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CRIMINAL DEFENSES TO ANTI-CIRCUMVENTION CHARGES
FOR MODIFYING VIDEO GAME CONSOLES

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ABSTRACT

In United States v. Crippen, Matthew Crippen was charged with modifying Xbox 360 consoles for others for a fee. His modifications allowed the consoles to run unlicensed software in violation of the anti-circumvention provision of the Digital Millennium Copyright Act (DMCA). In the first criminal trial arising from these provisions, the United States District Court for the Central District of California granted a motion in limine allowing the government to exclude evidence of fair use, holding that the DMCA provisions contained no fair use exception. After the prosecution abruptly dropped the case in December 2010, several questions remain unanswered: What rights do consumers have to modify video game consoles they purchase legitimately? What role does fair use play in DMCA criminal cases? And what criminal defenses are available in the context of the DMCA? This Article will focus specifically on the DMCA in the criminal law context, while also investigating the background of the Crippen case.

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TABLE OF CONTENTS

Introduction.....	106
I. The Digital Millennium Copyright Act	106
A. Facts.....	108
B. Dismissal.....	109
III. What Criminal Defenses Are Available in the Context of the DMCA?.....	109
A. Fair Use	110
B. Failure of Proof.....	111
Conclusion	113
Practice Pointers.....	114

INTRODUCTION

In an age when both technology and user sophistication are developing at an unprecedented rate, “jailbreaking” smart phones¹ and modifying video game consoles have become commonplace. Illegal modifications often lead to civil penalties, but until the federal government brought charges against Matthew Crippen for modifying Xbox 360s,² no individual had been prosecuted for circumventing closed systems for commercial purposes. Although Crippen’s case was ultimately dropped, it raised many questions regarding criminal defenses and the anti-circumvention provision of the Digital Millennium Copyright Act (DMCA) as applied to closed systems.

I. THE DIGITAL MILLENNIUM COPYRIGHT ACT

In 1998, Congress passed the DMCA to implement two World Intellectual Property Organization (WIPO) treaties: the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).³ WIPO, established in 1967, is a

¹ Jailbreaking smartphones is the act of circumventing the standard limitations of one’s mobile device and allow it to download prohibited third-party software.

² The Xbox 360 is Microsoft’s video game console.

³ THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998: U.S. COPYRIGHT OFFICE SUMMARY, 1 (1998), <http://www.copyright.gov/legislation/dmca.pdf>.

specialized agency in the United Nations dedicated to the promotion, development, and protection of intellectual property.⁴

The DMCA provides two principal anti-circumvention protections. The first protects copyright holders from the actual act of circumventing technological measures, while the second prohibits the “distribution or sale” of technology that is designed to circumvent protection measures.⁵ This Article will address the former in the context of circumventing video game consoles.

The DMCA also provides several exceptions to its anti-circumvention provisions. The statutory exceptions include exemptions for government activities, reverse engineering, and uses by non-profit libraries.⁶ In addition to the exceptions enumerated in the Act, further exceptions are promulgated through administrative rulemaking and are updated every three years.⁷ Most recently, the Library of Congress, with the recommendation of the Register of Copyrights, determined that smartphones qualify for an exemption because it believed that limiting their closed systems would adversely affect non-infringing uses.⁸

The Library of Congress did not extend the exception to video game consoles because the Register found no evidence that the inability to circumvent access controls on those consoles had a substantial adverse impact on non-infringing uses.⁹ The agency’s final ruling suggested that allowing circumvention of consoles would diminish their value because they would no longer be secure platforms to develop legitimate content.¹⁰ Although circumvention proponents analogized smartphones to video game consoles, the Register distinguished video game consoles because of the more complex nature of developing video games for consoles.¹¹

⁴ *What is WIPO?*, WIPO, <http://www.wipo.int/about-wipo/en/> (last visited Nov. 26, 2012).

⁵ 17 U.S.C. § 1201 (2006).

⁶ 17 U.S.C. § 1201(d)–(j).

⁷ *See* 17 U.S.C. § 1201(a)(1)(C).

⁸ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 77 Fed. Reg. 65,260, 65,263 (Oct. 25, 2012) (to be codified at 37 C.F.R. pt. 201), available at <http://www.copyright.gov/fedreg/2012/77fr65260.pdf>.

⁹ *Id.* at 65,272.

¹⁰ *Id.*

¹¹ *Id.*

Under the anti-circumvention provisions of the DMCA, criminal defendants may face fines or imprisonment.¹² To invoke criminal penalties under the Act, a defendant must act willfully for the purpose of commercial gain.¹³ For the first offense, the fine will be a maximum of \$500,000 and/or a maximum prison sentence of five years.¹⁴ Any subsequent offenses will not be more than \$1,000,000 and/or imprisonment that will not exceed 10 years.¹⁵

II. *UNITED STATES V. CRIPPEN*

A. *Facts*

In 2009, 28-year old Matthew Crippen was arrested and charged with running a business that modified Microsoft Xbox 360 consoles in violation of the DMCA.¹⁶ For roughly \$60 to \$80, Crippen's modifications allowed buyers to run pirated or unauthorized games by circumventing the firmware of the Microsoft video game console.¹⁷ After the Entertainment Software Association (ESA) was tipped off, it investigated Crippen's activities by purchasing a modified Xbox 360.¹⁸ The ESA

¹² Compare 17 U.S.C. § 1204 (2006) (setting criminal penalties), with 17 U.S.C. § 1203 (setting civil penalties using "equitable and monetary damages similar to those under the Copyright Act." To prevent or restrain a violation, a permanent or temporary injunction may be granted. Awards of damages may consist of both actual damages suffered by the party and statutory damages between \$200 and \$2,500); THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998: U.S. COPYRIGHT OFFICE SUMMARY, 1 (DEC. 1998), <http://www.copyright.gov/legislation/dmca.pdf>.

¹³ 17 U.S.C. § 1204(a).

¹⁴ *Id.* at 1204(a)–(b).

¹⁵ *Id.*

¹⁶ David Kravets, *Corporate Cop's Covert Video at Issue in Xbox Modding Case*, WIRED (Nov. 8, 2010, 4:47 PM), <http://www.wired.com/threatlevel/2010/11/xbox-trial-dustup/>.

¹⁷ *Id.*

¹⁸ David Kravets, *Student Arrested for Jailbreaking Game Consoles – Update*, WIRED (Aug. 4, 2009, 12:53 PM), <http://www.wired.com/threatlevel/2009/08/game-console-jailbreaking-arrest/>; The ESA is a "U.S. association exclusively dedicated to serving the business and public affairs needs" of video game and computer companies. They offer a range of services to software publishers, including a global anti-piracy program which aims to reduce the cost

subsequently reported Crippen to the Department of Homeland Security and he was arrested.¹⁹

B. Dismissal

After presenting witnesses and proposing jury instructions to the judge, the prosecution decided to move for dismissal of its own case. Tony Rosario and Kevin McGrail, two of the witnesses presented by the government, had potentially broken the law.²⁰ Rosario was an undercover agent with the ESA who responded to Crippen's advertisement and secretly taped the meeting.²¹ He later presented new evidence at trial; this new evidence was not made available to the defense beforehand.²² McGrail, a Microsoft employee, had previously modified consoles himself during his college years.²³ After Judge Philip Gutierrez berated the prosecution for presenting government witnesses who had engaged in unlawful behavior, as well as for proposing harmful jury instructions, the prosecution dropped the case.²⁴

III. WHAT CRIMINAL DEFENSES ARE AVAILABLE IN THE CONTEXT OF THE DMCA?

Had Crippen's case been decided, the issue of criminal liability and defenses concerning the circumvention provisions of the DMCA might have become clearer. Instead, uncertainties remain as to what criminal defenses might prove effective against the anti-circumvention provisions of the DMCA. Defendants, as the party

of piracy that affects the U.S. entertainment software industry.
<http://www.theesa.com/about/index.asp>

¹⁹ *Id.*

²⁰ David Kravets, *Prosecutors Dismiss Xbox-Modding Case Mid-Trial*, WIRE (Dec. 2, 2010, 3:18 PM), <http://www.wired.com/threatlevel/2010/12/crippen-dismissed>.

²¹ *Id.*

²² *Id.* (presenting new evidence in the form of a sworn declaration that Crippen inserted a pirated game into the console).

²³ David Kravets, *Xbox-Modding Judge Berates Prosecution, Puts Trial on Hold*, WIRE (Dec. 01, 2010, 3:36 PM), <http://www.wired.com/threatlevel/2010/12/xbox-judge-riled/>.

²⁴ *Id.*

that must raise these defenses, bear the burden of this uncertainty.²⁵

A. Fair Use

The Copyright Act gives copyright owners specific exclusive rights to uses of their protected works, allowing them to freely engage in activities such as reproducing, performing, or distributing copies of the works.²⁶ One important limitation to these exclusive rights is provided by the fair use doctrine, which carves out an exception “for purposes such as criticism, comment, news reporting, teaching (including multiple copies of classroom use), scholarship, or research”; such uses are considered equitable and do not constitute infringement.²⁷

Section 107 of the Copyright Act does not offer any bright-line rules, nor does it offer any test that will grant a litigant a per se fair use argument.²⁸ Instead, the court must take a case-by-case approach generally guided by a four-factor balancing test to determine if a particular use is a fair use: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.²⁹ These factors should be considered as a whole and “are to be explored, and the results weighed together.”³⁰

In *Crippen*, the court granted the United States’ motion in limine to exclude fair use evidence at trial.³¹ The DMCA was enacted to address holes in existing copyright protections, and these protections are separate from those afforded by copyright law.³² However, the circuit courts have been split on this issue of

²⁵ PAUL H. ROBINSON ET AL., 1 CRIM. L. DEF. §3 (2012).

²⁶ 17 U.S.C. § 106 (2006).

²⁷ See Joel Androphy, 3 WHITE COLLAR CRIME § 28:13 (2d ed.) (July 2012); 17 U.S.C. § 107 (2006).

²⁸ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

²⁹ *Id.* at 576.

³⁰ *Id.* at 578.

³¹ Criminal Minutes – General at 1, *U.S.A. v. Matthew Crippen*, CR 09-703 PSG (C.D. Cal. 2010).

³² Noah J. Wald, *Don’t Circumvent My Dongle! Misinterpretation of the*

separability, and judicial interpretations have “blur[red] the distinct line between copyright protection and the protection bestowed by the DMCA.”³³ The Federal Circuit held that a nexus between the circumventing acts and the violation of protections afforded by the Copyright Act must exist in order to violate the DMCA.³⁴ The Ninth Circuit, however, rejected the Federal Circuit’s interpretation and, in a case of first impression, ruled that no such nexus is required.³⁵ Whether or not copyright infringement is necessary for a violation of the DMCA is an essential issue because the fair use defense only applies to copyright infringement. The court in *Crippen* found that fair use did not apply because no nexus is necessary for a violation of the DMCA, reasoning that “the DMCA rebalanced the interests to favor the copyright owner” when circumvention was present without infringement.³⁶

B. Failure of Proof

Despite the ruling on the fair use issue, *Crippen* could still have raised a failure of proof defense.³⁷ At issue in *Crippen* was the provision in § 1204, that criminalizes violations of § 1201 or 1202 when done “willfully and for purposes of commercial advantage or private financial gain.”³⁸ “Willful” violations are defined as “intentional act[s] done in violation of the law.”³⁹ However, in terms of copyright infringement, the circuit courts are split as to the scope of this definition. The majority view is that willful intent is a “voluntary, intentional violation of a known legal duty,” or,

Digital Millennium Copyright Act Threatens Digital Security Technology, 33 T. Jefferson L. Rev. 325 (2011).

³³ *Id.* at 327.

³⁴ *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, 381 F.3d 1178 (Fed. Cir. 2004).

³⁵ *MDY Industries, LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928 (9th Cir. 2010).

³⁶ Criminal Minutes – General at 1, *U.S.A. v. Matthew Crippen*, CR 09-703 PSG (C.D. Cal. 2010).

³⁷ Paul H. Robinson et al., 1 *Crim. L. Def.* §22 (2012).

³⁸ 17 U.S.C. § 1204(a) (2006) (emphasis added).

³⁹ Joel Androphy, 3 *White Collar Crime* § 28:4 (2012).

essentially, an intent to violate the law itself.⁴⁰ A minority of courts, including some within the Ninth Circuit, believe that only willful intent to copy the works is necessary, and not actual intent to violate the law.⁴¹

Although the Supreme Court has yet to address the willfulness standard in the context of the DMCA, it has come to a conclusion on this issue in the field of tax law. In *Cheek v. United States*, the defendant was charged with violating a tax law that required willful conduct.⁴² The Supreme Court held that the willfulness element can be negated by an actual good-faith belief that one is not violating a tax law because of a misunderstanding of the complex Internal Revenue Code.⁴³ Even though the defendant was found to have acted voluntarily and intentionally, such a good-faith belief does not have to be objectively reasonable to negate willfulness.

If the Supreme Court were to analyze the willfulness element of the DMCA criminal provisions by adopting an analytical approach similar to that in *Cheek*, then a failure of proof defense might prove successful. The Supreme Court's holding in *Cheek* mirrors the view of the majority of circuits on copyright infringement and requires that "willful intent" entail intent to violate the law itself.⁴⁴ Similar to the complex tax code discussed in *Cheek*, the DMCA contains a perplexing set of statutes that the Supreme Court has yet to interpret. In *Cheek*, the Court discussed how the defendant's knowledge of his duty was vital to proving willfulness, and that good-faith belief does not have to be objectively reasonable.⁴⁵ This holding was reinforced by the complexity of the tax system in the U.S., which a lay person would understand only in a very limited way.⁴⁶ Similarly, the anti-circumvention provisions of the DMCA constitute a complicated

⁴⁰ *United States v. Moran*, 757 F. Supp. 1046, 1049 (D. Neb. 1991).

⁴¹ *United States v. Moore*, 604 F.2d 1228, 1233-34 (9th Cir. 1979); *United States v. Backer*, 134 F.2d 533, 535 (2d Cir. 1943).

⁴² *Cheek v. United States*, 498 U.S. 192 (1991).

⁴³ *Id.*

⁴⁴ *Moran*, 757 F. Supp. at 1049.

⁴⁵ *Cheek*, 498 U.S. at 203.

⁴⁶ *Id.* at 200 (discussing the complexity of the tax system and how Congress did not intend for a lay person to suffer criminal consequences because of a lack of understanding of that system).

and often misunderstood regime that has courts have struggled to uniformly interpret.

A defendant in Crippen's position could raise a failure of proof defense to negate the element of willfulness by arguing that he was unaware that he was violating the DMCA. Section 1202(a)(1)(A) states that "no person shall circumvent a technological measure that effectively controls access."⁴⁷ The issue with console modification is whether the modification alone constitutes felonious conduct since the act of modification does not circumvent any protected software. The actual circumvention therefore seems to occur when the user inserts a copied disk. The defense could argue that by modifying the console, there is a subjectively reasonable good faith belief that no provision of the DMCA is being violated when the modifications are made. Although a person modifying a console may "knowingly" act with the knowledge that users will circumvent protections, he may not necessarily have the specific intent necessary to act "willfully."

CONCLUSION

Because *Crippen* was dismissed, the application of the DMCA in the criminal context remains unclear. The court disallowed the fair use defense, invoking the Ninth Circuit's interpretation of the anti-circumvention provisions. That approach allows for a fair use defense in copyright infringement cases, but not for anti-circumvention violations. However, a future defendant accused of circumventing a closed system could also raise a failure of proof defense, which would rely on negating the "willfulness" element required by §1204(a) of the DMCA. Unfortunately, since the circumvention provisions have yet to be interpreted in the criminal context, it is difficult to project where courts will arrive on the issue.

⁴⁷ 17 U.S.C. § 1201(a)(1)(A) (2006).

PRACTICE POINTERS

- Defendants should raise a fair use defense only where copyright infringement is implicated. At this point, there is no fair use defense available under the DMCA.
- Defendants should assert a failure of proof defense to negate the element of “willfulness” if they are accused of circumventing a closed system in violation of the DMCA. Although it is unclear whether such a defense will be effective in the criminal context of the DMCA, defendants should argue that a similar defense was allowed in *Cheek v. United States* in the field of tax law.