QUICK GUIDE TO THE DMCA

The DIGITAL MILLENNIUM COPYRIGHT ACT Basics

What is the DMCA?

The Digital Millennium Copyright Act (DMCA) isa copyright law that was passed in October 1998. The language of the DMCA is extremely technical and easily misinterpreted or misunderstood.

Too often the law is debated without the participants having read the law or having any knowledge of what it does.

However, removing the legalese and providing real examples of why it was enacted and how it works can help people understand it and be in a position to discuss and debate its merits.

Why the DMCA?

The world went digital. In the "old days," movies, books, music, photos, and art were in physical or analog formats. Illegal use or theft of copyrighted works did happen, but making, selling, and distributing copies of those works was difficult and costly. The quality of the copy deteriorated the further down the chain it went—for those who can remember, think copied mix tapes, mimeographs of mimeographs, and many-times copied VHS movies—which naturally reduced demand, and federal law gave owners of copyrighted works adequate legal mechanisms to sue those who violated their rights.

Then in the 1990s, more and more content and information was put into digital formats. Digital content offered high-quality, low-cost distribution options to producers of traditional entertainment content. New software industries emerged, like video games and computer software. With copyrighted material now in a digital format, both the new and the old copyright producers didn't have the legal means to protect and enforce their rights.

Enter Congress

Prior to the passage of the DMCA, there was clear agreement that current law did not give copyright owners adequate protection in the digital environment. Recognizing the widespread economic benefits of a digital market, Congress wanted to provide the necessary incentives for creators to participate and thrive.

The legislation that became the DMCA was the subject of years of hearings and debate. Movie studios, the music industry, guilds and unions, broadcasters, internet service providers, telecommunications companies, book publishers, libraries, universities, the software and technology industries, electronic devices manufacturers, and consumer groups all contributed to the DMCA, and the law represents a series of compromises among these groups.

Still, some feared that the law would give too much control to copyright owners – something they still say today.

Is it true?

What Does the DMCA Really Do?

The DMCA has two main sections:

1.

Copyright owners can use technological locks to protect their works and it is illegal to pick them or make lock-picking tools.

This is commonly referred to as "Section 1201." It gives copyright owners the authority to prevent "circumvention" or breaking of technological measures or digital locks used to protect their rights under copyright law.

In other words, copyright owners who put their works online are able to protect those works with digital locks like passwords, watermarks, and security codes with the assurance that the law will provide remedies against those who hack the locks or make and sell tools designed to defeat them.

2.

It creates a safe harbor against copyright liability for responsible online service providers.

This section provides a safe harbor for providers of online services or network access, including entities that transmit, route, or provide connections for digital online communications between users of third party directed material.

In other words, internet service providers may not be sued for infringing content found on their system if certain conditions are met. The most notable requirement is the "notice and takedown." Service providers must take down infringing material in response to notices sent by copyright owners in order to enjoy safe harbor protection.

So After 15 Years,

How is the DMCA Holding Up?

As with most legislation, the DMCA was not without its critics. There is simply no denying that the worst fears of opponents did not materialize. While neither copyright owners nor tech and user groups were completely happy with the final language in the DMCA, it has proved to be flexible during the breathtaking digital revolutions of the past decade, which have brought us YouTube, Hulu, iTunes, smartphones, app stores, digital books and magazines, online access to art, and all sorts of other on-demand content.

In fact, most lawsuits involving the DMCA were ***not*** brought by traditional copyright owners, and the courts have generally ***narrowed rather than expanded the scope of the DMCA protections*** in the decisions.

Still, some critics of the DMCA continue to employ the same arguments they alleged against the law when it was first enacted. A quick glance at the tech and content digital marketplace demonstrates the lack of merit in those claims.

CLAIM: The DMCA "Chills" Innovation

One of the main fears regarding the DMCA was that it excessively protected copyright in a way that would block innovation. However, the growth in the technology and content industries in the intervening 15 years ***has proven that fear unfounded.***

Today, there are a multitude of innovative electronic devices and digital services that provide consumers an even greater number of options for purchasing and licensing content and technology.

Critics claim that the DMCA has been used to suppress innovation and competition and point to lawsuits involving laser printer toner cartridges, garage door openers, and computer maintenance services as proof. However, the law is explicitly designed to ensure innovation continues to thrive and the courts have repeatedly upheld that concept.

In each of these cases, the courts applied the DMCA to the facts and found that the law either did not apply or was not violated. When Lexmark sued chipmaker Static Control Components (SCC) for making replacement microchips that enabled refill of laser toner cartridges, the Sixth Circuit Court of Appeals ruled that the DMCA didn't apply to a measure that was used to prevent the use of embedded software by aftermarket components and didn't actually serve to protect the underlying software from infringement. When the Chamberlain Group sued Skylink for producing a garage door opener that bypassed Chamberlain's authentication regime, the Court of Appeals for the Federal Circuit did not find a reasonable relationship between the circumvention and the use of the copyrighted work so as to violate the DMCA. And when StorageTek sued to block independent service providers from using maintenance software included in the StorageTek hardware systems, the Cort of Appeals for the Federal Circuit concluded the DMCA does not apply to forms of circumvention that don't put at risk the rights of the copyright owner. This demonstrates how courts are capable of interpreting the DMCA in a manner consistent with what it was designed to do—spur legitimate innovation.

The technology industry, which is inaccurately characterized as unified opponents of the DMCA, discovered that the DMCA provided clear rules and procedures that enable tech firms to continue innovating in the content space. It has been said many times before but it is worth repeating: electronic devices and services need cool content to be successful and vice versa. Technologists just want to know what the rules are so they can get on with making awesome stuff.

The past few years have seen incredible innovation in the way we watch, listen, interact with, and share content—innovations that some claimed were impossible under the DMCA. For example, we have completely legal time-shifting technologies like TiVo, and jukeboxes in the sky like iTunes and Spotify. There is also a broad range of mobile devices and tablets that support consumption of legitimate, high quality digital content in a wide variety of ways, like HBO Go and Netflix. And location-shifting technologies like Slingbox are emerging.

The DMCA provided the environment in which that could take place. If critics had been correct, these innovations wouldn't have occurred.

CLAIM:

The DMCA has Not Stopped Piracy

The DMCA, or the Copyright Act itself, was never expected to end unlawful uses of content. No laws, for that matter, prevent unlawful behavior entirely. Theft of physical property continues despite laws prohibiting it, and no one is advocating that those laws be removed. The DMCA provides property owners, in this case intellectual property owners, with rights to protect their property much like the rights provided to an owner of a brick-and-mortar store who locks it at the end of each business day. While the DMCA has not put an end to digital piracy, it has ensured copyright owners have a way of protecting their copyrights online.

As just one example, Stephen Hackett of 512pixels.net was alerted that his ebook, "Bartending: Memoirs of an Apple Genius," was being pirated on a website known as Ebookee. He sent a DMCA takedown request to the website. The site's support team emailed back the next day and the files containing his pirated book were removed. As Mr. Hackett noted,

there is a continual uphill battle of copyright owners against infringers, but "that doesn't mean it's not worth fighting for [his] content."

CLAIM:

The DMCA Limits Public Access

The opponents claimed, "Creators will lock everything up and charge a mint for access!" Well, clearly that didn't happen.

Again, products, services, and content offerings continue to grow exponentially while the costs to consumers continue to decline, and in many cases are now free with the advent of ad-supported business models.

Lawmakers drafting the DMCA understood the concerns about users having access to digital copyrighted works for legitimate uses, and specifically included a provision to ensure access for lawful purposes, like fair use. Every three years the Librarian of Congress, upon the recommendation of the Register of Copyrights, considers requests that certain types of works be exempt from the section 1201 rule against picking digital locks. This is commonly referred to as the "triennial rulemaking."

And guess what? In every triennial rulemaking since the passage of the DMCA several types of digital copyrighted works have been determined to be exempt from the rule against digital lock-picking until the next proceeding. Exemptions granted under this procedure have included: obsolete computer programs and video games; literary works distributed electronically; wireless telephone handsets for the purpose of software interoperability; and motion picture excerpts for commentary criticism and educational uses. This is complex, but simply put: the procedure works.

CLAIM:

The DMCA Allows Copyright Owners to Prevent Fair Use

DMCA opponents argue that the law has been used to threaten copyright users from engaging in fair use of content. Copyright owners have the right to make copies of their work or give permission for others to make copies. That right has limitations, one of which is "fair use." Fair use means making copies of a work without permission from the owner. The Copyright Act contains a list of the various purposes for which that may be allowed and the factors a court must consider in determining whether a use was fair. It is not always clear what is a fair use, as it is determined on a case-by-case basis.

The DMCA actually states that section 1201 "shall not affect rights, remedies, limitations, or defenses to copyright infringement, including fair use,..". It specifically allows for reverse engineering, encryption research, and security testing.

Still opponents make several claims that the DMCA threatens fair use, including:

It prevents consumers from moving content between devices.

No. That is not necessarily a fair use, but where content owners protect their works online and restrict uses on multiple platforms or devices, then it does. However, consumer demand for this capability prompted the market to deliver it. Legal music download services have dropped all DRM to allow seamless movement between devices and video download and streaming services now let you watch content on almost any conceivable device, including increasingly via cloud services.

It makes backup copies illegal.

No. Backup copies, except for the limited exception for computer programs, are not considered a fair use under copyright law and the digital marketplace has responded by providing the ability to make multiple copies across devices and through cloud-based access to content.

It shuts down the ability to utilize new distribution technologies for smaller content creators.

No. Courts have not used the DMCA to prohibit the use of any technologies, like P2P, which can still be used so long as the service is not operated with the object to promote infringement.

It restricts encryption research.

No. It may make researchers more cautious, but there have only been a few claims alleging violations of this provision in section 1201, and the explosive growth in the encryption industry (there is big business in watermark technology and tracking and redirection services) demonstrates that the effects are minimal.

Amend the DMCA?

Attempts to amend the DMCA have been kept at bay for many years for fear that reopening debate was not a risk worth taking. Recently, however, proponents and opponents of the DMCA, along with some Members of Congress, have been discussing the possibility of amending the DMCA in order to ensure that it comports with today's market realities. The House Judiciary Committee is conducting a comprehensive review of the Copyright Act, a process which could take years.

There are two issues gaining more serious traction.

1. Notice and Takedown:

Notice and takedown refers to the DMCA's requirement that copyright owners who find infringing copies of their work online send a notice to the internet service provider and that the ISP must then take the content down or disable access to it. Today's speed of transmission and the amount of data transactions every second was not envisioned at the time the DMCA was written. The notice and takedown process proved an easy-to-understand and effective mechanism for all stakeholders for many years. However, the explosion of digital services that must be monitored for infringement, and the claim that some service providers are not cooperating, is generating support amongst content owners to seek legislative changes to the notice and takedown provisions of the DMCA.

2. Cell Phone Unlocking:

Love the phone but don't like the service company? Prior to the most recent rulemaking, mobile phone owners were able to circumvent the computer programs on their phones to enable them to connect to other wireless carriers (or "unlock" the phones).

In 2006 and 2010, the Librarian of Congress granted an exemption for the circumvention of digital locks on the firmware in wireless phones for the purpose of switching to another wireless network. But the Librarian significantly restricted the exemption in 2012. The Librarian of Congress argued that the mobile phone marketplace now provides a wide array of unlocked phone options to customers and many wireless carriers provide unlocking services which made the exemption no longer necessary. That decision prompted much public outcry resulting in a Congressional response.

Members of both the House and Senate supported efforts to permit this activity permanently and introduced legislation to do so. However, S. 517, the "Unlocking Consumer Choice and Wireless Competition Act" only repeals the regulation imposed by the Librarian of Congress until the next triennial rule-making. The bill was signed into law on August 1, 2014. There will no doubt be more debate over whether the DMCA should apply to cell phones and the risk of exempting tools that enable unlocking.

CONCLUSION

The DMCA created the foundation for protecting copyrighted works in the digital world. It's the result of a complex series of negotiations and compromises between policymakers, copyright interests, tech firms, network operators, and nonprofits. The final law is not without flaws, but it has proven effective and flexible enough to provide for and deal with continued innovation in the tech sector. Courts have reined in attempts to abuse the law and the worst fears of the tech industry have proven unwarranted. There may be opportunities to continue to improve the legislation to ensure it's ready for the next generation of technological advances, but we should be wary of dismantling a series of compromises that has served innovation and creativity well for the past 15 years.

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