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Tales from 'De-Crypt': Movie Industry Wins a Round in DVD Copyright Protection Battle

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The digital age has been a boon to the entertainment industry, but it is also the bane of copyright owners. As entertainment content has become available in digital form, the risks of unauthorized duplication and worldwide dissemination of copyrighted material have increased exponentially.

Copyright owners have always taken measures to protect their intellectual property from piracy. As content delivery has become more technologically sophisticated, protection technology has had to keep pace. In conjunction with the recent development of digital versatile disks (DVDs), a new access-control and copy-prevention system, Content Scramble System (CSS), was developed to prevent infringers from making nearly-perfect digital copies of feature-length motion pictures.

Even the toughest codes can be broken, however, and CSS was no exception. In this case, a teen-ager in Norway decoded CSS and created a program that could "rip" a film from its DVD medium so that it could be played on computers, copied and sent to others over the Internet. The teen-ager posted this "DeCSS" code on his personal Web site, where it was subsequently copied and offered for download by many other sites.

When the motion-picture studios discovered that DeCSS existed and was widely available on the Internet, it commenced efforts to eliminate these postings. Many Web site operators voluntarily removed DeCSS, but others were recalcitrant. The Motion Picture Association of America, therefore, commenced litigation in federal court in New York and obtained a preliminary injunction barring certain site operators from posting DeCSS.

Significantly, the association did not accuse the defendants of copyright infringement because there was no evidence that they had actually used the DeCSS software to make unlawful copies of any feature films. Rather, the association claimed that the defendants had violated the provisions of the Digital Millennium Copyright Act that make it unlawful either to circumvent technological-protection measures that have been put in place to control access to copyrighted works, or to create and make available technologies that are intended to defeat such copyright-protection measures.

After the preliminary-injunction hearing, the defendants removed DeCSS from their Web site. But, in a self-described act of "electronic civil disobedience," they posted a list of nearly 500 "links" to other sites from which DeCSS could continue to be downloaded. The district court had not enjoined this conduct, which all but eviscerated the preliminary injunction it had issued.

The lawsuit went to trial this summer and, on Aug. 17, the court entered its final judgment. The court permanently enjoined the defendants from posting DeCSS on any site or in any other way trafficking in DeCSS. It further enjoined the defendants from trafficking in any technology designed or produced for the purpose of circumventing CSS or

any other technological measure adopted by the motion-picture studios to protect and control access to their films.

The 90-page opinion accompanying the court's judgment thoroughly condemned the defendants' actions and methodically rejected each and every one of the legal justifications offered for their conduct. *Universal City Studios Inc. v. Reimerdes*, www.nysd.uscourts.gov (S.D.N.Y. Aug. 17, 2000). The court's treatment of certain legal issues is particularly noteworthy and may have the most impact upon future litigation under the Digital Millennium Copyright Act.

*** Intent to infringe copyrights.** The association alleged that posting DeCSS violated Section 1201(a)(2) of the Copyright Act, which prohibits offering to the public any technology that "is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under [the Copyright Act]." The trial court found that the defendants had offered DeCSS to the public by making it available for download on its Web site and that DeCSS constituted "technology" within the meaning of the statute.

The defendants claimed that DeCSS had not been primarily designed to circumvent copyright-protection measures. According to the defendants, DeCSS was created to further the development of a DVD player that would run under a different operating system.

In the trial court's view, however, the motivation of those who created DeCSS was immaterial to the question of whether these defendants violated the anti-trafficking provision of the Digital Millennium Copyright Act: "The inescapable facts are that (1) CSS is a technological means that effectively controls access to plaintiffs' copyrighted works, (2) the one and only function of DeCSS is to circumvent CSS, and (3) defendants offered and provided DeCSS by posting it on their Web site. Whether defendants did so in order to infringe, or to permit or encourage others to infringe, copyrighted works ... simply does not matter for purposes of Section 1201(a)(2)."

*** Fair use.** The defendants also argued that without the ability to de-encrypt DVDs, it would not be technologically possible to copy and use the encrypted films in ways that would constitute fair use of those films under the Copyright Act. The defendants argued that the Digital Millennium Copyright Act should not be construed to make it difficult or impossible to make any fair use of the copyrighted works contained on DVDs and that the statute, therefore, did not reach the defendants' activities, which were simply a means to enable users of DeCSS to make such fair uses.

The district court rejected this argument, finding that Congress had considered the issue of fair use when it enacted the Digital Millennium Copyright Act. The court recognized that Section 107 of the Copyright Act provides that certain otherwise wrongful uses of copyrighted works are "fair uses" that do not constitute infringement. But, Congress chose not to make fair use a defense to the Digital Millennium Copyright Act's proscriptions against trafficking in technology designed to circumvent copyright-protection technology. Thus, it did not matter whether DeCSS could be used to circumvent copyright-protection technology in order to make fair uses of the protected works.

*** Linking.** The defendants rendered virtually meaningless the court-issued preliminary injunction by linking their Web site to other sites that made DeCSS available to users. The association, therefore, sought a permanent injunction preventing such linking on the basis that linking to another Web site containing DeCSS independently constituted conduct prohibited by the Digital Millennium Copyright Act's anti-trafficking provisions.

The district court observed that to the extent the defendants linked to sites that automatically download DeCSS, or to Web pages that display nothing more than the DeCSS code, there was no doubt that the linking was the "functional equivalent" of directly trafficking in DeCSS.

While it might be difficult to treat a link to a site containing a large quantity of information and material aside from DeCSS as constituting trafficking in DeCSS merely because the code happened to be available on the site as well, the court had no problem concluding that the defendants' links constituted such trafficking because the defendants

purposely encouraged others to post DeCSS and advertised on their own site that DeCSS could still be obtained by clicking on various links.

***The First Amendment.** As most Internet infringers do, the defendants in this lawsuit sought to cloak their conduct in First Amendment garb. The defendants argued that computer code is protected speech and that the Digital Millennium Copyright Act's prohibition of dissemination of DeCSS violated their First Amendment rights.

The court agreed that computer code was merely another form of idea expression and that a restriction on such expression had to satisfy First Amendment concerns. But the court observed that restrictions on expression fall into two general categories: "content based restrictions," which inhibit the expression of particular ideas, and "content neutral restrictions," which have nothing to do with the content of the expression but have the incidental effect of limiting expression.

Content-based restrictions on speech are permissible only if they serve compelling state interests by the least restrictive means available; content-neutral restrictions typically will be upheld if they serve a substantial governmental interest and restrict First Amendment freedoms no more than necessary.

The district court concluded that even though DeCSS code is expressive, the Digital Millennium Copyright Act was not subject to the strict scrutiny applicable to content-based restrictions on speech. The court observed that DeCSS did more than merely convey the message of its programmer. It also had a distinctly functional, nonspeech aspect, in that it enabled computer users to circumvent the access-control system incorporated into feature-film DVDs.

In the district court's view, Congress enacted the anti-trafficking provisions of the Digital Millennium Copyright Act not to suppress ideas but to prevent people from distributing the means to circumvent copyright-protection measures. Any impact on the dissemination of ideas was "purely incidental to the overriding concerns of promoting the distribution of copyrighted works in digital form while at the same time protecting those works from piracy."

Accordingly, the court found that the Digital Millennium Copyright Act was content neutral and that the anti-trafficking provisions of the Digital Millennium Copyright Act were a valid exercise of Congress' authority. The opinion in *Universal* represents only the views of one district-court judge. Nevertheless, the court's interpretation of the Digital Millennium Copyright Act's anti-circumvention provisions and its analysis of the myriad legal theories served up by the defendants will be a resource for other tribunals in currently-pending and future litigation.

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