ideas.

The ability to copy DVD's, for example, is not just a way to get movies for free. Taking excerpts from movies can be a legitimate use for criticism, research, or teaching. If the tools for doing this are illegal, then legitimate free speech is stymied and the important interchange of information is diminished. The film industry, however, is doing just that by suing companies that produce such software that allows shifting of DVD content. (Bowman, 2002).

It is hard to underestimate the possible harm of copy-protection, and the DMCA's legislative banning of efforts to thwart it could have disastrous effects. Dan Bricklin, the developer of the first spreadsheet, wrote "I believe that copy protection will break the chain necessary to preserve creative works. It will make them readable for a limited period of time and not be able to be moved ahead as media deteriorates or technologies change" (Bricklin, 2003). Bricklin speaks from experience. Copy-protection on his own software nearly made it impossible for him to distribute his work and allow it to be archived and studied - despite the fact that he had permission from the copyright holders to do so. This was not an unimportant piece of obscure software; VisiCalc was the first spreadsheet and was integral in the rise of personal computing in the 1980's. Luckily, a collector had a rare test version that lacked the copy protection. "If only the original diskettes could be passed down, then after they deteriorated they would not be useable, and until then, only people with special obsolete equipment could run them." (Bricklin, 2003). Thus the circumvention of copy-protection is important to collectors, archivists, and librarians to ensure the long term availability of works.

Whether the first-sale doctrine applies to digitally delivered content is also a contentious issue. The DMCA mandated that this issue be considered by the copyright office. "The first sale' doctrine limits the copyright holder's distribution right' by providing that once the owner authorizes the release of lawfully made copies of a work, those copies may in turn be passed along to others by sale, rental, loan, gift or other transfer." (American Library Association, 2003). Although an oversimplification, this issue can be thought of again in terms of expanding copyright owner's rights over the interests and rights of media users. Does the reader of an article purchased from the archive of an online magazine have the same fair use rights as the reader of that same article in the original print magazine? A number of library associations testified that this first-sale doctrine should be expanded to digitally distributed works. (Digital Future Coalition, 2000). As more reference sources, periodicals, newspapers, and other materials are distributed digitally, and in some cases replace the print sources, this will become increasingly important for libraries. The ability to allow materials to circulate, facilitate inter-library loans, allow copies of excerpts for research, are all affected. Despite the compelling arguments of the library associations and others, the Copyright Office recommended no such expansion of the first-sale doctrine (American Library Association, 2003).

The anti-circumvention clauses in the DMCA have been used in numerous

instances against researchers, particularly in the fields of computer security, digital rights managements, in an attempt to stop their work, as noted by the Electronic Frontier Foundation. (EFF, 2003). The censoring of legitimate research into the security of computer systems, and copy-protection systems in particular should be of concern to librarians and information professionals on a general principles level and as a matter of practicality. The free exchange of ideas and the freedom to research are important values. On a more practical level, if all research and activity regarding computer security and copy-protection systems ceases, the information systems used will be less secure and there will be no way to bypass copy-protection schemes.

## 2 Recent Developments

The movie industry used the DMCA in its legal actions against the writers and distributors of computer programs that circumvented DVD copy-protections. The proprietor of the “hacker” website 2600 was sued by the Motion Picture Association of America (MPAA) for having information related to DeCSS - a tool that can be used to decrypt DVD movies. Based on the DMCA, courts ruled that 2600 could not post the information or even link to other sites that had the information (Bowman, 2002). An interesting point about DeCSS is that its original purpose was not in disabling copy-protection, but instead to enable playback of DVD's on the Linux operating system. No legal players existed for that operating system at the time. There are current lawsuits against similar DVD manipulation software, although the latest are for patent infringement, not DMCA violations (Borland, 2004).

Dmitry Sklyarov, a Russian programmer and employee of ElcomSoft, was arrested in 2001 in Las Vegas for his work on an ElcomSoft program that bypassed the protections in Adobe's eBook format. Criminal charges against Sklyarov were dropped in return for his testimony against his employer. A jury eventually found the company not guilty, despite the fact that both prosecutors and defense agreed the program could be used to bypass copy-protection (Bowman, 2002). Their judgment was based on their evaluation of the intention of the company:

“After much wrangling among attorneys over the definition of the word willful,’ the judge told jurors that in order to find the company guilty, they must agree that company representatives knew their actions were illegal and intended to violate the law. Merely offering a product that could violate copyrights was not enough to warrant a conviction, the jury instructions said.” (Bowman, 2002).

This judgment may be helpful in setting a precedent for a high legal bar for prosecution in DMCA criminal cases.

The Librarian of Congress issued four exemptions to the DMCA's anti-circumvention provision on October 28, 2003. These include the renewal of two previous exemptions: one for accessing the lists of websites blocked by filter software, another for the circumvention of schemes that block access due to

malfunction, damage, or obsolescence. The two new exemptions allow for the circumvention of schemes that block accessibility software like text-to-speech readers, as well as computer programs and video games in obsolete formats (American Libraries, 2003). The computer and video game exemption is particularly helpful in preserving software, as noted by the Internet Archive, that called for the exemption. (Internet Archive, 2003). Although these exemptions are helpful, they are temporary (reconsidered every three years) and not a clear affirmation of fair use rights. Also, the general prohibition on circumvention makes it all but impossible to legally bypass copy-protection or shift the formats of software until they have reached this critical obsolescence point, which is far from the ideal situation for an archivist or collector concerned about data integrity.

### 3 Tracking Strategy

An excellent starting point for information relating to the DMCA is the Electronic Frontier Foundation's resources on the DMCA - <http://www.eff.org/IP/DRM/DMCA/>. They have been involved in the legal challenges to the law, and defending those charged with DMCA related offenses. The American Library Association also has a section of their site related to DMCA and its effects on libraries - <http://www.ala.org/ala/washoff/WOissues/copyrightb/dmca/dmcdigitalmillenium.htm>. For specific legal analysis, try LegalTrac and the subject heading "digital millennium copyright act of 1998."

### 4 Works Cited

1. "Billington issues narrow DMCA exemptions" American Libraries, Dec 2003 v34 i11 p14(1).
2. Borland, John. "New lawsuit targets DVD copying." February 13, 2004. February 23, 2004. <http://news.com.com/2100-1025-5159279.html>;
3. Bowman, Lisa M. "Hollywood targets DVD-copying upstart." CNet News.com. December 20, 2002. February 23, 2004. <http://news.com.com/2100-1023-978580.html>;
4. Bowman, Lisa M. "DVD-cracking code ban upheld." CNet News.com. May 17, 2002. February 23, 2004. <http://news.com.com/2100-1023-916665.html?tag=nl>;
5. Bowman, Lisa M. "ElcomSoft verdict: Not guilty." CNet News.com. December 17, 2002. February 23, 2004. <http://news.com.com/2100-1023-978176.html>;
6. Bricklin, Dan. "Copy Protection Robs The Future." February 23, 2004. <http://www.bricklin.com/robfuture.htm>;

7. "DMCA Sect 104." American Library Association. 2003. February 23, 2004. <http://www.ala.org/ala/washoff/WOissues/copyrightb/dmca/dcmasect104.htm>
8. Electronic Frontier Foundation. "Unintended Consequences: Five Years under the DMCA." September 24, 2003. February 23, 2004. [http://www.eff.org/IP/DMCA/20031003\\_un](http://www.eff.org/IP/DMCA/20031003_un)
9. "Guide to the DMCA." American Library Association. 2003. 23 Feb, 2004 <http://www.ala.org/ala/washoff/WOissues/copyrightb/dmca/guidedmca.htm>
10. "Internet Archive Gets DMCA Exemption To Help Archive Vintage Software." Internet Archive. 2003. February 23, 2004. <http://www.archive.org/about/dmca.php>
11. "Reply Comments of the Library Associations." Digital Future Coalition. September 5, 2000. February 23, 2004. [http://www.dfc.org/dfc1/Active\\_Issues/graphic/first\\_sale.html](http://www.dfc.org/dfc1/Active_Issues/graphic/first_sale.html)
12. The Digital Millenium Copyright Act. 1998. February 23, 2004. <http://www.copyright.gov/legislation/h>