

The DMCA Revisited: What's Fair

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Since they were enacted in 1998, the “anti-circumvention” provisions of the Digital Millennium Copyright Act (“DMCA”) have not been used as Congress envisioned. Congress meant to stop copyright infringers from defeating anti-piracy protections added to music, movies and video games, and to ban “black box” devices intended for that purpose.

In practice, however, the DMCA anti-circumvention provisions have been used to stifle a broad range of legitimate activities and have done little to stop piracy. The DMCA has become a serious threat to consumers, competition, and computer security research:¹

- The DMCA prevents consumers from making back-up copies of DVDs they own in order to protect them from scratches and loss. It also stops parents from using DVD control software to protect their children from undesirable DVD content and forbids fast-forwarding through unskippable advertisements before feature movies.
- MP3 players can be found in 23% of American homes, but the DMCA makes it a crime to provide a music fan with software that helps him get his music from a copy-protected CD into his iPod.
- A garage door opener company has invoked the DMCA to prevent a competitor from selling interoperable replacement garage door “clickers.”
- Laser printer giant Lexmark has used the DMCA against the toner cartridge remanufacturing industry, leaving consumers with fewer choices and higher prices.
- Former White House Cyber-Security Chief Richard Clarke has called for DMCA reform based on concerns that the DMCA is chilling computer security research vital to our national security.
- A Princeton University computer science professor was threatened with a DMCA lawsuit for trying to publish a research paper about weaknesses in watermarking technologies.

Five years of experience make it clear that the DMCA went too far and needs to be reformed. The narrow exceptions put into the DMCA have proven inadequate. The Copyright Office’s triennial rule-making procedure has proven itself ineffective in protecting legitimate consumer expectations in the age of DVDs and copy-protected CDs.

The DMCA needs to be revised to make it clear that it does not impair a consumer’s ability to use the products he owns, so long as he does not infringe copyright. And it should be legal for innovators to make technologies that would help consumers make the most of the CDs, DVDs and other materials they purchase.

This is common sense. Everyone agrees that circumventing to infringe copyrights is wrong. Everyone should similarly agree that circumventing when necessary for a legitimate noninfringing use should be allowed. Fortunately, the Digital Media Consumers’ Rights Act (DMCRA), H.R. 107, introduced by Rep. Boucher and Doolittle, accomplishes exactly this result. Pirates stay in the legal crosshairs, while legitimate consumers, researchers and competitors can rest easy.

¹ For a report collecting five years of press accounts of DMCA misuse, see EFF, “Unintended Consequences: Five Years Under the DMCA” (google search: “EFF DMCA”).