

1. Sect 109

(a) DVDs are being produced that are deliberately encrypted. The perpetrators of this are attempting to use DMCA to protect their encryption and enforce restrictive licensing terms. Some DVDs are given ``region codes'' that would block playback, even for the original purchaser. This restricts the purchaser to playing the purchased disc only on a licensed DVD-player and in a restricted geographic area.

(b) Privacy concerns demand that anonymity be possible, even if this disables copyright management schemes. When they conflict, human rights are of higher value than profit. It is incumbent on copyright owners to only use copyright management that is compatible with the rights of individuals, of businesses and of organizations, and approaches that violate society's legitimate interests should not be permitted. There should not be carte blanche for copyright management.

(d) If such practices (per answer to (a) above) are permitted, how long will it be before players and discs are restricted to particular hours or rooms or number of plays? Automobiles and domiciles will soon be Internet-enabled. If linkage of copyrighted materials to external conditions is permitted, won't this lead to product tie-ins?

If this is allowed for DVDs, it could be allowed for electronic ``books''; these have already appeared in proprietary formats.

In this context, note the following trends:

1. major U.S. book publishers bought by large corporations.
2. Large-scale mergers and acquisitions are being permitted, even in industries critical to civil society, such as book distribution (e.g., Barnes and Noble with Ingram), telephone carriers, cable television operators, radio and television stations, banking.
3. Databases being accumulated of personal data.
4. Recent legislation: WIPO, DMCA, UCITA, ...

Do these boost special interests at the expense of freedom? Will libraries be weakened?

1. Sect 117. Multiple backup copies are needed.

Backup programs backup computer files. These programs have no knowledge of the license status of these files. There is no commonly used file system that stores such status with the files, so that there is no way (within common practice) for backup programs to ascertain that status. Organized backups are made according to schedules, and to enable recovery. For example, backups may be made daily, weekly, monthly, yearly. Each tape (of the ``full backup'' type) would contain a copy. Although tapes are generally recycled, there are often legitimate reasons to preserve tapes.

Example: databases and programs have multiple versions, and tapes allow restoration of files from a given time with the version extant at that time.

There should be no limitation on the number of archive copies.

Archives have at least two purposes: to preserve (generally older) data offline and to fix the data as a quasi-permanent record. It may be necessary to store the programs with the data to insure subsequent retrieval. Later versions (often labeled as ``upgrades'') may be unable to read the older data or may be deficient in features that work in contemporary versions. Contemporary programs may be unavailable when

needed to access the archive ('`out-of-print``'). Archives may be split, e.g., if part of a business is sold, necessitating program replication.

Computer sites maintain their own copies and often contract with off-site warehouses and even duplicate facilities so that flood, fire, hurricane, act of war, etc. will not disrupt an operation.

(d)Technological developments: Continuous backups can be made. Distributed systems spread copies over networks. Online storage costs have fallen so that online storage, optical, magneto-optical and magnetic disks are being used instead of tape by many computer sites. This puts backup online, increasing its capabilities.

2.(a)(1). The DMCA is being used to extend the scope of copyright. In granting a copyright, the United States government grants an `exclusive right' to the copyright owner. This exclusivity constitutes a government-backed monopoly. In ordinary antitrust law, leveraging a monopoly in one place to exert untoward pressure at a different point is prohibited. In addition to the copyrighted work, DMCA protects the technological measures being used by the owner to prevent infringement. This allows copyright owners to try to bundle other, non-copyright products with the copyrighted work, and employ technological measures, ostensibly for the copyrighted work to all bundled ancillary products.

Example: Members of the MPAA are using DMCA to lock the content of DVDs that they are producing. Already having a monopoly, they are then adding other products to the DVD, to wit, commercials. The licensing of DVD-players, also through the DMCA, blocks the development of DVD-players that allow the person viewing the content to control the viewing condition, viz., to have DVD-players that can skip the commercials.

2.(a)(2). In general, DMCA encourages the tying of other products, especially devices, to copyrighted works. A frequent topic of discussion among LXNY members is the potential copyrighting of computing machinery (such as the BIOS) so that manufacturers could create ``DMCA-monopolies'' that would make the use of unlicensed or unauthorized software on purchased equipment a crime.

Example: Computers might then be sold that would not allow the Operating System of your choice to be used.

2.(a)3. Constitution.

The United States Constitution: Article I Sect. 8
Section 8. The Congress shall have power

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

Congress only has the power to grant copyrights for the purpose of progress. It does not have the constitutional authority to grant copyrights to amplify the profit potential of applicants, typically at others expense.

Exclusive rights, when applied to computer software, if used inappropriately, can easily prevent the `progress of science and useful arts'. These problems, and the unequal weight of the two goals of progress and of business, need to be kept in mind.

Example: Debugging a program may require access to and mutability of the program source.

Example: Programs need to be able to work conjointly.

2.(a)4. General Comments:

DMCA gives one the impression of 1) attempting to use governmental power to prolong the profitability of business models made obsolete by technological progress and changes in society, and 2) giving a higher priority to enforceability (of copyright) than to protecting human rights, constitutional rights and consumer rights (including businesses as consumers).

The problems with proprietary software, some mentioned in these comments, stand in contrast to free software, where copyright is used to ensure unlimited copying, access to all, the ability of different parties to work together for 'progress of science and useful arts,' and for a greater economic benefit.

Reference: For information on the free software movement, www.gnu.org .

2(b). Hearings would be useful. I would be available.