

321 STUDIOS: DVD COPYING PRODUCTS VIOLATE DMCA (2004)

Earlier this year, a California federal district court held, in 321 Studios v. Metro Goldwyn Mayer Studios, Inc. et al., that the making and selling of products that permit users to reproduce motion picture DVDs violates the Digital Millennium Copyright Act (“DMCA”). It is important to note that this case addresses the vicarious liability of manufacturers of copying products, rather than the fair use and other rights of purchasers of DVDs. Under the Copyright Act, legitimate owners of DVDs possess the right to make backup copies and other fair uses of their DVDs; manufacturers and sellers of products that assist these DVD owners in exercising their rights do not themselves possess such rights. Since suing home users is bad business, creators and sellers of copying and related products make safer defendants. Increasingly, then, lawsuits like this one will become the battleground between copyright owners and users, as inventive technology manufacturers produce more products, testing the parameters of the DMCA. Some would say that this decision favors the rights of copyright owners over those of legitimate users, and it remains to be seen whether the Ninth Circuit will affirm this case on appeal.

Background

Plaintiff, 321 Studios (“321”), filed for a declaratory judgment that the distribution of its products did not violate the DMCA. Alternatively, 321 argued that the DMCA was unconstitutional. The defendants were the motion picture studios (the “Studios”) that own the copyrights in the movies distributed in DVDs.

Contents Scramble System (“CSS”), the industry standard for encrypting DVDs, limits the ability of unlicensed DVD players to playback DVDs. The Copyright Control Authority, which administers CSS, licenses electronic “keys” that permit licensed DVD players to playback DVDs. However, these keys, as well as the algorithm to decode DVDs, are publicly available on the Internet. 321 markets and sells two products, DVD Copy Plus and the DVD-X Copy, that copy video content -- regardless of whether it is CSS-protected -- through the use of this publicly available information.

Digital Millennium Copyright Act

Sections 1201(a) and (b) of the DMCA prohibit the manufacture and distribution of devices that circumvent a technological measure meant to either control access to copyrighted works or to protect the rights of copyright owners. 17 USC 1201(a), 1201(b). However, these anti-circumvention provisions are qualified by the use rights of DVD owners in the remainder of the Copyright Act. *See* 17 USC 1201(c)(3).

a. Section 1201(a)

Significantly, the legislative history to section 1201 requires that, for a technology product to violate the DMCA, it must meet one of three conditions: 1) be primarily

designed or produced for the purpose of circumventing a technological protection measure; 2) have only a limited commercially significant purpose or use other than to circumvent; or 3) be marketed for use in such circumvention. While the Sony test of “capability of substantial non-infringing uses” still applies to cases of contributory infringement, the House Report continues, the controlling standard under the DMCA is whether or not a product or service “has only limited commercially significant purposes or uses other than to circumvent.”

The Studios maintained that CSS bars access to coded DVDs without the CSS keys, and that only licensed DVD players can legally access the CSS keys in order to play DVDs. The Studios also argued that 321’s software is primarily designed for the purpose of circumventing CSS, and is marketed for that purpose.

321 countered that its products are legal because they work on DVDs that a user has already purchased, and therefore has the right to access.

The court concluded that the purchase of a DVD does not give to the purchaser the authority of the copyright owner to decrypt CSS. With respect to section 1201(a)(2), the court reasoned that licensed DVD players are issued a key to decrypt CSS. Since 321’s software does not have such a license, it does not have the authority of the copyright owner. Moreover, the court held, even if 321’s software was not designed primarily to circumvent a technological measure, the function that *was* designed to bypass CSS (and the only feature that was challenged by the Studios in the case) was designed solely to circumvent CSS, so that portion of the software violates section 1201(a)(2)(A).

It would seem, however, that the court’s focus on a single function of 321’s software is misplaced. The standard for liability under the DMCA is whether an entire product or service has only limited commercially significant purposes other than to circumvent. If a single, commercially insignificant portion of either 321 product bypasses CSS, couldn’t the remainder of the product perform the commercially significant functions of, for example, making backup copies of public domain material, allowing fair uses of the DVDs, and/or permitting archival backup copies of legitimately purchased DVDs?

b. Section 1201(b)

Section 1201(b) relates to copy control measures. 321 argued that CSS is not a copy control measure, since it controls only access to DVDs, rather than protecting rights of copyright ownership. So if 321’s products only circumvent CSS, section 1201(b)(1) is inapplicable.

The court disagreed: although CSS does control *access* to encrypted DVDs, the purpose of this access control is to control *copying* of those DVDs, since encrypted DVDs cannot be copied unless they are accessed. Thus, section 1201(b)(1) does apply.

It is a basic rule of statutory construction that Congress intends to give meaning to all provisions of a law. Thus, the court’s analysis is questionable, since it ignores the

DMCA's distinction between access and copy controls. Indeed, using the court's logic, every case of access control will also raise copy control issues, since encrypted DVDs cannot be copied unless they are accessed.

321's next series of arguments raised issues that concern many academics and other legitimate users of copyrighted content. Technological protection, they argue, does not have the flexibility and nuanced measures of protection contained in the fair use and related provisions of the Copyright Act and in negotiated legal agreements. 321 maintained that the primary and intended use of its software was to make copies of DVDs that are in the public domain; to make fair use of protected materials; and to provide single, archival backup copies of movies that a user has already purchased.

The court sidestepped these potential land mines by concluding that any legitimate downstream use by 321's customers could not be imputed upstream to 321 for purposes of the DMCA. 321, therefore, violated section 1201(b)(1). The statute does not ban the *act* of circumventing use restrictions, the court reasoned. Rather, it addresses only the trafficking in and marketing of devices *primarily designed* to bypass use restriction technologies (emphasis added). Congress, in fact, sought to preserve the fair use rights of persons who had legally acquired a work.

Yet it is difficult to square this reasoning with the court's prior conclusion that the purchase of a DVD does not give the purchaser the authority of the copyright owner to decrypt CSS. When confronted with an encrypted DVD, then, how does one exercise one's fair use rights?

Moreover, ignoring the italicized language, above, is problematic. This case was decided on summary judgment, yet the court acknowledged that it was impossible to determine the factual question of the primary design of 321's devices, since neither party produced significant evidence on the issue. Despite that fact, the court squarely held that 321 marketed its software for circumventing CSS, and was therefore in violation of the marketing provisions of sections 1201(a)(2) and (b)(1). That is, the court found that 321's software was primarily designed and produced to bypass CSS, and marketed to the public for that use. However, if 321's software were not *primarily* designed to aid in infringement, but instead created to make legitimate backup copies and permit fair use, would it still be barred by the DMCA?

The court also concluded that that even if 321 used the *authorized* key to access a CSS-protected DVD, it did so without authority. Thus, unlike the software contained in licensed DVD players, 321's software avoided and bypassed CSS encryption, violating section 1201(b)(1). By analogy, if a thief knows that there is a front door key under the rock near your house, he is still illegally gaining entrance when he uses this key without permission to enter your home, even if he is not picking your lock or knocking down the door.

c. Constitutionality of DMCA

Finally, 321 maintained that the DMCA violates the Constitution's First Amendment, since the statute restricts 321's right to tell others how to make fair use of copyrighted works.

Courts have held generally that computer code is speech, entitled to First Amendment protections. Here, however, the court ruled that the DMCA did not suppress the speech contained in the CSS because of its content, but only because of the way that the code, when executed, operated. In other words, 321's software was barred only because of its capacity to instruct a computer to bypass the CSS encryption. That functional capability was not speech within the meaning of the First Amendment, and such regulation was content-neutral and not prohibited by the First Amendment. Accordingly, intermediate, rather than strict scrutiny, applied. Under the intermediate standard of review, a law will be upheld if it furthers an important or substantial government interest unrelated to the suppression of free speech, and if the incidental restrictions on the First Amendment are no greater than essential to the furtherance of that interest. By eliminating the strict scrutiny standard, which is almost always fatal to the validity of a law regulating speech, the court upheld the DMCA.

d. DMCA and Fair Use

The court held that the DMCA does not unconstitutionally burden the fair use rights of users of *copyrighted* material. Although not all content on DVDs may be available in unprotected forms, the court reasoned, it is possible to copy the content in ways other than in an exact DVD copy. Citing the appellate decision of another circuit, the court agreed that "[t]he fact that the resulting copy will not be as perfect or as manipulable as a digital copy obtained by having direct access to the DVD movie in its digital form, provides no basis for a claim of unconstitutional limitation of fair use." Users also have the option of copying DVDs by non-digital means, the court stated.

Both options, of course, presuppose that the content is available in forms other than the CSS-encrypted option and that, technologically, the user can actually make an analog copy of the encrypted digital work. Moreover, if the DVD were encrypted by a means other than CSS, it would arguably be actionable to bypass *that* technological protection mechanism.

As applied to the copying of *public domain* (i.e. non-copyrighted) materials, the court held that users can access the content from a non-CSS encrypted DVD or can access and copy public domain materials in a non-digital form.

Significantly, then, the court stated that the DMCA did not prohibit copying of non-CSS encrypted material, so if 321 removed that part of its software that bypassed CSS and marketed only the DVD copying portion, it could freely market its product to customers who use the software to copy non-CSS encrypted DVDs and other public domain materials.

Finally, the court held that the DMCA does not exceed the scope of Congressional power under the Commerce Clause, Intellectual Property Clause, or the Necessary and Proper Clause.