

From:

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The matter of access control to protected works is not only important to the copyright holder but is just as important to the consumer. In such an instance a corporation such as Directv, Directv employs circumvention protection through an access card to provide the programming a customer purchased. More importantly, such circumvention measures prevent a customer from viewing programming they did not purchase. The DMCA makes illegal the customer from using an electronic counter measure to obtain programming the customer did not purchase.

The customer as well has an equal interest in "receiving" the programming that they purchased. Like Directv, the customer has the same right to protect the programming they have purchased. One might ask, "why would a customer would need such protection."

Long before the DMCA was a federal court case named Luaces V. Directv. (Miami Federal Court 1997.) In that case, Directv customers paid in advance for the entire year to Directv to receive the encore channels. Four months into that year, Directv used the electronic counter measure to remove the Encore channels and refused to give the channels back or offer refund. It is pointed out the consumer owned the right to access the Encore channels for a period of one year fully paid for in advance. This case was settled in 1998 when Directv admitted to no wrong doing, agreed not to do this again and paid 11 million dollars to settle in the class action where 31 state attorney general's signed on.

Directv clearly had the right to use anti-circumvention measures to control access to their Intellectual Property to prevent theft of programming. The question arose in this case though "did the public have an equal right to use anti-circumvention measures in the protection of a purchased service or product [from] Directv? Do all persons have the right to protect their purchases from unlawful taking by way of access control?

So we turn to a definition of self defense. It is certain that Directv is able to employ self defense measures using electronic measures, but does the consumer possess the same right of self defense to protect real property, a product or service? Can the consumer also use an electronic counter measure as self defense the same way Directv does?

Black's Law Dictionary self-defense is defined as "that degree of force which is not excessive and is appropriate in protecting oneself or "one's property." When such force is used, a person is justified and is not criminally liable, nor liable in a tort."

Black describes force which is appropriate in protecting one's property. Property can be intellectual, real, or right of access. Once programming was purchased and paid for by the consumer, ownership of "that" programming would transfer from Directv to that of the customer.

Turning to a state constitution we look at what is appropriate in property protection.

Florida constitution:

The US Constitution has a very similar passage:

SECTION 2. Basic rights.—All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion, national origin, or physical disability.

The right of protecting access to protected works has its roots in this constitutional language. The public and consumer also derive these same rights in protecting the purchase's they make of products and services. Some of those products and services the consumer buys will be controlled by access technologies.

Current law protects the intellectual property owner to assert their intellectual property rights even when those rights were used for illegal purpose. (see my records) In this case, the programming the consumer purchased and as such had ownership was unlawfully taken from them. Taken from them through the illegitimate use of access control for which there is no law according to the FTC.

Normally, the consumer has the right to protect from such unlawful taking of the programming they purchased. Normally the consumer has the right, the same right as the intellectual property owner to use electronic counter measures to prevent unlawful taking of the programming for which they paid.

In this matter, in 2003, some 5 years after the taking of the Encore channels, consumers are sued stating that the consumer had no right to self-defense in the protecting their Encore channels. That the customer cannot use the same electronic counter measures to protect what they have purchased. The contradiction becomes clear. Directv can use access control to protect their programming from being taken but, where directv takes paid for programming from the consumer, the consumer has no such right. While 31 state attorney general's sued and won the 11 million settlement from Directv, Directv was free to sue customers who attempted to use circumvention to stop their channels from being taken.

The issue of suing the victim for trying to stop their program from being taken is supported by attorney's general and courts and no protections offered for the victim. The US Crime victims program failed to recognize failed to recognize this class of victims even though the crime victim law exists.

The holder of intellectual property should never be permitted to profit first by the taking of pre-paid programming and, second, should never profit from a suit which arose out of such unlawful use of access control. The statute needs to reflect this.

Then in settlement of all claims to close an intellectual property suit, the holder of intellectual property rights should never be permitted enter into contract with the consumer to never again use electronic counter measures to protect the property they have purchased. Never should the constitutional right be taken from the consumer in confidential contract to protect the property for which they paid. Never should the right of a consumer to file a complaint with authorities for a crime be taken in confidential contract for such an agreement obstructs reporting and conceals crime.

US Courts and states attorney general have concluded that even where an intellectual property owner employs access control in an unlawful manner to take pre-paid programming away from the consumer, the consumer has no right to stop such a theft. This is the first time in the US where a consumer is powerless to stop a theft because states prohibit the consumer from electronic circumvention. Powerless due to the statute and then powerless through confidential contract.

The national policy supports an intellectual property owner where Access controls were used to commit theft. I have amassed considerable written communications over 10 years now which demonstrates this. Consumers currently under confidential contract prohibiting them from using electronic counter measures to prevent theft, prevent a crime, should have their rights restored as our constitution permits such use. People continue to this day under contracts which prohibit the use of "any device to intercept signals in the public airways." This because the DMCA allows for such court settlements. Electronic counter measures cannot be permitted by some to protect property and then disallowed for others.