

Mad as Hell about the DMCA

By Beale Screamer- 10/18/01

Below is an essay Beale Screamer included with his FreeMe program, a command-line utility he created to defeat Microsoft's digital rights management (DRM) scheme. Whether you agree with his actions or not, his thoughts on the recent turmoil sparked by the DMCA deserve a read. -- editor.



The new Rio Volt SP90 MP3/CD player is available on [Amazon](#) for \$99.00

This document is intended as a position paper on copyright and the abuses the copyright system has undergone, especially with the introduction and abuse of the notorious Digital Millennium Copyright Act (DMCA). This document is originally distributed with software that in fact clearly violates the DMCA, and so this gives background on why I would write this software. I hope that anyone who uses this software reads the "README" and "LICENSE" files in the same distribution, and respects my wishes as to how the software should be used. I do not want to create massive copyright infringement, but rather hope to give people the tools to regain the rights that have existed for centuries with respect to copyright, and are now in danger of being taken away in a most uncompromising manner.

Copyright has always been intended as a balancing act between the rights of authors/publishers and the rights of consumers. Technical advances are making it possible for publishers to take away technically what they would have a hard time justifying legally or morally. And unfortunately, in a misguided attempt to address copyright issues in the digital age, the U.S. government has given legal backing to the technical means through the DMCA, outlawing attempts at circumventing these technical protections. In effect, this gives publishers full and complete control over copyright issues, without the annoyance of actually having to go through the usual legislative debate and judicial review. As a shock to no one, the publishing industry (particularly the MPAA and RIAA) have used the DMCA as a bludgeon to attack anyone who suggests that consumers and citizens have rights too. I hope people take my civil disobedience as an opportunity to send a message to publishers. To borrow words from Howard Beale in the movie "Network," just yell to the publishers "I'm mad as hell, and I'm not going to take this anymore!"

DISCLAIMER

I am neither a lawyer nor a copyright expert, so my personal opinions are really those of an "interested outsider." I have done extensive reading on the basis and history copyright, as well as following the most visible current legal cases regarding the application of copyright and the DMCA. But clearly no one should take any of the information or ideas of this document as legal advice or precedent! I *am* an expert on the technical issues involved, and plan on being a thorn in the side of the publishers until they adopt a more reasoned and reasonable approach. The current climate regarding these issues leaves me little choice except to remain anonymous. I don't intend on being a martyr, or on spending the next decade of my life defending myself in legal proceedings.

HISTORY OF COPYRIGHT

The history of copyright has been written many times, but a good, brief account is available from the Association of Research Libraries [1]. For the past several centuries, copyright law has tried to balance the rights of consumers with incentives to authors and publishers for promoting their work. It is quite explicit in the intent of copyright that in the sale of a copyrighted work, "once purchased the copyright owner does not control the use of the work" [1]. Lawrence Lessig, a Stanford law professor and expert on these issues, echoed this observation in an interview when he pointed out that "The traditional idea of fair use - and the law has been extremely vague in defining this - is that the copyright owners do not have the right to perfectly control how you use their copyrighted material" [3].

However, the situation today with the DMCA is precisely the opposite of this intent: the use of the DMCA often does not have to do with limiting copying or distribution, but rather with restricting the use of the copyrighted work. The violation of this intent was

described, among many other places, in quote taken from a New York Times article in which they wrote "In the past, when a company published a book, the fair use rights of readers limited its control over the work. But if the same company issues a book today and encrypts it, its control over readers is far greater -- in fact, almost unlimited -- unless there is a right of access to the material."

The DeCSS case is a particularly flagrant example of this: the DeCSS code does not have any effect on DVD pirates, who can simply copy a full disk as-is. The entire purpose of using CSS by DVD publishers seems to be to restrict how the material is used! The purpose of DeCSS was to allow legitimately purchased DVDs to be played on Linux, a system that at the time did not support DVD playback. It is abundantly clear that this is 100% OK with respect to copyright; however, it violates the DMCA, since the *use* of the material is in a manner inconsistent with what the publisher desired.

The erosion of the reader's/listener's rights has been a steady process for many, many years. The limited time granted for copyrights has been repeatedly lengthened, and now is a totally preposterous 70 years past the death of the author. While the "limited time" is no longer terribly limited, the introduction of the DMCA goes even farther in this extreme by allowing publishers to have an infinite-time monopoly on a work: they can simply put technological protection measures on a work, and the DMCA makes removing those measures a crime even when the work is no longer covered by copyright!

The best treatment I've seen of these issues is an excerpt from Siva Vaidhyanathan's book "Copyrights and Copywrongs: The Rise of Intellectual Property and How it Threatens Creativity" that was published on msnbc.com [2]. If the bulk of the book is as good as the excerpt, this will be an outstanding book, and I take the liberty of quoting quite a bit from this work here. As an overall background to copyright, Vaidhyanathan begins with the following:

Copyright, when well balanced, encourages the production and distribution of the raw material of democracy. But after more than 200 years of legal evolution and technological revolution, American copyright no longer offers strong democratic safeguards. It is out of balance. And our founders - especially Thomas Jefferson - would not be pleased.

Copyright was created as a policy that balanced the interests of authors, publishers, and readers. It was not intended to be a restrictive property right.

I have to agree that the founders would not be pleased with what is happening today. Vaidhyanathan quotes the following passage from Thomas Jefferson regarding copyright: "It's peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me."

One of the big successes of publishers such as the RIAA and MPAA has been a steady erosion and public brain-washing regarding the point of copyright. A simple but effective measure has been the modification of terminology that is used for copyright violations: they speak of people "stealing intellectual property" or "theft of copyrighted music" in the trading of MP3s. The wide-scale copying ala Napster clearly is copyright violation, but "theft"? The definition of something being "stolen" means that it is taken from the rightful owner - and the owner no longer has possession of that item. As Jefferson observed several centuries ago, this simply doesn't apply to the types of material that are copyrighted. Making a copy of an item doesn't in any way remove that item from the original possessor, so "theft" is clearly an inaccurate terminology. However, the publishers' insistence on using that word, and the public's acceptance of it, means that a much more negative light is cast on an action that, while wrong, is nowhere near the severity of a true "theft."

The use of terms "theft" and "intellectual property" cleverly casts copyright issues as being "property" issues, although Jefferson and other founding fathers explicitly did not accept the idea of writings as property. Remember: just because the publishers want you to think of recordings and music as property does not make it so!

One final quote from Vaidhyanathan, this time talking directly about the DMCA:

This law has one major provision that upends more than 200 years of democratic copyright law. It forbids the "cracking" of electronic gates that protect works - even those portions of works that might be in the public domain or subject to fair use. It puts the power to regulate copying in the hands of engineers and the companies that employ them.

The last sentence is vital: the regulatory role regarding copyright has now been fully turned over to the publishers and technology producers. Congress has explicitly written itself out of the loop on such regulatory issues, and has thrown the balance between publishers and citizens entirely to the control of the publishers. The citizens have lost their voice in these matters, and unless Congress acts to drastically change the DMCA and reassert the consumer side of the balance, we simply will have no say in what rights the publishers deign to allow us to have.

HOW THINGS SHOULD BE

Any Digital Rights Management (DRM) scheme has two sides: on the one hand, the most obvious use is to take away the rights of the consumer. On the other hand, it can in fact be used to give the consumer *more* possibilities than existed before. I think the idea of limited time, full-length previews, or time-limited Internet-based rentals is excellent. If DRM was *only* used for this, in order to give us more options than we previously had, I would not have taken the effort to break the scheme. What is bad is the use of DRM to restrict the traditional form of music sale. When I buy a piece of music (not rent it, and not preview it), I expect (and demand!) my traditional fair use rights to the material. I should be able to take that content, copy it onto all my computers at home, my laptop, my portable MP3 player, ... basically anything I use to listen to the music that I have purchased. I can't do this at all with Microsoft's DRM scheme. Ideally, I would see two types of sales: limited, clearly spelled-out licenses for rentals and previews, and traditional sales, where the content is not protected, and ideally is provided in an open, non-proprietary format. As long as publishers insist on removing our rights in a traditional sale, we will continue to fight back with technical and legal measures.

To complicate matters in the specific case of Microsoft's DRM version 2 technology, not only are licenses applied, but there doesn't seem to be a clear way to even see what your license really enforces. A technically skilled person who knows how the scheme works can look through the binary license file, find the ACTION strings, and figure out what restrictions the license imposes, but the overwhelming majority of people simply will have no idea what license they have purchased. If a publisher decided to hide a 5 year expiration date in the license, for whatever reason, the average consumer would have no way of knowing this. And after 5 years, your license would go away, and there would be nothing you could do about it.

Laws passed by the government should not simply do corporate bidding. Congress is supposed to be there to protect *our* rights, but unfortunately, money talks, and that seems to be the basis of the DMCA. Even with legal issues put aside, technology has the ability to take away our rights, especially if cryptographic "secure hardware" gets incorporated into devices. The government should be using its power to *limit* that, not enhance it! In other words, the government should be passing laws that guarantee that the citizens retain their fair use rights, *regardless* of what the technology allows. And laws should somehow (escrowed keys for corporations, perhaps!?) be in a position to guarantee that technical measures expire at the same time the copyright does, forcing the work into the public domain as has been happened historically. And finally, if the technology is used for new services, laws should ensure that the technology should be designed in such a way that full disclosure of license restrictions is made to the consumers.

I'm not sure I hold out much hope of this happening. The publishers will certainly fight strongly against it. But until such changes are made, expect to see me and others like me doing acts of civil disobedience in order to salvage what we can out of this travesty.

CURRENT ABUSES

The DMCA has been used in a reprehensible fashion in at least 3 cases: the DeCSS case, the case of Edward Felton, and the case of Dmitri Sklyarov. The DeCSS case was mentioned above, where the MPAA used the DMCA as a weapon to attack a tool whose primary use is to make legal use of legally obtained material (DVDs). However, since the particular use is not sanctioned by the MPAA, they used the DMCA to criminalize what would otherwise have been a perfectly legal use.

Increasing the level of appalling behavior, the SDMI Foundation threatened to sue Professor Edward Felton for disclosing an attack on several of the SDMI audio watermarking technologies, even though the attacks were performed at the specific invitation of the SDMI Foundation! By participating in the SDMI challenge, and rejecting any claims to the cash prizes offered, the challenge announcement clearly allowed Felton to retain rights to publish details of his work. In the DeCSS case, Judge Kaplan decided that DeCSS could be suppressed, despite first amendment concerns, because computer code was not allowed the same rights as English prose. This seems to contradict the decision in the Bernstein case that source code is protected speech, but this is just one of the many decisions Kaplan made in this case that were very poorly thought-out. Kaplan decided that code wasn't protected speech, so Felton's paper carefully avoided including any code, and stuck to straight English descriptions. Even so, the SDMI Foundation, in its initial threats to sue Felton and his research group, was somehow trying to make the argument that English descriptions are no longer protected speech. This is clearly absurd, and the RIAA and SDMI Foundation have apparently understood this and backed off in their initial threats, now going so far as to claim they never intended to sue. However, their actions with Professor Felton are clearly at odds with their later revised history of events.

Finally, the case of Dmitri Sklyarov is perhaps the most appalling of all. Among its other problems, the DMCA has taken what has traditionally been a civil matter (copyright issues) and criminalized certain actions. Dmitri Sklyarov wrote a program that removes protections from Adobe e-books, restoring traditional fair-use rights to e-book owners. Furthermore, he wrote this program in Russia, where it is not illegal. His company (and I don't believe there are any claims that he did this personally) distributed his unlocking software from a U.S. website, and on the basis of this Sklyarov was arrested when he made a trip to the U.S. Sklyarov has actually spent time in jail on these extremely flimsy grounds, and faces a criminal prosecution in the matter. Despite the fact that Adobe has subsequently said it doesn't wish for Sklyarov to be prosecuted, the government is continuing in its case. This is apparently the reward that the government gives for people who stand up for their fair use rights under copyright law, and is the primary reason I'm remaining anonymous.

FUTURE

What does the future hold? Hopefully, the government will start acting to protect citizen's rights instead of corporate interests. If this doesn't happen, expect to see many of the current DRM schemes being very publicly broken as an act of protest. I will stay quiet for a while, until any publicity of this current work dies down, but there are many, many others out there that have the ability to do precisely what I've done, and are in fact doing so right now. Remember: "We're mad as hell, and we're not going to take this any more!"

REFERENCES

- [1] <http://www.arl.org/info/fm/copy/timeline.html>
- [2] <http://www.msnbc.com/news/594462.asp?cp1=1>
- [3] <http://www.openp2p.com/pub/a/p2p/2001/01/30/lessig.html>

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