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Over the years there has always been a distinction in the law between the license of copyright material and the sale of it in the marketplace. In the former case, the copyright owner retains all rights to the material including the right to prevent the licensee from using the material after the license has expired. In the former case, purchaser acquires the copyright material as personal property with all rights except that of making copies. After reading sections of the DMCA and materials related to the DVD/DeCSS, I believe that in both instances encryption technology is being used to subvert this traditional distinction. By using CSS and requiring that purchasers have the correct license key installed in their regionally purchased DVD players¹, the DVD makers are able to split the world into geographic and temporal distribution regions rather than selling personal property. Is one purchasing a copyrighted material or a license to it? Is it a sound legal theory that one may own copyright material as personal property but also require a license to access it? If the use of the material is inside the restrictions of copyright law, is one truly violating the law because the access to it is not in a way the holder desires? And what are the damages?².

In essence the concern I have is that the DMCA and DVD/DeCSS attempt to provide the convenience of sales through the marketplace but with the control of a license even beyond the expiration of a copyright. Allowing this economic convenience beyond that of the Uniform Commercial Code or Common Law and I am not cynical enough to believe that the law recognizes convenience or the right to extra profit as a legal principle.

Sincerely,

Michael A. Rolenz

¹ Presumably after the film has finished its run in another region a DVD will be released for that region. There are $2^6 = 64$ possible settings. How DVD makers plan to manage their inventory is an exercise for the alert reader. How consumers react is another. After a film has finished its run in all regions and a DVD released in that region, a previously released DVD that will not play in all regions is then defective. That may make some interesting discussion for consumer law in the future.

² A subtle point to consider is the following: If the DVDs or even DVDs that were purchased LEGALLY in one region then transported to another region for use (note the word "use" not copying), what are the damages that the DVD makers have suffered? An item has been offered for sale at a price. The consumer has purchased the item at the specified price. The consumer is using the item exactly for what it is intended and in the way intended but not where and when the DVD makers desire. The situation here is hardly that of film distribution where in some extreme cases (e.g., Star Wars) where the film reels for highly popular films were delivered on opening night and used under guard to prevent film pirates from making a master print while the film was being shown!