

## **The DMCA Revisited: What's Fair?**

Escalating rhetoric on both sides of this question is making it hard to reach consensus about what's fair or what's fair use. But there is broad consensus on a few points:

- To answer “*What's fair?*”, Congress and the courts must balance the interests of content owners and content users. A true balance will preserve incentives to create and distribute digital content while allowing the public to access copyrighted material in digital forms.
- The balance must be dynamic, adapting to changes in technology and trends in use of technologies. Title I of the DMCA provides for a triennial rulemaking process to adapt to change and maintain the balance. And The Copyright Office has risen to the task, with clear ground rules for broad participation in the review process.

Six years after the DMCA became law, it looks like Congress struck the right balance, and that the courts and Copyright Office have maintained that balance in their decisions and reviews.

### **Courts are reaching the right balance, too.**

- **Lexmark v. Static Control.** The Court found that Static's replacement toner cartridges were not protected under the DMCA's reverse engineering exception, because Static actually *copied* an ancillary bit of code from Lexmark's toner loading program. The DMCA allows reverse engineering to make interoperable products, but that does not open the door for copying code.
- **U.S. v. Elcomsoft & Sklyarov.** Demonstrates unwillingness by the courts and juries to punish ‘accidental’ infringers or those lacking criminal intent.
- **U.S. v. Thomas Whitehead.** A jury found that Whitehead violated DMCA by selling phony access cards for DirecTV's satellite service. Whitehead faces jail time and fines, while Sklyarov attracted public sympathy in his DMCA case. Taken together, these cases show the DMCA is both flexible and forceful.
- **Hendrickson v. eBay.** This case affirmed the DMCA's safe harbor exception for service providers, finding the copyright owner hand't provided the requisite details to let eBay determine whether the listings were actually infringing.
- **Harlan Ellison v. AOL.** This Ninth Circuit case tested whether AOL satisfied the DMCA's safe-harbor provision after a content owner complained about copyright violations. It turns out AOL didn't have a valid mechanism in place for rights holders to report infringement, and therefore wasn't eligible for safe harbor immunity.
- **Chamberlain v. Skylink.** Known as the “garage door opener” case, the court held that interoperability which serves consumers can trump copyright holders' assertions.

### **Those Betamax tapes won't play in the online world.**

Critics of the DMCA say the Supreme Court's Betamax decision needs to be affirmed by Congress, through new legislation that would allow circumvention tools that also have any legitimate use. But the Betamax case dealt with bulky, low-quality video tapes that are ancient ancestors to the copying technology at issue today, where the Internet provides free, instantaneous, global dissemination of perfect copies made from any digital work. We've already seen how quickly “fair use” technology can facilitate copyright violations around the world.

### **Public Policy recommendations for DMCA**

- Reject legislation like H.R. 107, which weakens DMCA and tilts the carefully maintained balance between copyright owners and public access.
- Avoid using legislation to fix a definition for fair use. Technology moves too fast for a fixed definition, as we've seen with recent market success for music download services. Moreover, those who wantonly violate copyrights will abuse *fair use* as an unfair excuse to break encryption technologies.