Electronic Frontier Foundation

DMCA Triennial Rulemaking:

Failing the Digital Consumer

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During the legislative debates leading up to the Digital Millennium Copyright Act of 1998 (DMCA), critics of the measure worried that copy-protection mechanisms and other "digital rights management" (DRM) technologies might interfere with fair use (and other noninfringing uses) of music, movies, television, books and other copyrighted materials. In an effort to address these concerns, Congress included what it described as a "fail-safe" mechanism in the DMCA—a rulemaking proceeding to be held every three years—intended to ensure that DRM technologies would not block the public from making lawful uses of copyrighted works.[1]

Unfortunately, the DMCA triennial rulemaking has failed to protect digital consumers. After participating in the first two rulemakings, in 2000 and 2003, and closely examining the requirements laid out by the Copyright Office for the 2006 proceedings, the Electronic Frontier Foundation (EFF) has concluded that the DMCA triennial rulemaking is fundamentally unable to protect the interests of today's digital media consumers. Congressional action will be required to reform the DMCA and the rulemaking process, if the harms imposed on consumers by the DMCA are to be remedied.

I. Background.

The DMCA's "anti-circumvention" provisions make it unlawful to bypass DRM technologies that control access to copyrighted works.[2] In addition, the DMCA makes it unlawful to "traffic" in tools that enable individuals to bypass access controls or copy-protection restrictions.[3]

In the years since its enactment, the DMCA has proven to be bad policy for a variety of reasons, discussed in detail in prior EFF reports.[4] In particular, it has been the bane of consumers interested in engaging in fair uses of digital media they have legitimately acquired. According to some courts, the DMCA forbids bypassing DRM even where necessary to make lawful uses of copyrighted materials.[5] On this view, even if making a personal backup copy of a DVD would be lawful as a fair use, bypassing DRM measures in order to make such a copy would violate the DMCA.

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[1] *See* Marybeth Peters, Recommendation of the Register of Copyrights in RM 2002-4; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Oct. 27, 2003, at 8 (hereafter "Register's 2003 Recommendation") (available at <http://www.copyright.gov/1201/docs/registers-recommendation.pdf>).

[2] *See* 17 U.S.C. § 1201(a)(1).

[3] *See* 17 U.S.C. § 1201(a)(2) & (b).

[4] *See, e.g.,* EFF, Unintended Consequences: Five Years Under the DMCA (available at <http://www.eff.org/IP/DMCA/unintended_consequences.php>).

[5] *See, e.g., Universal City Studios v. Reimerdes,* 111 F.Supp.2d 294, 322 (S.D.N.Y. 2000).

The DMCA triennial rulemaking was meant as a "fail-safe" to prevent DRM from encroaching on the public's ability to engage in activities that would otherwise be perfectly legal under copyright law. According to the Copyright Office, "The primary responsibility of the Register and the Librarian in this rulemaking proceeding is to assess whether the implementation of access control measures is diminishing the ability of individuals to use copyrighted works in ways that are otherwise lawful."[6]

Although consumers and public interest groups have repeatedly participated in the DMCA rulemakings, the Copyright Office has not recommended a single DMCA exception responsive to the submitted comments of literally hundreds of digital media consumers. Instead, the rulemaking process has repeatedly discounted consumer concerns.

II. Why the DMCA Rulemaking Fails Digital Media Consumers.

The DMCA triennial rulemaking has failed to protect lawful consumer activities from the encroachments of DRM restrictions in digital media products, including DVDs, copy-protected CDs, region-coded video games, and software products relying on activation codes.

The following are the most prominent problems that render the rulemaking process of little utility to digital consumers.

A. No Tools.

The DMCA provides that the Librarian of Congress can only grant exemptions from the DMCA's prohibition on *acts* of circumvention; exemptions from the DMCA's prohibition on distributing *tools* of circumvention are not within the scope of the rulemaking.[7] As a result, exemptions granted can only be exercised by the very small number of persons who have the technical know-how to fashion their own software or hardware circumvention tools.

Needless to say, this restriction effectively shuts the door on digital consumers. Only engineers, computer scientists, and those who can afford to hire them, need apply. The ability of consumers to circumvent DRM restrictions depends almost entirely on the ready availability of tools in the marketplace, as demonstrated in DMCA cases involving DVD copying, garage door openers, and laser printer toner refills. In contrast, average consumers denied access to circumvention tools are not able to make use of the 6 exemptions that have been granted by the Librarian in prior DMCA rulemakings.

Currently, the rulemaking proceeding holds out, at best, an empty promise to digital consumers: a legal right to circumvent, without access to the tools necessary to make that right a reality. Until this structural problem is addressed by Congress, digital consumers will obtain no relief through the rulemaking procedure.

B. Impenetrable Complexity, Impossible Burdens.

Any digital consumer interested in participating meaningfully in the DMCA rulemaking process must first decipher a bewildering array of legal arcana and independently gather considerable evidence. Rather than receiving public comments and engaging in independent fact-finding, as many administrative agencies do, the Copyright Office has instead laid a heavy burden on the shoulders of those seeking DMCA exemptions: "[P]roponents must show by a

[6] Register's 2003 Recommendation at 6.
[7] 17 U.S.C. § 1201(a)(1)(C).

preponderance of the evidence that there has been or is likely to be a substantial adverse effect on noninfringing uses by users of copyrighted works."[8]

For example, any individual interested in participating meaningfully in the 2006 rulemaking procedure must begin by reading the 6-page 2005 Federal Register Notice[9], the 30-page 2003 Determination and Final Order[10], the Register's 200-page recommendation memorandum[11] in the 2003 proceeding, and the 18 page Final Rule issued in 2000. Each of these documents is written by and for those familiar with many of the most complex and arcane provisions of the Copyright Act.

Moreover, the Copyright Office requires that those seeking DMCA exemptions:

- Define a "class of works" independently of the characteristics of particular users[12];
- demonstrate that their activities are noninfringing[13];
- identify the technological protection measure and establish that it is an "access control" within the meaning of the DMCA[14];
- establish that the noninfringing activity cannot be undertaken without circumventing the DRM in question[15];
- show by a preponderance of evidence that the DRM has, or will have, a substantially adverse effect on noninfringing uses beyond "mere inconveniences or individual cases"[16]; and
- be prepared to address the potential impact of an exemption on the market for, and availability of, the DRM-protected copyrighted works in question[17].

Simply put, this does not facilitate participation by members of the public. Meeting these onerous requirements generally requires the assistance of specialized copyright attorneys, technical experts, researchers, and industry analysts. Without expert assistance, individual digital consumers cannot reasonably gather the expertise and devote the time necessary to participate successfully in the DMCA rulemaking process.

Even with expert assistance, the burdens imposed by the Copyright Office on participants often prove nearly insurmountable. For example, during the 2003 rulemaking, 51 initial comments requesting exemptions were filed, and 337 reply comments were filed. Of these, 254

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[8] Register's 2003 Recommendation at 10.
[9] Available at <http://www.copyright.gov/fedreg/2005/70fr57526.html>.
[10] Available at <http://www.copyright.gov/fedreg/2003/68fr2011.pdf>.
[11] Available at <http://www.copyright.gov/1201/docs/registers-recommendation.pdf>.
[12] Register's 2003 Recommendation at 11-13.
[13] Notice of Inquiry, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 67 Fed. Reg. 63578, 63581 (Oct. 15, 2002) (hereafter "2003 Notice of Inquiry").
[14] *Id.*
[15] *Id.*
[16] Register's 2003 Recommendation at 17.
[17] 2003 Notice of Inquiry at 63581.

reply comments were filed by consumers in support of the consumer-oriented exemptions proposed by the EFF and Public Knowledge (PK). EFF devoted considerable resources to assisting members of the public in formulating their submissions, in hopes that the submissions would meet the Copyright Office's stringent guidelines.

In the end, none of the 4 classes of consumer-oriented exemptions requested by EFF and PK were granted. In each case, the Register and Librarian of Congress determined that any harm to consumers was "de minimis" based on the evidence presented by proponents. EFF and PK, even with the assistance of sophisticated attorneys and technical experts, nevertheless faced difficulties in shouldering the evidentiary burdens imposed by the Copyright Office. For instance, EFF and PK were asked to identify (1) the number and volume of all copy-protected audio CDs available in the United States, in support of a request for circumvention to enable playback of malfunctioning copy-protected CDs, and (2) all public domain motion pictures released either alone or bundled with other copyrighted works, on DVDs protected by Content Scramble System (CSS) encryption, and which were not available on VHS cassette, in support of an exemption to access public domain works.[18] In both cases, the information was effectively unavailable to consumers, EFF, or PK. Ironically, the music and movie industry participants who were opposing the exemptions were in a much better position to provide this evidence than were the consumers facing DRM restrictions, yet were not required to provide it.

C. Costs and Impediments Imposed on Consumers are "Mere Inconveniences."

The Copyright Office has also established a number of presumptions that discount the legitimate concerns of digital consumers.

First, the Copyright Office has said that exemptions will not be granted so long as a work remains available in an unprotected format, even if that unprotected format imposes additional costs and inconvenience on consumers: "Unless one can show that a particular noninfringing use can only be accomplished by using the digital version, the existence of a public domain or other work in alternative, unprotected formats provides a safety valve for noninfringing uses."[19] For example, in denying exemptions involving DVDs, the Copyright Office has emphasized that movies released on encrypted DVDs are also frequently released on unencrypted analog VHS cassettes.[20] This ignores the obvious advantages of digital formats and fails to address whether average consumers are likely to have ongoing access to analog VHS alternatives or the players needed to watch them.

Second, the Copyright Office has been stubbornly indifferent when DRM restrictions impose increased costs on lawful activities. Most motion pictures released on DVD, for example, are subject to a "region coding" system that is enforced through DRM technologies. Many consumers who have legitimately purchased a DVD in one geographic region suddenly discover that those DVDs are not playable on DVD players purchased in other regions. The Copyright Office admits that playing a DVD you have legitimately purchased is a noninfringing activity. However, the Copyright Office has concluded that this is "a mere inconvenience" so long as

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[18] *See* EFF post-hearing comments, dated June 20, 2003, in response to letter from Mr. David Carson, Copyright Office General Counsel, dated June 5, 2003 (available at <http://www.eff.org/IP/DMCA/copyrightoffice/EFF_post_hg_062003.pdf>).
[19] Register's 2003 Recommendation at 101.
[20] *Id.*

consumers are able to purchase multiple DVD players from multiple regions (along with associated adapters to convert the resulting video between international PAL and NTSC standards)—the fact that this "solution" means that a digital consumer will likely have to spend much more on equipment than she spent on the original DVD is apparently irrelevant to the Copyright Office's analysis.[21]

Third, the Copyright Office has effectively established a general presumption against all lawful consumer activities that do not strike the Office as being sufficiently "important," repeatedly dismissing consumer concerns as "mere inconveniences." For example, when asked to approve an exemption that would allow consumers to skip over "unskippable" promotional material included on DVDs, the Copyright Office concluded that "being forced to play (not necessarily watch) the promotional material constituted no more than a mere inconvenience for users in possession of such works."[22] Similarly, responding to complaints regarding the inability to play copy-protected CDs on certain computers, the Copyright Office concluded that "where someone could not listen to a sound recording on a computer or some other device, the Register cannot find that this is more than a mere inconvenience."[23] Rather than using the rulemaking to protect the lawful activities of digital consumers (i.e., simply playing the CDs and DVDs they had purchased), as mandated by Congress, the Copyright Office has arbitrarily relegated the concerns of digital consumers to the realm of "mere inconveniences."

Finally, the Copyright Office routinely presumes (on the basis of no independent evidence and contrary to the logic of the free market) that, but for the continued legal inviolability of the DRM technologies that protect them, many forms of digital media would simply be withheld from the market by copyright owners. According to this pretzel logic, granting any consumer-oriented DMCA exemption would (paradoxically and counterfactually) reduce the availability of copyrighted works.[24] When confronted with the fact that many of the "commentary tracks" and "bonus features" contained on movie DVDs are not available in alternative unprotected formats, the Copyright Office concluded that these ancillary features "likely would not exist at all but for [the protected DVD] format, due both to its greater storage capability over VHS tapes and the greater security it offers."[25] The Copyright Office went on to blithely assert that "the motion picture studios' willingness to distribute their works [on DVD] is due in part to the faith they have in the protection offered by CSS."[26] Similarly, where copy-

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[21] Register's 2003 Recommendation at 120-23.
[22] Register's 2003 Recommendation at 113.
[23] Register's 2003 Recommendation at 157.
[24] Register's 2003 Recommendation at 141 ("The effect of circumvention of the protection measures employed on [DVDs] would likely be to decrease the digital offerings for these classes of works, reduce the options for users, and decrease the value of these works for copyright owners.")
[25] Register's 2003 Recommendation at 118-19.
[26] Register's 2003 Recommendation at 145. Where DVDs are concerned, not only is this assertion unsupported by any independent evidence, but it is almost laughable—notwithstanding the DMCA, the encryption on movie DVDs was broken long ago and provides no meaningful protection against widespread infringement. It borders on the absurd to think that movie studios would not be issuing movies and "bonus materials" on DVDs but for their faith in the "security" provided by CSS. *See generally* Fred von Lohmann, *Measuring the DMCA Against the Darknet*, 24 Loyola Entertainment L. Rev 635 (2004).

protected CDs are concerned, the Copyright Office simply asserts that "[a]n exemption from the prohibition on circumvention in cases where sound recordings on compact discs are protected … would have great potential for massive negative effects on the market for copyrighted sound recordings."[27]

In other words, the Copyright Office has chosen to privilege hypothetical, counterfactual assumptions about the impact that DRM has on the availability of works, over the demonstrated impediments faced by consumers attempting to make lawful uses of DVDs and CDs that they have legitimately acquired. This logic sets the consumer's interests to naught, since any impediment of a lawful use caused by DRM restrictions will be deemed inconsequential, in light of the assumption that the work would not exist at all but for the DRM restrictions in question. This circular logic is not only inconsistent with the purpose of the rulemaking, but it is also virtually impossible for a consumer to refute—how can a consumer hope to prove what the copyright owner would have done in a counterfactual world without DRM?

D. Fair Use in the Deep Freeze.

Fair use is a critical and necessary element of American copyright law—without it, the broad exclusive rights granted by our copyright law might violate the First Amendment.[28] Among other things, fair use operates as a "safety valve" that allows courts to adjust copyright law in response to new technologies. Rather than treating every unauthorized copy, distribution, performance, or derivative work as infringing, the Copyright Act delegates to courts, acting on a case-by-case basis, the responsibility to apply and evolve the principles of fair use.[29] Although the fair use doctrine plainly protects scholarly, research, and educational activities, it also applies to noncommercial, personal consumer uses, as made clear by the Supreme Court's landmark 1984 "Sony Betamax" ruling holding that recording broadcast television programming for "time-shifting" purposes was a fair use.[30]

The Copyright Office has turned these settled fair use principles on their head in the DMCA rulemaking process. Rather than treating fair use as a forward-looking, evolving regime, the Copyright Office has made it backward-looking, effectively barring courts from addressing the fair use implications of new digital consumer technologies in the 21st century.

New digital technologies are making new kinds of consumer activities possible every day, including time-shifting (e.g., TiVo), space-shifting (e.g., Slingbox), and format-shifting (e.g., iPod). In this environment, it is critically important that courts be allowed to perform the

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[27] Register's 2003 Recommendation at 158. This assertion also borders on the absurd, in light of the fact that these "copy-protection" technologies have proven to be abject failures at reducing the incidence of infringing activity, while simultaneously exposing digital consumers simply trying to play their legitimately acquired CDs to serious computer security risks. *See* Edward Felten, *What Does MediaMax Accomplish?*, Freedom-to-Tinker Blog, Nov. 23, 2005 (<http://www.freedom-to-tinker.com/?p=935>).

[28] *See Eldred v. Ashcroft,* 537 U.S. 186, 221 & n.24 (2003).

[29] The fair use doctrine is codified at 17 U.S.C. § 107. *See also* H.R. Rep. No. 94-1476, 94th Cong., 2d Sess, 65-66 (1976) ("The [1976 Copyright Act] endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change.").

[30] *Sony v. Universal City Studios,* 464 U.S. 417 (1984).

duty delegated to them by Congress—to decide, on a case-by-case basis, whether these new digital consumer activities are within the ambit of fair use. But DRM restrictions, buttressed by the DMCA, interfere with the ability of the courts to perform this function. After all, if accessing the work in the first place violates the DMCA, how will we ever find out whether making a personal backup copy of a DVD qualifies as a fair use? Or whether making a digital copy of a DVD you own for your iPod is a fair use? How about copying DVDs in order to extract public domain material that has been mingled with newer content? So long as DVDs are DRM-protected and circumvention is prohibited by the DMCA, digital consumers will stumble over the tripwire of DMCA liability before courts can address these 21st century fair use questions.

In light of this, the Copyright Office should be liberally construing consumer (as well as other) fair use claims in the context of the DMCA rulemaking, erring on the side of approving DMCA exemptions, and thereby permitting courts to perform their traditional role in applying fair use principles to new noncommercial, personal-use consumer activities. After all, it is not for the Copyright Office to decide what uses are fair—that is a task expressly delegated by Congress to the courts. Rather, the Copyright Office should be administering the DMCA rulemaking so as to facilitate the judicial testing of the fair use claims of today's digital consumers. Because DMCA exemptions must be renewed every 3 years, the Copyright Office can easily refuse to renew exemptions should courts decide that activities made possible by the exemptions do not qualify as fair uses.

Instead of this forward-looking approach, the Copyright Office has expressly embraced a backward-looking posture with respect to fair use, dismissing the fair use claims of digital consumers, and arrogating to itself the authority expressly reserved to the courts to decide what uses are fair. Rather than admitting the possibility that courts may recognize new digital consumer activities as lawful under the fair use doctrine, the Copyright Office will approve exemptions only for "lawful uses of copyrighted works that the public *had traditionally been able to make prior to* the enactment of the DMCA."[31] The Copyright Office has further observed that "this rulemaking is not the forum in which to break new ground on the scope of fair use."[32] The correct forum, of course, would be the courts. But, without a DMCA exemption, digital consumers will be found liable for circumvention and may have no opportunity to present their fair use claims in court.

The Copyright Office, however, has not been content to simply freeze fair use jurisprudence in 1998. It has gone even further astray, arrogating to itself the power to decide what 21st century activities are *not* fair use. So, for example, the Copyright Office opined in the 2003 rulemaking that "space-shifting" (making personal-use copies of an e-book, DVD, or CD in order to enjoy them on multiple devices,) does not qualify as a fair use.[33] The Copyright Office similarly concluded that making personal backup copies of DVDs would not qualify as a fair use, stating that "such reproductions of convenience are infringing under the Copyright Act."[34] These determinations are simply not for the Register of Copyright to make; Congress expressly delegated the development of the fair use doctrine to the courts. If a new consumer activity might

[31] Register's 2003 Recommendation at 9.
[32] Register's 2003 Recommendation at 106.
[33] Register's 2003 Recommendation at 130.
[34] Register's 2003 Recommendation at 108.

plausibly qualify as a fair use, the Copyright Office should grant a 3-year DMCA exemption, thereby leaving it to the courts to continue to develop fair use law in the 21st century.

III. What Should be Done?

Congressional action is necessary to fix the defects in the DMCA rulemaking. The simplest solution is also the best one: amend the DMCA to permit circumvention for noninfringing purposes. This is the approach taken by Rep. Barton and Rep. Boucher in the Digital Media Consumers' Rights Act (DMCRA), currently pending before the 109th Congress as H.R. 1201. In addition, Congress would need to reform the DMCA's ban on the distribution of circumvention tools to give consumers marketplace access to the tools necessary to enable noninfringing uses of DVDs, copy-protected CDs, and other digital media products.

In the alternative, Congress could revise and clarify its instructions to the Copyright Office and Librarian of Congress regarding the DMCA rulemaking procedure. The following immediate reforms should be considered:

- **Independent Fact-Finding**. As part of the triennial rulemaking, the Copyright Office shall actively solicit input from users and undertake independent fact-finding to determine whether lawful uses of copyrighted works are being impaired by DRM technologies. The Librarian shall undertake regular survey research designed to monitor the attitudes and experiences of digital consumers in connection with DRM-restricted media and shall report to Congress regarding its findings.
- **Reduce Complexity and Re-assign Burdens of Proof**. The complexity and burden now imposed on consumers should be replaced with a regime that imposes the burden of proof on those best positioned to shoulder it. Accordingly, once a petitioner comes forward with a concern regarding a lawful use that appears to be impaired by DRM restrictions, the burden should then shift to the copyright owner to (1) describe how the DRM technology functions and how widely it is deployed; and (2) demonstrate by a preponderance of the evidence that continuing DMCA protection for the DRM in question is necessary to the market viability of the work.
- **Leave Fair Use to the Courts**. Where a petitioner comes forward with a use, otherwise impeded by DRM restrictions, that might plausibly be viewed by a court as a fair use, the Copyright Office shall presume that the use in question is a fair use for purposes of considering whether an exemption should be granted. This presumption shall not be construed as the expert opinion of the Register, but rather as a presumption favoring DMCA exemptions for potential fair uses intended to funnel those uses into court for judicial resolution.
- **Authorize Exemptions to Include Distribution of Circumvention Tools.** As noted above, consumers must have access to circumvention tools if they are to be able to take advantage of any DMCA exemptions granted in the rulemaking. Congress should expand the scope of the rulemaking proceedings to expressly authorize the Librarian to grant exemptions to the DMCA's prohibitions on trafficking in circumvention tools to the extent necessary to permit technically unsophisticated consumers take advantage of any exemptions to the DMCA's circumvention prohibition granted in the rulemaking.

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