

THE DMCA AND SILICON VALLEY: IS THE DMCA BECOMING TECHIES' BEST FRIEND?

Jonathan Blavin

Shortly after the Digital Millennium Copyright Act (DMCA) was signed into law by President Bill Clinton in October 1998, members of the legal techno-elite described its anticircumvention provisions as reflecting an inherent conflict between the content industries of Hollywood and the technology sector of Silicon Valley—a conflict that Hollywood decisively had won. Professor Pamela Samuelson from UC Berkeley's School of Law lamented that the “battle in Congress over the anticircumvention provisions of the DMCA

nected devices and the concomitant rise of protected ecosystems have created an environment ripe for the DMCA's enforcement by technology companies.

HOLLYWOOD AND THE ORIGINS OF THE DMCA

The birth of the DMCA can be traced to the hills of Hollywood. In the early 1990s, the movie studios focused on releasing their films in digital format. With the DVD, however, came the specter of widespread digital piracy. In contrast to analog tape technology,



was a battle between Hollywood and Silicon Valley. . . . Hollywood and its allies were successful.”¹ Professor Mark Lemley of Stanford Law School similarly decried that the DMCA's “primary purpose” was to “intervene in the innovation marketplace” of Silicon Valley.² And Harvard Law School Professor Lawrence Lessig described the DMCA as the product of a “civil war” in which “Silicon Valley has become the target of punitive legislation being pushed by Hollywood.”³

Nearly twelve years later, this perceived dichotomy between Hollywood and Silicon Valley appears increasingly anachronistic. Today, Silicon Valley firms have not only learned to live with the DMCA but are gradually embracing the statute. The growing convergence of copyrighted content and technology on intercon-

where each copy degrades in quality, the interconnected digital world threatened endless, “perfect,” and most ominously, *free* copies of movies. The studios thus sought to protect their DVDs with the Content Scramble System, or CSS, encryption technology. Hollywood believed, however, that a technological solution to piracy alone was insufficient and, with other content industries, lobbied for the passage of a federal law that would criminalize the circumvention of copy-protection technologies. As the Second Circuit noted in *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001), one of the early, most prominent DMCA cases involving the hack of CSS, “[w]ith encryption technology and licensing agreements in hand,” the “studios secured added protection against DVD piracy when Congress passed the DMCA.” *Id.* at 437.

The hearings on the proposed legislation before the House Subcommittee on Courts and Intellectual Property were a showdown between Hollywood and Silicon Valley. Jack Valenti of the Motion Picture Association of America testified that the bill “must address . . . how best to outlaw circumvention of technologies used to protect copyrighted material against unauthorized access and copying”⁴ and that “there must be criminal penalties attached to deliberate, systematic acts of circumvention if such acts are to be seriously lessened.”⁵

Silicon Valley firms rallied against the legislation out of concern that the anticircumvention provisions would harm innovation, research and development, and interoperability between systems. Edward Black, president of the Computer & Communications Industry Association, testified that its members, which included leading technology firms, were “concerned about the scope and consequences” of the anticircumvention provisions and, in a jab at Hollywood, noted that the technology “industry has the potential to be a cornucopia

puter security testing. 17 U.S.C. §§ 1201 (f), (g), (j). Congress also created a triennial rulemaking process, whereby every three years the Library of Congress may exempt classes of works from the prohibition against circumvention of access-control measures where non-infringing uses are adversely affected.

SILICON VALLEY’S EMBRACE OF THE DMCA

Despite Silicon Valley’s initial, adamant opposition to the DMCA’s anticircumvention provisions, in recent years several technology firms have gradually turned to the statute in protecting their products and devices. Although the 1990s utopian, libertarian vision of the Internet as an open, free system continues to persist today, the digital frontier is increasingly one of fences and walled gardens protecting valuable digital assets, including a wealth of copyrighted content. Technology companies are steadily reinforcing these barriers through the backing of the DMCA’s legal sanctions.

DESPITE THEIR INITIAL, ADAMANT OPPOSITION TO THE DMCA’S ANTICIRCUMVENTION PROVISIONS, SEVERAL SILICON VALLEY FIRMS HAVE GRADUALLY TURNED TO THE STATUTE IN PROTECTING THEIR TECHNOLOGICAL INNOVATIONS.

of growth and jobs, a veritable bottomless cookie jar. Let’s not break the jar by letting one group try to grab too much too soon.”⁶

As passed, the DMCA makes it unlawful to circumvent technological measures that control access to copyrighted works and to traffic in devices that enable the circumvention of measures that control access to works or that protect the rights of copyright owners (for example, from unauthorized copying). 17 U.S.C. § 1201 (a)(1)(A), (a)(2), (b)(1). Congress attempted to address Silicon Valley’s concerns through statutory exemptions immunizing certain forms of circumvention, such as circumvention facilitating software program-to-program interoperability, encryption research, and com-

ADOBE AND THE ARREST OF THE RUSSIAN PROGRAMMER

The love affair between technology companies and the DMCA has been a slow, complicated one. Adobe, one of the first prominent technology companies to bring a claim under the statute, found itself confronted with a public relations crisis. In 2001, Dmitry Sklyarov, a Ph.D. student researching cryptography and an employee of the Russian software company Elcomsoft, hacked through the Adobe eBook file format. Following a complaint filed by Adobe with the government, on July 16, 2001, Sklyarov was arrested by the FBI after giving a presentation at the Def Con hacker convention in Las Vegas on the eBook’s security system. Sklyarov and Elcomsoft were charged with distributing

a product designed to circumvent technological protection measures under the DMCA, and Sklyarov was placed in federal jail in San Jose.

Sklyarov's arrest prompted widespread "Free Dmitry" protests among techies throughout the world. While Adobe initially supported the arrest, after meeting with the Electronic Frontier Foundation (EFF), it issued a joint press release on July 23, 2001, recommending his release. The government later dropped its charges against Sklyarov in exchange for his testimony. Adobe still supported the government's case against Elcomsoft. Following a two-week trial in San Jose in December 2002, a jury found that Elcomsoft had not willfully violated the DMCA and acquitted the company.

APPLE AND THE RISE OF THE PROTECTED ECOSYSTEM

Needless to say, few Silicon Valley firms were eager to embrace the DMCA following Adobe's experience. In recent years, however, one firm—Apple—has unabashedly built an entire line of products protected by technological systems that are reinforced by the DMCA's anticircumvention provisions. Apple's Mac computers and "i" products (iPod, iPhone, and iPad) not only seamlessly blend technology and content, but are all enshrouded in anticircumvention technologies. Apple is resolute that these protected ecosystems shield its devices from external digital threats in the networked environment and improve the security and reliability of its technology. Indeed, in recent emails made public between Steve Jobs and Ryan Tate, the editor at the Silicon Valley gossip blog Valleywag, Jobs stated that "we're just doing what we can to try and make (and preserve) the user experience we envision. You can disagree with us, but our motives are pure."⁷

Apple repeatedly has turned to the DMCA to preserve that experience. Apple recently prevailed on a DMCA claim in the United States District Court for the Northern District of California against Psystar Corporation,



who had circumvented the decryption keys protecting the Mac operating system in creating a line of Mac-clone computers.⁸ In antitrust litigation also pending in the Northern District challenging Apple's iPod and iTunes products,⁹ Apple has defended its use of software updates to disable iPod "hacks" under the DMCA, noting that "[w]hen Apple updated its software to thwart" the circumvention of the iPod, "it was simply exercising rights that Congress expressly afforded to copyright holders and others to protect copyrighted works" under the statute.

Although Apple has never filed a DMCA action against an individual for hacking an Apple device, Apple did oppose the EFF's filing of an exemption in the recent triennial DMCA rulemaking process for "jailbreaking," or the hacking of an iPhone for the purpose of running unauthorized software applications on it. Apple argued that such an exemption would "destroy the technological protection of Apple's key copyrighted computer programs in the iPhone device itself and of copyrighted content owned by Apple that plays on the iPhone." In its recent ruling, the Librarian of Congress sided with the EFF and exempted circumvention that is "accomplished for the sole purpose of enabling interoperability" of lawfully obtained "computer programs that enable wireless communication handsets to execute software applications."

While the ruling has been widely reported as limiting Apple's ability to rely on the DMCA in protecting its iPhone, in reality its effect may be quite limited. First, the exemption only relates to a specific circumvention activity of end users but would not preclude Apple from bringing a DMCA claim against *traffickers* of iPhone circumvention devices. As Professor Jonathan Zittrain of Harvard Law School noted, "even though the Library of Congress has given blessing to the act of hacking here," it is "not able to give a blessing to trafficking in the tools" that let users hack.¹⁰ Moreover, the exemption is confined to circumvention where its "sole purpose" is to "enabl[e] interoperability" of software

applications. The Register of Copyrights made clear in its recommendation to the Librarian of Congress that Apple remained free to bring claims for circumvention of the iPhone beyond jailbreaking, such as circumvention that “expose[s] copyrighted content that is protected by access controls” to “unlawful copying and distribution.”

OTHER DMCA “ADOPTERS”

Apple is not alone in turning to the DMCA to protect its technologies. Facebook, for example, similarly is a “walled garden,” in that users must log in to Facebook to access the site, custom applications are developed for the site, and it is guarded by technological protection measures. Indeed, Facebook’s most valuable commodity is its user base and the information users make available on the site. In January 2009, Facebook filed suit in the Northern District of California against Power.com, a third-party website that extracts user information from Facebook and other social networking sites and integrates it into a single portal. The complaint alleged that Power.com violated the DMCA by “scraping” user information from Facebook and in the process circumvented technological protection measures on Facebook’s site. The district court denied Power.com’s motion to dismiss the DMCA claim,¹¹ and the action is still pending.

Craigslist, the online classified ads website, which to many is the proverbial poster child for online openness, even has asserted DMCA claims. Like Facebook, Craigslist has an interest in protecting its site from external threats and has done so through Captcha technology, which is intended to tell humans and computers apart. In March 2009, Craigslist filed a complaint in the Northern District against Powerpostings.com asserting a DMCA claim. Craigslist alleged that in enabling users to post repetitiously duplicative ads in multiple categories on Craigslist through the use of automated bots, Powerpostings.com unlawfully circumvented Captcha technology. In March 2010, the district court granted Craigslist’s motion for a default judgment.¹²

THE FUTURE OF THE DMCA AND SILICON VALLEY

Perhaps unthinkable twelve years ago, today Silicon Valley firms are increasingly relying upon the DMCA in protecting their products and devices. Whether there will be a happy Hollywood ending for Silicon Valley and the DMCA remains to be seen, but this story at the very least promises to be interesting.

Notes

1. Pamela Samuelson, “Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised,” 14 *Berkeley Tech. L.J.* 519, 522–23 (1999).
2. Mark A. Lemley, “Standardizing Government Standard-Setting Policy for Electronic Commerce,” 14 *Berkeley Tech. L.J.* 745, 749–50 (1999).
3. Lawrence Lessig, “Hollywood vs. Silicon Valley: Make New Code Not War,” eweek.com, <http://www.eweek.com/c/a/Midmarket/Hollywood-vs-Silicon-Valley-Make-New-Code-Not-War/>, July 17, 2002.
4. WIPO Copyright Treaties Implementation Act; and Online Copyright Liability Limitation Act: Hearing on H.R. 2281 and H.R. 2280 before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 105th Cong. 78–82 (1997) (statement of Jack Valenti, President and CEO, Motion Picture Ass’n of America).
5. NII Copyright Protection Act of 1995 (Part II): Hearings on H.R. 2441 before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 104th Cong. 23 (1996) (prepared statement of Jack Valenti, President and CEO, Motion Picture Ass’n of America).
6. February 7, 1996, NII Copyright Protection Act of 1995 (H.R. 2441).
7. <http://venturebeat.com/2010/05/15/steve-jobs-to-valleywag-why-are-you-so-bitter/>.
8. *Apple, Inc. v. Pystar Corp.*, 673 F.Supp.2d 931, 940–41 (N.D. Cal. 2009).
9. The Apple ipod itunes Antitrust Litigation, No. C-05-00037-JW(HRL), Dkt. No. 325 at 11.
10. <http://techcrunch.com/2010/07/27/zittrain-jailbreak-dmca-appledevelopers/>.
11. *Facebook, Inc. v. Power Ventures, Inc.*, 2009 WL 1299698 (N.D. Cal. 2009).
12. *Craigslist, Inc. v. Naturemarket, Inc.*, --- F.Supp.2d ---, 2010 WL 807446 (N.D. Cal. March 5, 2010).

Jonathan Blavin is a litigation associate in the San Francisco office of Munger, Tolles & Olson. He has an active intellectual property practice, including high-technology disputes brought under the DMCA.