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Legal Issues Affecting Creation And  
Implementation Of DRM Systems

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# Overview of the DMCA (17 USC § 1201)

- Prohibits “circumvention” of “technological protection measures”
- In other words—DRM protecting copyrighted works
- Various remedies
  - Injunction
  - Devices impounded, modified or destroyed
  - Monetary damages (can be tripled for repeat offenders)
  - Defendant may pay plaintiff’s costs and attorneys fees
- Criminal penalties
  - Willful violations
  - For commercial advantage or private financial gain

Selecting A Strong  
DRM System

Overview of  
The DMCA

“Access Control”  
Measures

“Copy Control”  
Measures

“Circumvention”

Minimizing The  
Risk Of DRM

Obtaining User  
Consent

Use Care In  
What You Say

# Overview of the DMCA (17 USC § 1201)

## Addresses Two Different Kinds Of DRM

- Measures that “effectively control access to a work”
- Measures that “effectively protect the right of a copyright owner”—i.e. protects against copying
- Different scope of liability for these different types of technologies

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# Overview of the DMCA (17 USC § 1201)

- “Access Control” Measures—who faces liability?

- Manufacturers and distributors of technology which circumvents access controls
- USERS of technology which circumvents access controls

- “Copy Control” Measures—who faces liability?

- Only manufacturers and distributors of technology which circumvents copy controls

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# “Access Control” Measures

“Effectively controls access to a work” means:

*“in the ordinary course of its operation, requires the application of information, or a process or treatment, with the authority of the copyright owner, to gain access to the work”*

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# “Access Control” Measures

- “Access control” measures completely prevent any experience of the work
- Encryption is often a feature
- Examples:
  - CSS encryption and authentication for DVDs
  - Authentication handshake between PC and server
  - Region codes and authentication codes on
  - Authentication codes on game discs

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# “Access Control” Measures

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- Must “effectively” control access
- If content easily obtained—measure does not “effectively” control access
- This is why encryption is important
- But, if unauthorized conduct leads to weakening of system, may still be considered “effective”



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# “Copy Control” Measures

“Effectively protects a right of a copyright owner [under the Copyright Act]” means:

*“the measure, in the ordinary course of its operation, prevents, restricts, or otherwise limits the exercise of a right of a copyright owner . . .”*

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# “Copy Control” Measures

- “Copy control” measures do not restrict initial experience of the work
- Rather, they limit what can be done with a work thereafter
- For example, may limit ability to reproduce, distribute, print, perform or display a work
- Examples:
  - DVD watermarks
  - Adobe eBook use restrictions
  - Macrovision Analog Copy Protection

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# “Copy Control” Measures

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- Copy control measures may be intertwined with access control measures
- Like access controls—copy controls must “effectively” protect the copyright
- Content containing embedded “copying” preferences of the owner, but which does not enforce them is not effective



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# "Circumvention"

- To circumvent an access control measure:

*"to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner"*

- To circumvent a copy control measure:

*"avoiding, bypassing, removing, deactivating, or otherwise impairing a technological measure"*

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## “Circumvention”

- The troublesome issue of passwords
- Password authentication regimes are clearly “access control” measures as defined by the DMCA
- However, two courts have found that an unauthorized party obtaining access to and using passwords (to gain access to websites) is not “circumvention”
- Hard to see how this is different from obtaining access to and using CSS keys in the DeCSS software—found to constitute circumvention

# Minimizing The Risk Of DRM

- So, you have your robust DRM
- You're protecting your killer content!
- But your customers say that it broke their CD-ROM drive
- And they sue you . . .



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- A number of recent lawsuits by users claim that DRM harmed their computers or other interests
- Disputes turned on two key issues:
  - Alleged lack of user consent
  - Alleged affirmative misstatements about the nature of the DRM systems

# Minimizing The Risk Of DRM

## User Consent

- End-user license must be accepted *before* DRM installed
- In the license, disclose the general nature of the DRM system
- Disclose in reasonable detail potentially contentious items
  - Low level drivers installed?
  - Collects or transmits information about the user or their computer?
  - Overwrites or replaces any files?
  - Anything that could degrade performance or pose risk to hardware?
  - Hidden files?

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# Minimizing The Risk Of DRM

## Affirmative Statements

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- The impulse is to downplay the functionalities of DRM
- Overly zealous “assurances” that user systems will not be affected can be risky
- Marketing and technical materials describing the system must, obviously, be accurate