



ELECTRONIC FRONTIER FOUNDATION eff.org

TPMs and Civil Rights

The Impact of the U.S. DMCA on
Freedom of Expression, Scientific
Research, and Innovation

Trans-Pacific Partnership Stakeholder Forum
Santiago, Chile February 15, 2011

Matt Zimmerman
Senior Staff Attorney
mattz@eff.org



Key Points

- Countries' policy choices about the scope and structure of legal protection for TPMs have significant implications for education, scientific research, free expression, competition policy, and innovation.
- As U.S. experience with DMCA over last 12 years has shown, overbroad legal protection for TPMs can cause considerable harm to important public policy interests outside the copyright sphere.
- The TPP agreement should leave the choice of how to structure TPM provisions to member economies.



WIPO Copyright Treaty - Article 11

Contracting Parties shall provide *adequate legal protection* and *effective legal remedies* against the circumvention of *effective technological measures* that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.



Digital Millennium Copyright Act

Particularly broad implementation. Prohibits:

- (1) Act of circumvention of “technological measures” that control *access* to copyrighted works
 - excerpt eBook, rip DVDs to iPod
 - (2) Tools that can circumvent technological access controls and *use* restriction controls
 - DeCSS to make back-up copy of DVD
 - Software to remove CD copy-protection
- 7 exceptions to access ban for public policy purposes.
 - Triennial rulemaking can grant 3 yr exemptions to access ban, but does not authorize devices.



Impact of DMCA

- Overrides national copyright law exceptions.
- Chilling effect on scientific research and publication.
- Anti-competitive misuse.
- Stifled technological innovation and creation of interoperable devices.
- Threatened free and open source software.
- Report: “Unintended Consequences: 12 Years Under the DMCA”
 - <http://www.eff.org/unintendedconsequences>



Lawful Use Restricted

- TPMs can prevent lawful non-infringing uses.
- U.S. copyright law's balanced set of rights replaced by "anti-circumvention" law:
 - new access right - protection beyond copyright
 - no right to circumvent to make fair use
 - device ban - downstream fair use no defense
 - U.S. statutory exceptions overridden - as documented by those who have had to apply for exemptions every 3 years:
 - Libraries and Archives not able to make copies of TPM protected works to preserve cultural heritage;
 - Educators sought exemption to make DVD clips for film class;
 - American Federation of Blind for e-book text to speech.



Chilled Scientific Research

- Chilling effect on scientific researchers, journalists, publishers:
 - 2000 Music industry group threatened to sue Princeton Professor Felten and research team for publishing research paper on security vulnerabilities.
- Ongoing effect - computer security weakened:
 - 2005 Researcher discovered Sony BMG music CD “Rootkit” software security risk but consulted with lawyers for several weeks before raising alarm.
 - 2006 exemption for good faith security testing of music CD access TPMs.



Anti-Competitive Misuse

- Blocked aftermarkets, product lock-in at monopoly prices:
 - printer cartridges (*Lexmark v. SCC*)
 - garage remote controls (*Chamberlain Group v. Skylink Technologies*)
 - computer maintenance service (*Storage Tek v. CHE*)
 - cell phone unlocking (*TracFone v. SOL Wireless*)
 - recent administrative exemption, but not for tools
- Geographic market segmentation:
 - Sony Playstation MOD chips (*Sony v. Gamemasters*; *Sony v. Stevens*)



Technology Innovation Stifled

- Overbroad TPM laws give control over pace and nature of technology innovation:
 - TPMs and license conditions control DVD player feature set.
 - Prevent creation of interoperable new technologies.
 - DVD movie jukeboxes (*DVD-CCA v. Kaleidescape*)
 - iTunes on iPods (*Apple v. RealNetworks*)



Conclusions

- TPP Agreement should not include specific TPM provisions, but leave policy choices on how to structure TPM laws to member economies.
- If the TPP Agreement includes TPM provisions they should be based on the WCT and WPPT provisions, and give member economies discretion in how to implement.
- Key principles:
 - Circumvention should only be unlawful if results in copyright infringement.
 - TPM laws should not hinder creation of new copyright exceptions and limitations to meet domestic needs.
 - TPM laws should permit use of circumvention devices/ services for non copyright-infringing purposes.
 - Give member economies discretion to regulate anti-competitive misuse of TPMs and structure penalties to minimize chill on innovation and socially beneficial activities.



ELECTRONIC FRONTIER FOUNDATION eff.org

TPMs and Civil Rights

The Impact of the U.S. DMCA on
Freedom of Expression, Scientific
Research, and Innovation

Trans-Pacific Partnership Stakeholder Forum
Santiago, Chile February 15, 2011

Matt Zimmerman
Senior Staff Attorney
mattz@eff.org