

The Digital Millennium Copyright Act

Questions and Critical Observations

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Presentation Overview

- Description of the DMCA
- Problems
- Test Case Histories
- Options / Solutions
- Further Concerns
- Conclusion

What is the DMCA?

- Revision of Title 17, U.S.C. Copyright Law
 - Passed in 1998 by 105th Congress
 - Aligns our law with global norms
 - WIPO Copyright Treaty
 - WIPO Performances and Phonograms Treaty
- Broken into Five Titles
 - Focus on Titles I and II
 - Title I: Technology-based Access Control Measures
 - Title II: “Safe Harbor” Provisions

Title I

- Appended Chapter 12 to copyright law
 - §1201 renders circumvention of technological access-control mechanisms illegal
 - §1202 defines legal space for Digital Rights Management
 - §1203 defines civil penalties
 - §1204 defines criminal penalties

Title II

- Added §512 to copyright law
 - Limits liability of Internet Service Providers (ISPs) in copyright infringement cases
 - Added conditions by which ISPs can claim innocence
 - No prior knowledge / no knowledge during
 - Establishes procedure for indemnification by ISPs
 - “Notice and Takedown”

Problems

- DMCA may be too broad and too vague
 - Empirical effects may now be examined
- First Amendment Issues
- Fifth and Fourteenth Amendment Issues
 - due process of law
- National Sovereignty Issues

First Amendment Issues

- Chilling Effects on Speech
- Legal Tests:
 - Motion Picture Association of America v. 2600 Magazine
 - United States v. Sklyarov
 - Secure Digital Music Initiative v. Felten

Motion Picture Association of America v. 2600 Magazine

- 2600 Magazine distributes DeCSS
- DeCSS used by DVD owners to play encrypted DVDs on Linux OS
- Reverse engineering necessary to create DeCSS
- Under §1201 of DMCA, circumvention of encryption is illegal, even for fair use purposes

United States v. Sklyarov

- Dmitry Sklyarov writes a program capable of breaking encryption on Adobe eBook file format
- eBook format can restrict usage / fair use
 - Printing rights, Copying text, Backup
- Advanced eBook Processor used to restore fair use rights to eBook consumers

Secure Digital Music Initiative v. Felten

- SDMI challenges computer scientists to break proposed digital watermark technologies
- Professor Felten succeeds in doing so
- Felten's team decides to present research results at an academic conference
- SDMI threatens Felten under §1201 of the DMCA (distribution of circumvention knowledge)
- Professor Felten does not present at the conference

Stakeholders

- MPAA
- Electronic Publishing Industry
- Recording Industry Association of America

- The Scientist / Researcher
- The Consumer

Fifth and Fourteenth Amendment Issues

- 'Due Process of Law'
- §1201 introduces an initial presumption of guilt on the alleged
- Any and all acts of technological access-control circumvention are prohibited regardless of the reason
 - What about fair use?
- Burden of disproving guilt placed on the alleged -- "guilty until proven innocent"

Scientific Research Stifled

- Researching and publishing knowledge that *might* be used to
 - circumvent an access-control mechanism
 - build a circumvention deviceexposes researcher to potential liability
- No statute of limitations
- Contributory Infringement

§512 “Notice and Takedown”

- Potential for Abuse
- ISP may prefer to limit liability vs. protect freedom of speech

- Examples:
 - Barbie Critique website
 - Church of Scientology critic: xenu.net

National Sovereignty Issues

- United States v. Sklyarov
- United States v. ElcomSoft Co. Ltd.

- Sklyarov arrested after DefCon 9 computer security conference
- Sklyarov and his employer ElcomSoft are Russian
- Do the provisions of the DMCA apply to them?

National Sovereignty Issues

- Are national copyright laws enforceable over citizens of other nations?
- Position of the Berne Convention on Literary and Artistic Works
- Position of the WIPO Copyright Treaty

How does this affect me?

- Fair use rights which we take for granted are being eroded.
- The acts of research, criticism, print, and other First Amendment rights are being threatened.
- As a consumer, less and less choice will be available both in terms of goods and our ability to use those goods.

Options / Solutions

- Current Situation puts fair use on the defense, e.g. the burden of proof is on the potential infringer to show substantial non-infringing uses of software or research, etc.
- Solutions
 - Remove anti-circumvention clause
 - Rely on established *content* infringement laws
 - Amend clause to allow for fair use
 - Burden of proof shifted to copyright holder to demonstrate infringement

Further Concerns

- Does protection of weak encryption, watermarking, and other digital rights management systems make sense?
- What is the effect on the market if flawed digital security systems are sold to content providers?
- Should research hinge on the permission of corporate interests?

Conclusions

- The DMCA needs amendment to guarantee:
 - Fair use rights of consumers
 - Rights of scientists to publish discoveries without reservation or regard for corporate interests

Questions?
