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Copyright restrictions should be based on distribution and how it is achieved, rather than individual use; a distributor may wish to restrict how the material is used but they do not deserve the force of law behind that wish.

There should be a presumption of non-infringement.

The development of new devices and ways of storing and viewing things must be limited in the first instance only by what is possible and useful, not by what copyright holders are willing to permit. Otherwise there would be no VCR (to give an uncontroversial example); and no doubt a great many other devices would have been slowed in development or barred altogether. Any legislation in this area must require a copyright holder to prove a clear case for the banning of a device, rather than requiring the device manufacturer to show that their device should be permitted.

In general it is not enough to have access to a device which is capable of making unfair access to copyrighted material; it is necessary to have access to the material itself in some way. In general then, it will be hard to make material widely available to the public without being able to be tracked down and prosecuted directly, without any device restrictions.

The most obvious grey area here is the case of a distributor who finds it possible to save significant distribution costs by including one or more distinct works on one media, and selling access keys of some kind. There are a number of questions to be looked at here, such as:

- What is the consumer's remedy if they lose the access key? Will they find themselves in the position of no longer having access to media they've paid for?
- How easy is the access key to store or transfer? Is the distributor attempting to prevent resale?
- How easy is the access key to use? Is there a legitimate case that the consumer is simply saving time and inconvenience by working around the protection?

In general, inconvenient and easy-to-lose access keys will encourage the production of devices that work around them. This will increase the temptation to use the workaround without purchasing the access. But it should also be seen as the market attempting to remedy a poor service. The balance between the competing interests will most likely depend on the details.

In the longer term, there is also the problem of legacy access. In the past there has never been a system of copyright control which could make it impossible to access the work if the company involved went under. There have certainly been cases where desirable works were lost or come close to it when the owning company's archives were lost; we do not wish to add to this the risk of having the work but not the ability to access it. Devices which enable legacy works to be accessed must certainly be permitted.

It could be argued, given the public interest trade-off represented by copyright, that a company wishing to have an access device banned under this legislation should be required to show some provision for legacy access - something as simple as lodging an accessible copy of the work with a national library would be sufficient here.

The ability to make backups; to time-shift viewing (recording TV for later viewing, for example); and to format-shift (for example, from a CD to an iPod), are all abilities that rely on the ability to make usable copies of something. These are all things that the general public expects to be able to do with works; and that make those works much more enjoyable.

Devices of this kind should be generally unrestricted. All of them encourage the purchase and use of copyrighted works. Directly, in the case of purchasing CDs to rip to an iPod-like device, or DVDs without fear of having them destroyed by wayward toddlers. Or indirectly, by watching television programs (and their associated advertising) more than would otherwise be possible.

There should not be a chilling effect on legitimate device manufacturers.

Any legislation restricting the development and distribution of such devices must be written in such a way as to make clear what it cannot be used to restrict. Recent cases in the US of companies attempting to use the DMCA to prevent the sale of legitimately interoperable devices have shown the importance of this. While these attempts have failed in the courts, the law may still be used to threaten smaller players in the market, and this should be prevented. We do not know where this kind of threat has been used and not reached the courts; but we do know that obviously unjustified attempts have reached the courts.

Examples include the case of the Chamberlain Group, which sued a company called Skylink for creating a remote opener capable of opening garage doors built by the Chamberlain Group. This case was (rightly) dismissed. There is much more information at http://www.eff.org/legal/cases/Chamberlain_v_Skylink/

The printer manufacturer Lexmark sued Static Control Components for making printer cartridges which would work with Lexmark printers. The issue here was that the Lexmark printers required a specific authentication "handshake" before they would accept a printer cartridge. This authentication seems to have been done specifically to lock out non-Lexmark cartridges. When Static Control Components reverse-engineered the authentication sequence and produced interoperable printer cartridges, Lexmark unsuccessfully sued under the DMCA to stop their sale. There is a case archive at http://www.eff.org/legal/cases/Lexmark_v_Static_Control/

It should also not prevent people from making legitimate use of something in a way which is impossible without circumventing a copyright protection.

An example here is the case of Dmitri Sklyarov (See the Electronic Freedom Foundation website at http://www.eff.org/IP/DMCA/US_v_Elcomsoft/us_v_elcomsoft_faq.html for more information). Sklyarov was prosecuted under the DMCA in the US, for helping to create a program which allowed legitimate purchasers of Adobe Acrobat formatted e-books to copy them into other formats. This allowed them to read the e-book on other devices than the one they purchased it from, print portions of it, have it read by the computer with Text-to-speech software, read it after a hard drive crash, read it after an OS upgrade or using an alternative OS - all of which they would otherwise not be able to do. It would also have allowed them to

redistribute the materials, if they wanted to; and it did so by circumventing deliberate restrictions placed on it by the publisher - and therefore Skylarov was charged. What this shows is that device capabilities cannot be restricted to what copyright holders will allow voluntarily.

Adobe withdrew their charges after consulting with the Electronic Freedom Foundation - but the criminal prosecution continued without them. And in doing so, they said that the software was no longer available in the US, so their objective had been achieved. Copyright legislation must preserve people's ability to exercise fair use rights without any co-operation from the copyright owner concerned, and even in the face of open hostility.

Banning infringement-capable devices is too wide a net.

Banning devices **capable** of circumvention is very hard to do, and would cause enormous disruption because of the nature of modern computing. Computers are extremely flexible and powerful, and there are many ways to achieve a particular objective.

What should be banned are those devices which have no other purpose. In limited circumstances, it may be reasonable to ban those which do not have much in the way of other purposes - where there are other devices just as cheap and easily available which have the same or better non-infringing uses; or where the device has apparently been designed specifically for copyright circumvention and can be redesigned to make this much harder for ordinary users.

A device which cannot be used for circumvention even by expert users is unlikely to be useful for anything, as the example of Microsoft's X-Box shows.

Microsoft have a marketing plan where they sell the X-Box for less than it costs them to make it. The intention is to make the shortfall back by selling games. Because the box is powerful enough to run a modern operating system and perform very useful functions at a cheap price, some people have been buying the box and modifying it to run the Linux operating system. Obviously Microsoft do not want them to do this - such purchasers are unlikely to buy enough games (if they buy any) to make up Microsoft's shortfall. There has been something of an arms race between Microsoft's attempts to make these modifications impossible, and the attempts of the public to get around them. In this case a device manufacturer is actively attempting to make modifications impossible, and can modify the software it works with to help, but people find a way around it. There is a good outline of how this race has gone at <http://en.wikipedia.org/wiki/Modchip>.

Copyright law here must clearly distinguish between fairly purchasing a device from Microsoft and using it for a purpose for which it was not intended (running a legally obtained Linux distribution, or a legally purchased game from overseas); and using it for an illegitimate purpose (running a pirated game in violation of copyright). Microsoft deserve no legal protection for their efforts to stop people running Linux or games purchased elsewhere on the X-Box, although they are certainly entitled to manufacture their goods in such a way as to make this difficult. But they do deserve legal protection to stop people running pirated games on it. This legislation must be written in a way that at least allows courts to distinguish between the two activities, and

ideally makes the distinction clear without need for a court.

The High Court ruled today that "Mod chips" for the Playstation were legal for the purposes of playing overseas-purchased games, and any new legislation should not roll back these rights.

Summary

The ability to ban copyright-circumvention devices needs to be balanced against the many ways in which such bans can be misapplied. We must protect competitors and innovators from the chilling effects of companies with deep pockets and large legal staff. We must also not restrict the ordinary public from doing things that they are otherwise entitled to do.

It must not be forgotten that the purpose of copyright is to encourage the production of new works for the benefit of society as a whole. Measures that encourage production while stifling use may result in more works but less benefit to society.

Andrew Lang
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