

*MEDIA@LSE*

*Media and Communications Regulation*  
**U.S. Copyright Law and the Internet:**  
*The Digital Millennium Copyright Act of 1998*

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# Overview

- Background of the DMCA
  - Piracy
  - International Treaties
- Structure of the DMCA
  - Anti-circumvention
  - Copyright Management
  - OSP Liability

# Content Piracy

- Software
  - BSA estimates that in 1998, 38% of all new software installed worldwide was pirated, causing losses of \$11 billion
- Music
  - RIAA estimates annual losses of \$4.5 billion
- Movies
  - MPAA estimates \$250 million annual losses in U.S. alone

# Piracy and the Internet

- The Internet makes piracy easier
  - Unlimited numbers of perfect copies
  - Anonymity for buyers and sellers
  - Global access and reach
  - High speed and widespread distribution

# Treaty Background: Berne Convention

Berne Convention on the Protection of  
Literary and Artistic Works (1886, updated to  
1971)

- 122 member countries
- Establishes protected works
  - Writings, lectures, dramatic, choreography, music compositions, art works
  - translations
- Establishes moral rights

# Treaty Background: WIPO Copyright Treaty (1996)

- Special agreement within Berne Convention
- Ratified by 53 countries
- Clarifies protection of
  - Computer software, compilations of data, digital works
- Adds distribution right
- Requires penalties on circumvention of protection mechanisms

# Legislative Background

- 1995: Clinton Administration White Paper advocated anti-circumvention rights; legislation introduced by unsuccessful;
- 1996: US influenced passage of WIPO treaty with anti-circumvention provisions
- 1998: DMCA enacted to comply with WIPO
- Supporters:
  - Hollywood (content owners)
- Opponents:
  - Technology Vendors
  - Educators and Librarians
  - ISPs
  - Legal academics

# The DMCA: Structure

- Anti-Circumvention
  - Access
  - Protections
- Copyright Management
- Online Service Provider (OSP) Immunity



# Anti-Circumvention: WIPO

- WIPO Treaty Article 11 requires that:

Each country must provide “adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights...”

# Anti-Circumvention: Access

## Section 1201(a):

(1)(A) “No person shall circumvent a technological measure that effectively controls access to a work protected under this title.”

(2) “No person shall manufacture, import, offer to the public, provide or otherwise traffic in any technology, product, service, device, component, or part thereof, that --

(A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access ...

(B) has only limited commercially significant purpose or use other than to circumvent ...

# Anti-Circumvention: Protections

## Section 1201(b)(1):

“No person shall manufacture, import, offer to the public, provide or otherwise traffic in any technology, product, service, device, component, or part thereof, that --

(A) is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner ...

(B) has only limited commercially significant purpose or use other than to circumvent protection afforded ...

# Anti-Circumvention: Definitions

- 1201(a)(3)
- to “circumvent a technical measure” means to descramble a scrambled work, decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner.”
- (B) a technological measure “effectively controls access to a work” if [it], in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.

# Anti-Circumvention Exceptions

- Non-profit library, archive and educational institutions (to determine whether to obtain a work)
- Reverse software engineering (for interoperability purposes)
- Encryption research (to identify flaws and vulnerabilities)
- Protection of minors (a court may *consider* this beneficial purpose in applying the act)
- Personal privacy (when the work permits dissemination of personally identifying information)
- Security testing, with the permission of the owner/operator
- Law Enforcement and intelligence activities
- Fair Use (as otherwise recognized by the law)
- Free speech and press
- Lists of Web Sites blocked by software filters
- Malfunctioning Blocking Mechanisms

# DMCA Anti-Circumvention: Criticism

- Unnecessary because U.S. law already mostly complied with WIPO
- Goes beyond WIPO, which only requires restriction of circumvention itself, not devices
- Potential to challenge devices with substantial non-infringing uses (language differs from *Sony*)
- Exceptions are too narrow
  - Libraries and non-profits object to mere “shopping right”
  - Enumerated exceptions do not cover every possibility (needs an “other legitimate purposes” clause)

# Anti-Circumvention Cases

- Real Networks v. Streambox
  - device to allow downloading of streamed content was likely in violation
- MPAA v. 2600
  - publication of deCSS DVD decrypting software violated DMCA
  - Current appeal to 2<sup>nd</sup> Circuit
    - Limitation of fair uses of protected content
    - Stifling of security research
    - Limitation of free speech rights in publication of source code

# Copyright Management Information

- The one significant WIPO requirement not covered by existing U.S. copyright law;
- “Copyright management information” is copyright notice information, terms and conditions of use, and identifying numbers or symbols or links to such information.”



# Copyright Management Information

Section 1202 prohibits:

- Distribution of false copyright management information; and
- Removal or alteration of copyright management information without permission of the owner.

# Service Provider Safe Harbor

- Creates a “safe harbor” from copyright infringement for online service providers (OSPs) for:
  - Transitory communications (transmission, routing, or connection)
  - System caching (temporary copies)
  - Storage of user information
  - Information location tools (hyperlinks, directories, search engines)

# Requirements for Safe Harbor

- To qualify for the Safe Harbor, OSP must:
  - Implement a policy of terminating the accounts of repeat infringers; and
  - Accommodate and not interfere with standard technical measures.
- In addition, for User Information and Information Location:
  - OSP cannot have actual knowledge of infringement
  - OSP must not receive a financial benefit from the infringement
  - Upon proper notice, OSP must take down or block access to infringing material

# European Comparison

- Germany: *Hit Box v. AOL*
  - Downloading of pirated music over AOL
  - AOL was liable if it could/should have known of illegal content and did not block access
- EU E-Commerce Directive
  - No liability for ISPs who play a passive role with respect to illegal information from 3<sup>rd</sup> parties:
    - Mere conduits (transmission)
    - Caching
    - Hosting (w/o actual knowledge)
  - No obligation to monitor

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