

Rethinking Anticircumvention's Interoperability Policy

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This paper examines the restrictive effect of the anticircumvention provisions of the Digital Millennium Copyright Act (DMCA) on interoperability. It considers antitrust enforcement as a potential means of mitigating the DMCA's impact on interoperability, but argues that directly limiting the scope of the anticircumvention provisions offers a preferable solution.

Interoperability, the ability of two systems to exchange usable information, is widely touted for its ability to spur incremental innovation, increase competition, and decrease barriers to accessibility and consumer choice. In light of these attributes, intellectual property law has developed a fairly consistent interoperability policy. Follow-on innovators are generally free to create products that work with existing systems, unless the demands of patentability have been satisfied—and even then, under only limited circumstances.

The anticircumvention provisions of the DMCA represent a troubling departure from this policy, and the DMCA's reverse engineering exemption, because of its narrow focus on so-called software-to-software interoperability, is insufficient to safeguard interoperability. Instead, the DMCA results in patent-like rights to exclude products interoperable with protected platforms. Although courts faced with attempts to preclude interoperability have limited the reach of the DMCA in the durable goods context, many cases involving traditional copyrighted works are likewise best understood as battles over controlling platforms and preventing interoperability.

Subjecting restrictions on interoperability to antitrust scrutiny is one approach to holding anticircumvention law in check. Mandating disclosure of information necessary for achieving interoperability, after all, is not an uncommon antitrust remedy. But a number of considerations suggest antitrust is a poor tool for lessening the DMCA's impact on interoperability. First, whether characterized as tying, denial of essential facilities, or refusal to deal, the use of anticircumvention law to impede interoperability appears unlikely to trigger antitrust enforcement. Second, while antitrust can identify and address behavior that harms competition, incentives for creating and disseminating works can be adjusted even in competitive markets. And adjustments to the scope of intellectual property rights are not the province of antitrust. Third, reliance on *ex post* antitrust enforcement would result in fact-intensive litigation, slowing the pace and increasing the cost of the very innovation interoperability is intended to enable.

Rather than mandating interoperability through antitrust enforcement, this paper argues in favor of a solution that addresses the DMCA's effects on interoperability at their source. Section 1201(f) offers the most direct means of curbing the DMCA's impact on interoperability. Although a more forgiving reading of § 1201(f) by the courts could create an environment more hospitable to interoperability, the provision's narrow text compels a legislative fix. This paper will offer an overhaul of § 1201(f) that protects the legitimate interests of copyright holders while guarding against the collateral control over platforms the DMCA currently enables.