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David O Carson, Esq.
General Counsel
Copyright GC/I&R
Southwest Station
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Dear Mr. Carson:

Implicit within the DMCA is the assumption that the copyright holder always has the right to deny access to his copyrighted work. This assumption is incorrect in the case where the copyright holder has granted a license to another party. Once a license has been granted, the licensee has certain rights to access the work.

For example, suppose that party A writes a computer program, and on Jan 1, 2000, signs a contract licensing it to party B for ten years. Party B begins using the program and becomes financially dependent on it. Unbeknownst to party B, party A has surreptitiously included within the program a technological means to control access that disables the program after one year. Much to party B's surprise, the program stops working on the appointed date, and Party A calls on the phone demanding $1,000,000 for a password that unlocks the program so that it can continue to operate. Party B refuses to pay the ransom, and instead, takes party A to court, charging that party A granted a license to use the program for ten years, and that taking away access after one year constitutes breach of contract. Party B is likely to win the court case.

Unfortunately, it is impossible for Party B to rely solely on the court to defend its rights. Court cases take a long time, and party B is financially reliant upon the software in question. To wait for a court ruling is to lose his business. His only recourse is to circumvent the technological means to control access which is present in the software.

This illustrates the primary problem with the DMCA --- in a licensing conflict, the DMCA grants the licenser the ability to technologically protect his rights, while denying the licensee the right to technologically protect his rights. This lack of symmetry is contrary to prior precedent in contract law: in other contract dispute situations, both parties have the right to protect their rights. But with the DMCA in place, the licensee is not allowed to defend his rights, even if a court finds the copyright holder to be in breach of the license agreement.

Is this an academic scenario? I purchased a DVD a few months ago, and brought it home. I then went to purchase a software player, and found that the players were suspiciously expensive, about $30 more than I expected. After doing some research, I discovered that the DVD I had purchased was in code, and I discovered that the DVD control association was charging about $30 for the password to decode it. To conceal the fact that they are charging for the password, they don't charge the customer directly, instead, they charge the manufacturer of the software player, who passes the cost on to the customer. In other words, the software player cost $30 more than I expected because it contained a $30 password.

When I purchased the DVD, I made an implicit license agreement with the copyright holders, agreeing that I would not play the DVD in a public place, that I would not distribute it, and so forth. In exchange, I received the right to play the DVD in my own home. When I got home, I discovered that the copyright holders were effectively demanding a $30 ransom to view the DVD. When I purchased the DVD, nothing was said about a $30 fee to view it. It seems to me that the copyright holders are in breach of contract. Perhaps a court would agree, and perhaps it wouldn't, but my contention that the copyright holders are in breach of contract is sufficiently reasonable that I deserve a chance to defend my rights.

But again, it is impossible for me to rely solely on the courts to defend my rights. Court battles are expensive. I cannot afford to fight the DVD control association is a protracted court battle. Perhaps a class-action suit would be possible, but considering how long court battles take and how rapidly technology moves, by the time the case were settled, it seems likely that DVDs would be an obsolete technology. In short, I need the ability to defend my side of the license technologically, just as the DVD control association has the right to defend their side of the license. To do so, I must circumvent the technological access restriction on the DVD.

It is unjust to grant one side in a contract negotiation situation a power advantage of this magnitude, but perhaps worse than the injustice, is the chilling effect this would have on the economy. The licensee will always be aware that the licenser could revoke access (via a technological means) at any time, without warning, and that they will be unable to fight back by circumventing the technological means. Knowing this, potential software licensees will avoid the licensing of software, preferring to use in-house software.

However, many companies cannot avoid the licensing of software. For example, software development houses (such as my own company, eGenesis LLC), rely extensively on the licensing of software components. If licensing software becomes a risky business inside the United States, software development houses and other technology-oriented businesses will move outside the country, where they can be assured that their rights as licensees will be defensible. Therefore, the DMCA will create a pressure for software and other technology companies to move out of the United States.

Although the DMCA has created an unfair imbalance in copyright license negotiations, the situation is not irreparable. The librarian of congress may determine which users of copyrighted works are likely to be adversely affected by the anti-circumvention provisions of the DMCA. As I have shown, all licensees of any copyrighted work who have been granted a license and who rely upon that license will be adversely affected by the anti-circumvention provisions, in that they will fear for their ability to protect their rights as a licensee. Therefore, I recommend that the anti-circumvention provisions of the DMCA only be upheld in cases where the copyright user has not been granted a license, and has no explicit rights to use the copyrighted work. Exempt from the anti-circumvention provisions of the DMCA would be all licensees who have paid for the use of the copyrighted work or signed a license agreement granting access to the copyrighted work, and who therefore need the right to protect their rights as licensees.

Sincerely,

Joshua M. Yelon,
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