

## Slip-Sliding Away: Time Expiring on DMCA Challenges

by K. Matthew Dames

As time passes, the first year of the new millennium may come to be known as the year that copyright law changed forever. While the year's sexiest copyright battle pitted the record companies against Napster (*A&M Records v. Napster*) and freelance writers preserved their rights (*N.Y. Times Co. v. Tasini*), the three cases that focused on the *Digital Millennium Copyright Act* (Pub. L. No. 105-304, 112 Stat. 2860 [Oct. 28, 1998]) will likely have the greatest lasting doctrinal importance.

And libraries already have been on the losing side of two of them.

For large copyright owners and entertainment conglomerates, 2001 was a vintage year on the litigation front. "One of the most notable copyright developments was the firm rejection by the judicial branch, the executive branch, and the Copyright Office of the endlessly repeated arguments against the [DMCA] by the Electronic Frontier Foundation and its allies," Charles S. Sims told *The New York Times* on Dec. 28, 2001. Sims, an attorney at the New York law firm Proskauer Rose, LLP, successfully represented eight movie studios in their attempt to prevent the distribution of computer code that can defeat the copy protection for digital versatile discs, or DVDs (*Universal City Studios v. Corley*). As reported in its Section 104 report on the DMCA on Aug. 29, 2001, the U.S. Copyright Office decided not to recommend changes to the DMCA after libraries argued, among other things, that the law significantly undermines the first-sale doctrine.

"[The decisions] mean that the DMCA is safe, a recognized and stable part of

U.S. intellectual property law, and a fact of life that hackers and pirates will have to contend with," Sims added.

Conversely, DMCA opponents — which include AALL, other library representative organizations and the Electronic Frontier Foundation — are creating new strategies to ensure that the balance between copyright owners and users is maintained in a digital age. AALL, in particular, is resolved to keep fighting for this balance in the new year.

"The important concerns that libraries continue to have with the anti-circumvention provisions of the DMCA remain a priority for AALL," said Mary Alice Baish, AALL's associate Washington Affairs representative. "We continue to work with members of the Digital Future Coalition as Rep. Rick Boucher, D-Va., develops a legislative fix to permit circumvention in connection with a use of a work that does not infringe copyright."

This report summarizes the major DMCA decisions in 2001 and analyzes possible new copyright developments in 2002.

### One DMCA Provision Causes Much Controversy

The core issue in these cases is whether the DMCA's anti-circumvention provision diminishes the first-sale doctrine, the fair-use privilege and the First Amendment. (Provisions in other titles of the DMCA limit the liability of online service providers and grant copyright protection for boat hull designs.)

The DMCA's anti-circumvention provisions are codified at Section 1201 of the *Copyright Act of 1976*. Section 1201 prohibits people from "circumvent[ing] a technological measure that effectively controls access to a [copyrighted] work" and provides for civil and criminal penalties.

The section's goal is to protect copyright owners' ability to electronically protect their content. The law's opponents, however, are concerned that Section 1201 sweeps too broadly in a way that tilts the copyright balance away from free speech and fair use and toward owners' exclusive and pre-emptive control.

### Sklyarov Case Loses Its Principal Defendant

Although few will admit it, many DMCA opponents quietly considered the criminal prosecution of Dmitry Sklyarov an opportunity. Federal agents arrested Sklyarov, a Russian computer programmer, on July 16, 2001, in Las Vegas after he presented a paper about the Advanced

eBook Processor, a device that purportedly defeats the copy protection code in Adobe Systems Inc.'s eBook Reader.

A federal indictment (*United States v. Sklyarov*) followed on Aug. 28, alleging that Sklyarov and his employer, ElcomSoft Co., Ltd., conspired to circumvent anti-circumvention technologies and marketed and trafficked in those technologies. The maximum penalty on the criminal conspiracy charge is five years' imprisonment and a \$500,000 fine; the maximum penalty for each of the civil charges is five years' imprisonment and a \$250,000 fine. The Sklyarov case is the first criminal prosecution under the DMCA, and it collides with notions of academic freedom.

"Part of the genesis for this program had to do with research that Dmitry was undertaking under his doctoral program," said Joseph Burton, who is representing ElcomSoft and is an attorney with the San Francisco law firm Duane Morris LLP. "It's clear this wasn't just some effort to hack or be malicious about the Adobe software. There is a scientific aspect to this whole thing."

Sklyarov's arrest allowed DMCA critics to argue that academics everywhere were being forced to curb their research because of the chilling, pre-emptive reach of Section 1201. Further, by having the Russian programmer as the lead defendant in the country's first criminal DMCA case, opponents were able to personalize the issue, thereby making it more likely that an otherwise obscure copyright law would garner media and public interest. As Dec. 1, 2001, passed, it seemed certain that Sklyarov would spend the holidays in America as a condition of his \$50,000 bail. All that changed Dec. 13, 2001. In a stunning reversal, the U.S. Attorney for the Northern District of California agreed to defer prosecuting Sklyarov in exchange for his truthful testimony against his employer. The "pretrial diversion agreement" that the programmer signed effectively dismisses the case against him. Although the government may call Sklyarov as a witness in its remaining case against ElcomSoft, he returned to Russia on New Year's Eve, according to a Reuters report.

The indictment stands against ElcomSoft. Burton indicated it is highly unlikely that the company will plead guilty to any of the charges. "You can never say never, but there's also the possibility I could teleport to the moon," he said. "A guilty plea here has about the same chance." Motions on the DMCA issues are scheduled to be heard in early April; the trial is expected to begin on April 15.

(continued on page 19)

The *Sklyarov* case was beginning to do what the *Napster* case had already managed to accomplish: begin galvanizing public interest in copyright law and grassroots support for amendments to Section 1201 in particular. The programmer became the face of his case much like Shawn Fanning had become the face of the *Napster* case.

Without Sklyarov's presence, public and media interest in the case may wane, and they are weapons DMCA opponents will need as leverage for a possible battle in Congress. After two federal courts denied First Amendment challenges to the DMCA, the legislative battle may be the sole chance for any change.

## Losing Two

The two DMCA cases that were decided on Nov. 28, 2001, were based on challenges similar to those that libraries and civil libertarians waged against the *Communications Decency Act* (see *Reno v. ACLU*). Essentially, the plaintiffs in both DMCA cases argued that Section 1201 acted as a prior restraint against protected speech.

The courts, however, rejected these arguments. In one of the cases, the U.S. Court of Appeals for the Second Circuit upheld a lower court's injunction that prohibits defendants Eric Corley and his company, 2600 Enterprises, Inc., from posting on their Web site a computer program that allows access to the restricted content on DVDs.

"[I]t is not for us to resolve the issues of public policy implicated by the choice we have identified. Those issues are for Congress," wrote Judge Jon O. Newman in a unanimous decision. "Our task is to determine whether the legislative solution adopted by Congress, as applied to the appellants by the District Court's injunction, is consistent with the limitations of the First Amendment, and we are satisfied that it is."

As of this writing, Corley had not decided whether to ask for an en banc hearing at the Second Circuit or appeal directly to the U.S. Supreme Court, according to Cindy Cohn, legal director for the Electronic Frontier Foundation.

Across the Hudson River, District Judge Garrett E. Brown Jr. dismissed another First Amendment challenge to the DMCA filed by a group of professors led by Princeton

University's Edward Felten. The professors had sued the Recording Industry Association of America in April shortly after RIAA threatened to sue them for disclosing research that summarized how they cracked a watermark — a form of electronic access protection for compact discs — developed by the Secure Digital Music Initiative.

Judge Brown rejected the claim without issuing a written opinion, ruling that the case did not meet the case and controversy requirement, Cohn said.

"As we have said time and again, Professor Felten is free to publish his findings," said Cary Sherman, RIAA's general counsel, after the decision was announced.

Others were not so sanguine. "It was a mistake for the court to dismiss this case," said Julie Cohen, a law professor at Georgetown University who specializes in copyright issues. "The court said that Felten's claim was speculative, but that ignores the chilling effect of the jurisprudence. If researchers want to go ahead and act like there is an implicit exemption, then it's OK, but that probably isn't going to allay the fears of foreign professors who fear being prosecuted."

Felten, who is visiting this year at Stanford University, could not be reached for comment. EFF's Cohn, who coordinated both the *Felten* and *Corley* cases, said the professor was still considering whether to appeal the decision at press time.

## Copyright Owners to Tighten Digital Access in 2002

Buoyed by their victories, copyright owners have increasingly used technological restrictions on digital content. These restrictions prohibit unauthorized access and use of digital content but also perfectly control legal and non-infringing uses of copyrighted works.

Throughout 2001, record companies tested copy-protected compact discs throughout Europe to mixed reviews. The trend became a domestic reality during the Christmas holiday, when Universal Music Group announced in late November that the company was going to place copy-protection technology on its "More Fast & Furious" compact disc, a follow-up to a popular movie soundtrack, according to a Nov. 28, 2001, Reuters release.

The copy-protection scheme keeps purchasers from saving the disc's contents to their computer hard drives. But the mechanism could also keep buyers from playing the disc on a computer CD-ROM or an auto compact disc player — both of which share the same technical specifications. Any attempt to bypass this protection — even an attempt from an authorized purchaser — could run afoul of the DMCA.

As of this writing, it remains to be seen whether American consumers will rebel against this tactic, as have European consumers. Universal, however, has agreed to issue refunds to domestic consumers who cannot play the "Furious" disc.

Universal's move follows the lead of country music artist Charley Pride, who released a copy-protected compact disc in May. Karen DeLise, a consumer in California, has sued Pride's recording label, Fahrenheit Entertainment, alleging that the record company's failure to inform consumers about the copy-protection mechanism and its potential consequences violates that state consumer protection codes, according to a Sept. 7 report on News.com.

If South Carolina Sen. Fritz Hollings has his way, inclusion of these digital restrictions will become a mandatory part of the consumer electronics manufacturing process. Hollings' *Security Systems Standards and Certification Act*, currently in draft form, would levy penalties against electronics manufacturers if they fail to create computer equipment that does not implement "certified security technologies." Anyone who distributes copyrighted material that has disabled the item's electronic securities features could be held civilly or criminally liable.

Hollings' bill got lost in the legislation related to the Sept. 11 terrorism attacks. But the bill enjoys wide support from the entertainment industries and is sure to appear on Congress' legislative docket this year or in 2003.

**K. Matthew Dames** (*kmd32@law.georgetown.edu*) is the resident librarian at Georgetown University's Edward Bennett Williams Law Library in Washington, D.C.