

TOPIC 7:

DMCA AND THE ANTITRAFFICKING AND ANTICIRCUMVENTION RULES OF SECTION 1201

Topic question

What are the antitrafficking and anticircumvention rules of Section 1201 and how do these rules affect libraries?

Overview

As technology makes infringing on copyright easier, copyright owners seek to use new technology to protect their works. Technologies, such as encryption or key-coding that allow works to play on authorized equipment or consoles are two such common protection strategies. As use of technological controls by copyright owners increases, users also try to circumvent these measures or create new technologies (so-called black boxes) able to go around these controls and make new, protected technologies available to the consuming public. For copyright owners, having the ability to foreclose on these users with the threat of additional liability is at the heart of the new antitrafficking and anticircumvention rules of Section 1201.

Antitrafficking and anticircumvention rules were adopted as part of the Digital Millennium Copyright Act (DMCA). These rules respond to the United States' international commitment to implement new intellectual property laws.

Liability under the antitrafficking and anticircumvention rules exists separate from copyright liability. The rules are part of Section 1201 of Title 17 of the U.S. Code, which contains the statutory copyright law of the United States.

Circumventing copyright access controls is a separate offense, in addition to copyright infringement. This anticircumvention is proscribed by Section 1201(a)(1).

Distributing or sharing that circumvention access with another is also an offense under Section 1201; this sharing is trafficking. Section 1201(a)(2) prohibits trafficking in the circumvention device.

Creating and marketing a technology that circumvents a "use control" is also proscribed by a separate antitrafficking rule in Section 1201(b).

This provision proscribes so-called black box technologies, such as a unit that attaches to your VCR to allow recording from any source, regardless of the scrambling or other protection features.

Two exceptions are important to libraries.²²⁴ Section 1201(d) provides a specific exception for qualifying nonprofit libraries, archives, or educational institutions to circumvent an access control to make a bona fide determination of whether to purchase an item for its collection or curriculum. A more general exception applies to all users and was created by the regulatory authority of the Librarian of Congress to preserve fair-use access to techno-

logically protected material. But when the regulations were released, only two narrow categories of works were covered: compilations consisting of lists of Web sites blocked by filtering software applications and literary works including computer programs and databases that fail to permit access because of malfunction, damage, or obsolescence.²²⁵ These regulations are effective until Oct. 28, 2003.

What you need to know

Familiarity with the following is helpful to fully comprehend the discussion of this topic:

- A basic understanding of fair use and other use rights such as the first-sale doctrine and background on the DMCA

Why watch this topic?

The controversy at the heart of Section 1201 is the merit of a law that supports a copyright owner's right to control access and uses of works even when that access or use is a fair use and otherwise allowed by copyright law. Section 1201 not only creates a separate liability provision, but it shifts the focus from the technological neutrality that Congress has in the past attempted to instill within the copyright law. In place of neutrality is a new regime that rewards copyright owners who seek copyright enforcement through the use of control technologies. Works protected by such measures might be said to be protected by a super-copyright. The situation is analogous to a public park surrounded by private land. Anyone can use the park during the hours of normal operation, but access to the park is nearly impossible, because private land surrounds the park without any public right of easement. The property owner who controls access to the park in essence controls the park. Under traditional copyright law, various provisions of the law such as fair use and first sale provided this easement.

Background: The first-sale doctrine

See Topic 4.

The first-sale doctrine, codified in Section 109, operates to limit the copyright owner's ability to control disposition of the physical embodiment of the work once sold. For example, when a library purchases a book for its collection, it can place it in its collection for loan by patrons, if the library purchases a video for its collection it could even rent it (charge patrons a dollar for each circulation), and once the item is no longer needed it could "weed" it and sell the book or video at its annual used book sale. All this might change if the item collected now resides in a digital format and is protected by an anticircumvention device.

Main discussion

Added to copyright law as part of the DMCA, Section 1201 contains elaborate measures designed to protect the technological safeguards that

copyright owners develop to protect their works. Section 1201 contains both anticircumvention and antitrafficking prohibitions. The anticircumvention provision, however, did not take effect until Oct. 28, 2000, and was not enacted without dispute. At the time, a commentator observed: "Due to controversy surrounding this provision, the prohibition will not take effect for two years while the Librarian of Congress conducts a rule-making process, with public input, to determine the nature and extent of any exemptions that should be made available."²²⁶ The rule-making process is now complete; two very limited exemptions exist for lists of web sites blocked by filtering software and literary works inaccessible due to malfunction, damage, or obsolescence. The recommendations are to be reviewed every three years.²²⁷

Liability under antitrafficking and anticircumvention rules

Circumventing an access control that a copyright owner places on his or her work violates Section 1201(a)(1). For Section 1201 rules to apply, the access control must be effective and prevent unauthorized access, but the control need not be 100% effective.

The access control must be put in place by the copyright owner or with his or her authorization. A consumer or library that purchased an item from a retail seller that placed such protection on works without the approval of the copyright owner could circumvent the retailer's access control and not violate Section 1201.

In addition, the technological access control must not degrade, corrupt, or distort the work; if it does, Section 1201 does not apply. The authorization and degradation conditions apply to both the Section 1201(a) anticircumvention (Section 1201(a)(1)) and antitrafficking rules (Section 1201(a)(2)).

Section 1201(a)(2) prohibits trafficking in the anticircumvention access control. If a person writes a piece of code that when combined with other hardware allows access to information contained in DVD or CD-ROM, and then the person shares that code with others, the person violates Section 1201(a)(2).

This violation is true even if the DVD or CD-ROM were purchased from a legitimate source (it is a lawfully made copy), or if the access of the work were allowed under fair use or any other provision of copyright law. Separate liability still exists under Section 1201 and includes injunctive and monetary relief in the form of actual and statutory damages as well as costs and attorneys' fees.

A second antitrafficking rule prohibits the trafficking of technologies that wends around the controls of protected works. This provision targets the manufacturers of so-called black box technologies that systematically remove controls. Section 1201(b) makes illegal sale or distribution (trafficking) of a device that allows someone to use a copyrighted work in contravention of the protections placed by an owner. According to the 1998 DMCA House Report: "This provision is not aimed at products that are capable of commercially significant noninfringing uses, such as consumer electronics, telecommunications, and computer products—including videocassette recorders, telecommunications switches, personal computers, and servers—used by business and consumers for perfectly legitimate purposes."²²⁸ A person who markets a product called the Disk Wizard, whose only use is to allow purchasers to circumvent use controls and convert and play any CD-ROM, video disc, or DVD audiovisual program on a personal computer, violates Section 1201(b).

Libraries could trigger Section 1201 rules

How does Section 1201 litigation work in practice? Section 1201 is complex and new, but consider the following extended scenario:

“With respect to technological protective measures that control particular uses of a work once it has been lawfully accessed, there is no anticircumvention rule. There is only an antitrafficking rule. As a result, a user who, after gaining legitimate access to a protected work, employs a countermeasure to enjoy uses of that work for which he or she is unauthorized would not be liable...[R]ather, the person who provided the countermeasure might be liable both for doing so and possibly for vicarious or contributory copyright infringement as well. (The user...would still be liable for direct copyright infringement with respect to the unauthorized use.)”²²⁹

In other words, you could circumvent a use control, but not the ~~an~~ access control you needed to in order to use the protected work because Section 1201(a)(1) only prohibits the latter action. You could circumvent a use control, but not traffic in the instrument of the use circumvention (prohibited by Section 1201(b)). Finally, you could not circumvent an access control (prohibited by Section 1201(a)) nor could you traffic in the circumventing access control because Section 1201(a)(2) prohibits this action.

The collection evaluation exception

Section 1201(d) provides a specific exception for qualifying nonprofit libraries, archives, or educational institutions to circumvent an access control to make a bona fide determination of whether to purchase an item for its collection or curriculum. The provision does not offer any exception whatsoever to the trafficking rules of either Section 1201(a)(2) or Section 1201(b).

Several requirements exist. First, a library, archive, or educational institution must either be open to the public or “available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field.”²³⁰ These conditions are similar to the Section 108(a) requirements, discussed in Topic 2. Second, the circumvention of a technological control measure to access a copyrighted work can be made only to make a good-faith determination of whether to acquire a copy of that work.

Two additional conditions exist: a temporal limit and sole purpose rule. The access must be no “longer than necessary.”²³¹ The legislative history, however, does not indicate what time period might exceed the no “longer than necessary” proviso.

In addition, the access cannot be used for any other purpose than collection evaluation.²³² The library could not, once it has circumvented the work, extract a portion of the work for use in its electronic vertical file, even if that extraction and use is a fair use under the copyright law, because this use violates the sole purpose rule.

The library could not use material from the work to exercise its Section 108(c) replacement right (this would violate the sole purpose rule), and the library could not access a work through its Web site (for collection development), then keep access to the work available on its Web site (this would violate the temporal limit condition).

Finally, the exemption in Subsection (d) “shall only apply with respect to a work when an identical copy of that work is not reasonably available in another form.”²³³

This provision, unlike the Section 108 right, is made without regard to price. Instead of the replacement copy proviso of Section 108(c), Section 1201(d) uses an “identical copy” schema. If the only version available is something other than an identical copy, circumvention is acceptable. What if an identical copy is available in another form but would take weeks to procure? Perhaps then the work is not “reasonably available” and circumvention could proceed under Section 1201(d).

Must the work be available in the exact format as the one the library wants to circumvent? No, if an identical copy is reasonably available, even if it is in another format, then circumvention of the work in the new, protected format is not allowed. The statute specifically uses the “available in another format” proviso to indicate that other formats should be considered before circumventing copyright control.

What if an identical copy was available but at an exorbitant price—is this copy also not reasonably available? Not likely, since Congress could have added language similar to the fair-price construct of Section 108(c) to reflect whether the high cost of obtaining the work to circumvent should be a factor, and by the plain language of Section 1201(d), it did not. As long as the work is available, even at an exorbitant price, circumvention could not likely proceed.

Suppose the library wants to purchase a remastered DVD version of a classic film scheduled for an upcoming holiday release. No DVD version is out yet, but the VHS version exists in your collection. If the new, remastered DVD version is an identical copy to the VHS version, then an access circumvention could not be made. But if the new edition has added material then the two copies are not identical, and the Section 1201(e) exemption should apply to allow the circumvention as an “identical copy of that work is not reasonably available in another form.”²³⁴

Circumvention can only be made to evaluate the work for inclusion in a collection or curriculum. “Thereafter, the library must pay the requested price or forego use of the technologically protected copy, even, for example, to repair or replace a lost or damaged copy of the same work already in the library’s collections.”²³⁵

Finally, the library cannot in any way traffic in an anticircumvention access measure, even if it is permitted to circumvent the access under Section 1201(d). Suppose a systems librarian wrote a piece of code that circumvents a protected CD-ROM database and achieves access to the CD-ROM for purposes of collection development review. This access is acceptable, but now the librarian wants to share the circumvention code with other libraries for use in their respective collective development processes. Under a plain reading of Section 1201 and the Subsection (d) collection evaluation exception, the librarian violates Section 1201(a)(2) if he or she shares the code in any way such as posting the code on a collection development listserv. The institution cannot use the Section 1201(d) exception to engage in acts prohibited by antitrafficking rules. Anyone who willfully violates these provisions is subject to civil remedies under Section 1201. If the trafficking is repeated the library might lose its ability to exercise collection evaluation rights under Section 1201(d) in the future.²³⁶

Section 1201 limits fair use

Many commentators have questioned whether the anticircumvention provisions eliminate the concept of fair use.²³⁷ Neither the statute nor the regulations state that the anticircumvention rules do not apply to circumventions that are done as a precursor to an exercise of one's fair-use right. Nothing prevents a copyright owner from using an access control to, in essence, circumvent an individual's or an institution's fair-use rights or any other right under copyright law.

Another use right implicated by Section 1201 is the first-sale doctrine. Consider a copyright owner who places a technological control on access to a work. When a library purchases a copy of that work, an access code is provided, but that code expires every six months and must be renewed by the copyright purchaser, in this case the library, to continue access. Once the library transfers possessions in any way, the copyright owner could refuse to supply future access codes. In this way, a technological access control measure can be used to circumvent secondary transfers of a copyrighted work that were formally preserved by the first-sale doctrine.

Other rights beyond copyright might also be implicated, such as First Amendment rights. For example, a library could not use the Section 1201(d) evaluation exemption to access a protected work to write a review of the product without the owner's permission.

General exemptions

Initially, regulatory exceptions were hoped to preserve fair-use access to technologically protected material. But when the regulations were released, only two narrow categories of works were covered: compilations of Web site lists blocked by filtering software applications and literary works (including computer programs and databases) that fail to permit access because of malfunction, damage, or obsolescence.²³⁸ The filtering exception allows interested parties to circumvent an access control to crack into a list (compilation) of Web sites blocked by filtering software applications. A Web site proprietor might believe his or her site is blacklisted by filtering technology (ones that filter by site), and this exception allows circumvention to make that determination.

Consider the regulatory exception for circumvention and malfunction, damage, or obsolescence. Circumvention is allowed as a result of malfunction of access control, but only if the work is a literary work. Although the exception includes computer programs, it does not apply to audiovisual or musical works, such as videos, DVD, and CDs, which might have a technological access control since these categories of works were not included. The exclusion of these works from the exception was heralded as a victory for the entertainment industry.²³⁹

Courts are interpreting Section 1201 strictly

In one of the first cases to apply Section 1201, *Universal City Studios, Inc. vs. Reimerdes*,²⁴⁰ the court addressed the use of a program called DeCSS that could be used to de-encrypt (circumvent) digital versatile disks (DVDs) that

stored feature-length films and other copyrighted material. The district court had little trouble concluding that the DeCSS software was primarily designed to circumvent the DVD encryption software and that people posting or linking to the DeCSS software violated Section 1201, but since those provisions were not yet effective by law, the court looked to the antitrafficking provisions of Section 1201(b). (Section 1201(a) did not become effective until Oct. 28, 2000, two years after the passage of the DMCA.)

The *Reimerdes* district court was one of the growing number of courts that also rejected any First Amendment defense, either specifically to the antitrafficking and anticircumvention rules of Section 1201, or with respect to the fair-use defense for contributory infringement discussed by the Supreme Court in *Sony Corporation of America vs. Universal Studios, Inc.* Furthermore, the district court indicated that the standard of contributory infringement expressed in *Sony* ("substantial noninfringing use") is less than the "limited commercially significant purpose" test in Section 1201(a)(2).

Considering the legislative history of the provision, the *Reimerdes* district court observed that: "A given device or piece of technology might have a 'substantial noninfringing use, and hence be immune from attack under *Sony's* construction of the Copyright Act—but nonetheless still be subject to suppression under Section 1201"—Congress explicitly noted that Section 1201 does not incorporate *Sony*."²⁴¹

On appeal the 2nd Circuit observed that while computer code is speech,²⁴² the provisions of Section 1201 do not violate the speech protections of the 1st Amendment.²⁴³ The court set the tone when it characterized the circumventing code such as the DeCSS as follows: "In its basic function, it is like a skeleton key that can open a locked door, a combination that can open a safe, or a device that can neutralize the security device attached to a store's products. DeCSS enables anyone to gain access to a DVD movie without using a DVD player."²⁴⁴

These judicial developments applied the DMCA to effectively eliminate the fair-use protections built into Section 1201²⁴⁵ and "allows copyright owners to put into place encryption measures to preclude fair uses of works."²⁴⁶ In other words, someone could contemplate a fair use but not be able to use prohibited (anticircumvention) technology to do it. The person who traffics in the anticircumventing access device violates Section 1201 but is not liable for a contributory infringement vis-à-vis the lesser *Sony* standard.

In other related developments, a Princeton University professor has claimed that Section 1201 violates a faculty member's right of academic freedom (a related free speech issue) to comment and publish critique of the underlying software of various technological control measures, for example, by identifying problems with those technological control measures copyright owners have attempted to use.²⁴⁷

Although Sections 1201(c)(1) and (4) indicate that rights of fair use and free speech, shall be preserved, the legislative history shows that—to some extent—Section 1201 usurps fair use.

Second, a free speech provision in Section 1201 indicates that "[n]othing in Section [1201] shall enlarge or diminish any rights of free speech or the press for activities using consumer electronic, telecommunications, or computing products."²⁴⁸ But does someone use a product when he or she writes a review of it? If not, then a plain reading of the provision still requires a librarian to obtain authorization before circumventing an access control.

Circumvention and Web site links

What is the result if a library site contains direct links to a site of circumventing material? This case might be deemed trafficking in an access or use control technology, the damage limitation under Section 512(d) notwithstanding. The Southern District of New York issued a preliminary injunction to prevent posting of prohibited decoding software, when the defendant, Reimerdes, posted links to other sites with the same infringing software.²⁴⁹ In assessing liability, the *Reimerdes* district court applied the antitrafficking provisions of the copyright law. The court observed that: “the antitrafficking provision of the DMCA (Digital Millennium Copyright Act) is implicated where one presents, holds out, or makes a circumvention technology or device available, knowing its nature, for the purpose of allowing others to acquire it.” The defendants linked to sites that contained de-encryption software and “urged others to post DeCSS in an effort to disseminate DeCSS and to inform defendants that they were doing so.”²⁵⁰ Linking is equivalent a trafficking when the link is to a site that either consists only of the anticircumventing code or the download of the anticircumventing code commences as soon as the link is activated. If the anticircumventing code is on another site with numerous other content, then a link to that anticircumventing code containing site would only be a trafficking if the library would include an additional statement encouraging patrons to access and use the anticircumventing code.

Unresolved points or issues

- The extent to which Section 1201 and the technological controls it supports will render the concept of fair use and other use rights, such as the first-sale doctrine, meaningless.
- Early cases demonstrate the severity and reach of Section 1201. Whether this trend continues or whether courts will interpret the statute to bring some rights back to users remains to be seen.
- Whether during the next round of rule making, the Librarian of Congress expands the list of works not subject to Section 1201, such as any category of work when a fair use of the work is made, also remains to be seen.
- What is the extent to which First Amendment rights of free speech supercedes the prohibition on antitrafficking?

Resources

Helpful URLs

www.loc.gov/copyright/1201/anticirc.html U.S. Copyright Office. Rulemaking on Exemptions from Prohibition on Circumvention of Technological Measures That Control Access to Copyrighted Works.

From the library literature

L. Gassaway. (1999) “Anticircumvention and the Digital Millennium

Copyright Act." *Information Outlook*, 3(6), 49-50.

K. Hunter (2000) "The Digital Dilemma: A Publisher's Perspective." *Against the Grain*, 12(3), 47-48.

A. Klinefelter. (2001) "Will the First-Sale Doctrine Disappear?" *Information Outlook*, 5(5), 45, 55.

From the legal literature

Jason Sheets. "Copyright Misused: The Impact of the DMCA Anti-Circumvention Measures on Fair & Innovative Markets," *23 Hastings Communications and Entertainment Law Journal* (Comm/Ent) 1 (2000).

John A. Gliedman. "Business New E-Access Rules Lack Proposed 'Fair Use' Exception," *E-Commerce*, November 2000, at 1.

Pamela Samuelson. "Symposium, Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need To Be Revised," *14 Berkeley Technology Law Journal* 519 (1999).

Jay Dratler Jr. *Cyberlaw: Intellectual Property in the Digital Millennium* (2000) (This treatise on Sections 512 and 1201 has several hundred pages of detailed discussion).

END NOTES

²²⁴ 17 U.S.C. § 1201(e)—(j).

²²⁵ 37 C.F.R. § 201.40

²²⁶ B. A. Lazar, New Statute Tackles Challenging Internet And Creativity Issues: Digital Millennium Copyright Act Arrives, *New York Law Journal*, March 15, 1999, at S3.

²²⁷ Additional material may be found at www.loc.gov/copyright/1201/anticirc.html.

²²⁸ H.R. Rep. No. 551 (Part 2), 105th Cong. 2-d Sess. 39-40 (1998).

²²⁹ Jay Dratler Jr., *Cyberlaw: Intellectual Property in the Digital Millennium* § 2.04, at 2-16—2-17 (2000) .

²³⁰ 17 U.S.C. § 1201(d)(5)(B).

²³¹ 17 U.S.C. § 1201(d)(1)(A).

²³² 17 U.S.C. § 1201(d)(1)(B).

²³³ 17 U.S.C. § 1201(d)(2).

²³⁴ 17 U.S.C. § 1201(d)(2).

²³⁵ Jay Dratler Jr., *Cyberlaw: Intellectual Property in the Digital Millennium* § 3.04[3], at 3-62 (2000).

²³⁶ 17 U.S.C. § 1201(d)(3)(B).

²³⁷ J.H. Mutchler, Circumvention of Copyright Protection Systems, *Intellectual Property Today*, October 2000, at 12 ("The fair-use doctrine is predominantly market and economy based and therefore must be considered in detail when applying the new and evolving DMCA in a global electronic commerce.").

²³⁸ 37 C.F.R. § 201.40.

²³⁹ Technology Controlling Access to Movie DVDs and Video Games May Not Be Circumvented, Copyright Office Decides, *Entertainment Law Reporter*, November 2000 (no pagination, available in the LEXIS Legnew Library).

²⁴⁰ *Universal City Studios, Inc. vs. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000).

²⁴¹ *Universal City Studios, Inc. vs. Reimerdes*, 111 F. Supp. 2d, at 323 (S.D.N.Y. 2000).

²⁴² *Universal Studios, Inc. v. Corley*, 2001 U.S. App. LEXIS 25330, at *48 (2d Cir. 2001).

²⁴³ *Universal Studios, Inc. v. Corley*, 2001 U.S. App. LEXIS 25330 (2d Cir. 2001).

²⁴⁴ *Universal Studios, Inc. v. Corley*, 2001 U.S. App. LEXIS 25330, at *58 (2d Cir. 2001).

²⁴⁵ 17 U.S.C. § 1201(c)(1) states that "[n]othing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title."

²⁴⁶ C. R. Ottenweller and I. N. Chatterjee, "Courts begin to Rule against Acts of Circumvention," *National Law Journal*, Oct. 16, 2000, C2.

²⁴⁷ *Felton vs. Recording Industry Association of America, Inc.*, No. CV-01-2669 (N.D. June 26, 2001).

²⁴⁸ 17 U.S.C. § 1201(c)(4) (emphasis added).

²⁴⁹ *Universal City Studios vs. Reimerdes*, 82 F. Supp. 2d 211 (S.D.N.Y. 2000); 111 F. Supp. 2d 294, 325 (S.D.N.Y. 2000) (permanent injunction).

²⁵⁰ *Universal City Studios vs. Reimerdes*, 111 F. Supp. 2d 294, 325 (S.D.N.Y. 2000) (permanent injunction).