COMMENT SUBMISSION FOR DMCA RULEMAKING

John Payson

-- 1. COMPUTER SOFTWARE --

The DMCA should not be construed so as to prevent the removal of unwanted software from computers; regulations should make this explicit.

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I an embedded systems programmer with some graduate-level education in operating system design. I write on behalf of myself and not my employer.

Recently, a number of companies have started including on audio CDs software which self-installs on people's computers without their informed consent and will then forever more attempt to monitor the person's actions and break anything that it doesn't like. Such software consumes memory and CPU time, and can often cause interfere with a system's stability and security, sometimes even rendering the machine unusable.

For example, XCP, a piece of software that was packaged on some recent Sony compact discs was constructed so as to provide a "cloaking" facility that would hide software a user might not want on his machine. This cloaking facility has been used by the some malware authors to hide their nasty software from view.

Under a broad reading of the DMCA, any effort to remove such software from a machine would be forbidden, even if the purpose of such removal was not to obtain unauthorized access to the protected content, but merely make the machine useful for other purposes having nothing whatsoever to do with the protected content or its copyright owner, and over which the media's copyright owner has no legitimate authority. Further, tools for the purpose of detecting and removing such software would also be forbidden.

This is patently unreasonable. The possible application of the DMCA here is akin to telling a homeowner that he is forbidden from removing graffiti on his property, because the paint is the property of the vandal. Further, the fact that DMCA even might be applicable here has discouraged manufacturers of anti-virus and similar utilities from providing any

assistance in cleaning up the results of such vandalism.

I would therefore propose the following:

-1- The act of removing software from a computer shall not be construed as "circumvention" under the DMCA in the absence of an explicit and informed agreement by the machine's owner not to remove such software.

-2- The repair of damage done to a system by software which is unwanted, malfunctioning, or otherwise acting contrary to the will of the system's owner shall not constitute "circumvention" under the DMCA in the absence of an explicit and informed agreement by the machine's owner not to repair such damage.

-3- If a piece of software is required to access certain protected content, removal of the software may render such content unusable; this exemption shall not be construed to allow users to access such content via other means, except to the extent that when unwanted software is removed, a system may be repaired to allow whatever access to protected content would have been possible had the software never been installed (e.g. a user installs one player on his system to view protected content; a second player he installs renders the first unusable. If he removes the second, he has the right to repair the first).

-4- Tools and utilities for performing the above functions shall not be construed as "circumvention devices", and the DMCA shall not be construed so as to prevent individuals or companies from performing the above functions at the request of a machine's owner.

Although the above exemptions probably already apply, the fact that it isn't clear has a substantial "chilling effect" upon the suppliers of system repair tools and services. Regulations making the above explicit would solve this problem.

It is essential that these issues be addressed in this year's regulations. Otherwise, the damage caused by untouchable rogue software will be severe.