

Before the
Library of Congress
U.S. Copyright Office
Washington, DC

In re

Software-Enabled Consumer Products Study:
Notice and Request for Public Comment

Docket No. 2015-6

COMMENTS OF
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION

Pursuant to the notice of inquiry published by the Copyright Office (hereinafter “the Office”) in the Federal Register at 80 Fed. Reg. 77,668 (Dec. 15, 2015), the Computer & Communications Industry Association (CCIA)¹ submits the following comments on the notice regarding the subject of software-enabled consumer products.

I. Introduction

As the Office’s notice observes, the omnipresence of software in modern consumer products has greatly improved features and functions for users. CCIA agrees that this raises the prospect of copyright law being brought to bear on an increasingly diverse number of contexts, including many in which Title 17 may be ill-suited as a regulatory framework. These comments identify contexts in which copyright may be improperly applied, and suggests possible solutions to these problems.

The growing demand for feature-rich consumer products has resulted in formerly mundane devices increasingly being manufactured with pre-installed, embedded software critical to their operation. The result is that the use of goods from tractors to toasters has the potential to be subject to exclusive rights under the Copyright Act. While the exercise of these rights (generally, through licensing) is a core aspect of software distribution, licensing terms may also interfere with competition, and restrict the free movement of goods in the marketplace. As

¹ CCIA represents large, medium and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and services. Our members employ more than 750,000 workers and generate annual revenues in excess of \$540 billion. A list of CCIA members is available at <https://www.ccianet.org/members>.

discussed below, although the increasing ubiquity of copyrighted embedded software raises a number of challenges, there are several solutions within established copyright doctrines.

II. Challenges Arising From Widespread Embedded Software

Over a decade ago, the Section 104 report established that the assertion of exclusive rights as well as the terms of licenses may prevent consumers from exercising rights secured by limitations and exceptions in the Copyright Act.² Rightsholders may seek to impede users' ability to resell lawfully acquired goods (*i.e.*, the first sale doctrine), or prohibit activities permitted by fair use, such as (generally pro-competitive) reverse engineering to ensure interoperability.

The Office declined to reach this issue in its 2001 report. Copyright law has developed considerably in the intervening period, with the Supreme Court twice stating that certain boundaries to Section 106 rights are constitutionally required. *See Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003); *Golan v. Holder*, 132 S. Ct. 873, 890 (2012). In the same period, a circuit split has evolved as to whether contractual provisions may “set at naught” federal policy choices embodied in the Copyright Act. *Compare, e.g., Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 269 (5th Cir. 1988) *with Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317 (Fed. Cir. 2003).³ Absent a definitive resolution of this issue by courts or Congress, conflicts between exclusive rights provided by the Copyright Act and important economic activity will persist.

A. First sale

Product licensing agreements for goods with embedded software may attempt to restrict lawful transfers or resale of lawfully acquired products, impairing economically desirable transactions between consumers and secondary buyers. This conflicts with consumers' first sale right under the Copyright Act, codified in 17 U.S.C. § 109. As physical products increasingly incorporate digital components, a strong first sale doctrine will ensure that contractual restrictions do not limit the free movement of goods in interstate commerce, a principle that the Supreme Court's recent *Kirtsaeng* decision reinforces. The prospect that products with

² See U.S. Copyright Office, *DMCA Section 104 Report: A Report of the Register of Copyrights Pursuant to §104 of the Digital Millennium Copyright Act* (2001), at 162.

³ CCIA, *Copyright Reform for a Digital Economy* (2015), at 27-28, <https://www.ccia.net.org/wp-content/uploads/2015/08/Copyright-Reform-for-a-Digital-Economy.pdf>.

embedded software might not be transferrable as *Kirtsaeng* contemplates could have significant deleterious economic effects.

B. *Fair use, reverse engineering, and interoperability*

Users' fair use right to make copies of lawfully acquired software in the course of achieving interoperability is well established, but the ubiquity of embedded software may result in new challenges to this principle. The use of Title 17 in attempts to restrict competition is not a new phenomenon; familiar examples ranging from garage door openers to printer toner are a now over decade old. See, e.g., *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, 381 F.3d 1178 (Fed. Cir. 2004); *Lexmark Int'l v. Static Control Components*, 387 F.3d 522 (6th Cir. 2004). More recently, the Federal Circuit's opinion in *Oracle America, Inc. v. Google Inc.*⁴ represents a disappointing departure from settled copyright law in other circuits that may promote anti-competitive practices in consumer products industries utilizing embedded software.

III. Solutions to Challenges of Embedded Software

Given the ubiquity of embedded software and the robustness of copyright remedies, plaintiffs are likely to continue invoking copyright in novel contexts, including for anticompetitive purposes. The solution to this development, however, is not to arbitrarily limit or alter protections under the Copyright Act based on vague categories such as "everyday products." Such a distinction would be difficult to draft and administer, and would invariably prove to be over- or under-inclusive. Moreover, manufacturers and consumers would have no certainty regarding whether a given product was governed by specialized rules, or the conventional protections of the Copyright Act.

Rather, policymakers should identify to the courts which boundary-policing doctrines are available to prevent overreach and ensure that copyright law remains within its historically intended context of incentivizing authorship.

A. *Misuse*

A more robust doctrine of copyright misuse would alleviate pressures arising from the improper assertion of rights.⁵ If litigants had a meaningful mechanism for contesting such

⁴ 750 F.3d 1339 (Fed. Cir. 2014), *cert denied*, *Google Inc. v. Oracle America, Inc.*, 135 S. Ct. 2887 (2015).

⁵ *Id.* at 23-24.

claims it would contribute substantially to deterring plaintiffs from migrating toward the use of copyright remedies for anti-competitive or other undesirable purposes.

Anticircumvention misuse was suggested as a necessary doctrine not long after the DMCA became law.⁶ As noted above, attempts have been made to use the anticircumvention provisions in 17 U.S.C. § 1201 anti-competitively. However, unlike the DMCA safe harbors, which include the (unfortunately underpowered) Section 512(f), there is no statutory mechanism for addressing misuse of DMCA's anticircumvention provisions in Section 1201, or indeed in the Copyright Act itself. While some courts have recognized copyright misuse as a defense to infringement claims, the doctrine is not fully developed,⁷ and it has yet to be established as a defense to overreaching Section 1201 claims.

Precedent exists for prescribed penalties for fraudulently misrepresenting one's rights under copyright law. Section 29 of the 1909 Act provided statutory damages against those fraudulently placing copyright notices in unprotected articles, which were equivalent to the penalties for willful infringement.⁸ Congress should consider codifying a copyright misuse provision that creates meaningful penalties that deter the willful misuse of copyrights, including in relation to exclusive rights, anticircumvention rights, and notice and takedown.⁹

Such legislation would be consistent with the recently released Department of Commerce copyright white paper, which recognized that statutory damages function as a major chilling effect on innovation.¹⁰ The report contemplates whether remedies like statutory damages should apply in all contexts, and whether reforming statutory damages could help discourage misuse, including in the context of software embedded in consumer products.¹¹

⁶ See Dan L. Burk, *Anti-Circumvention Misuse*, 50 UCLA L. REV. 1095 (2002).

⁷ See, e.g., *Lasercomb America v. Reynolds*, 911 F.2d 970 (4th Cir. 1990) (finding that Lasercomb, by the terms of its copyright license agreement, was attempting to monopolize activity unrelated to the bundle of rights granted by copyright: the right to develop competing software utilizing the same ideas); *DSC Communications Corp. v. DGI Technologies, Inc.*, 81 F.3d 597 (5th Cir. 1996) (finding that DSC's attempts to use its copyright to indirectly gain control over a competitor's use of its microprocessor cards was copyright misuse).

⁸ 1909 Copyright Act, Pub. L. No. 60-349, 35 Stat. 1075 (Mar. 4, 1909), § 29.

⁹ Precisely what remedy should be available, and whether misuse protections should take the form of a mere defense or an affirmative cause of action deserve further study. At the least, a misuse defense should be available to render unenforceable license terms for embedded software that limit resale of the product in which the software is embedded.

¹⁰ Department of Commerce Internet Policy Task Force, *White Paper on Remixes, First Sale, and Statutory Damages: Copyright Policy, Creativity, and Innovation in the Digital Economy* (Jan. 2016), at 98-99, <http://www.uspto.gov/sites/default/files/documents/copyrightwhitepaper.pdf>.

¹¹ *Id.* at 95 & at 50 n.309.

B. *Preemption*

Should copyright licenses reach beyond the conventional bounds of copyright (including foreclosing established limitations and exceptions such as first sale), courts can in appropriate circumstances interpret the Copyright Act to preempt the enforceability of such overreaching terms. Undoubtedly, parties may rationally desire to contract around existing aspects of copyright law, and these terms should be honored when not hostile to important public policy choices. However, statutory limitations on the scope and use of copyright reflect careful balancing of stakeholder and public interests. In various cases where the private law of contract has threatened to supplant Congressional policy choices about the scope of copyright, courts have declined to enforce those terms, and the Copyright Office should not discourage this. To the extent courts have enforced contractual terms contrary to the broader policy goals embodied in the Copyright Act, these cases should be reexamined. *See, e.g., ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996); *Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317 (Fed. Cir. 2003). Allowing copyright in embedded software to impair the free movement of goods across the national economy, for example, is not necessary to incentivize authorship.

IV. **Conclusion**

The fact that copyrighted code is increasingly found in a broad variety of consumer products should not result in copyright becoming the prevailing regulatory paradigm for all consumer products. As has become evident in recent DMCA triennial rulemakings, copyright law is not a suitable apparatus for achieving objectives such as motor vehicle safety regulation. Statutes aimed at incentivizing authorship are poorly equipped for – and indeed, perhaps constitutionally barred from – pursuing such distant objectives. At best, the pursuit of other important societal objectives like consumer protection, privacy, and security through copyright is inefficient. At worst, it will distort doctrine and produce unintended outcomes.

Yet efforts to artificially exclude some set of consumer products from software protection are unlikely to bear fruit. Neither policymakers nor stakeholders can confidently define an administrable class of “everyday products” that would receive a different form of protection under the Copyright Act.

Responses to the ubiquity of copyright-protected subject matter should still be considered, however. The profound strength of contemporary copyright remedies, including extrajudicial relief, independent statutory protection for technological measures, and statutory

damages, will continue to make copyright claims attractive to potential plaintiffs whose interests have little to do with authorial incentive. For these reasons, the Office's report should identify ways by which Congress can strengthen copyright's boundary-policing doctrines such as misuse and preemption.

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