IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THE CHAMBERLAIN GROUP, INC.,	)	Docket No. 02 C 6376
Plaintiff,	)	
vs.	)	
SKYLINK TECHNOLOGIES INC.,	)	Chicago, Illinois
	)	June 12, 2003
Defendant.	)	9:00 a.m.

TRANSCRIPT OF PROCEEDINGS - Oral Arguments and Motion
BEFORE THE HONORABLE REBECCA R. PALLMEYER

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THE CLERK: 02 C 6376, Chamberlain v. Skylink for oral arguments and motion.

MR. FINK: Good morning, your Honor. Karl Fink for Chamberlain.

THE COURT: Good morning.

MR. LAFF: Good morning, your Honor. Charles Laff for defendant Skylink.

I would like to introduce to you -- I believe you have met Ms. Andra Greene.

THE COURT: Right.

MR. LAFF: And David Nimmer, who will -- both of them will be handling the argument. They are from Irell & Manella. They are both California admitted, and they are both admitted here as pro hac vice.

THE COURT: Welcome, Ms. Greene and Mr. Nimmer.

MS. GREENE: Thank you, your Honor.

THE COURT: If I am not mistaken, you are the son of the original Nimmer?

MR. NIMMER: Yes, your Honor.

THE COURT: But you also are yourself a Nimmer?

MR. NIMMER: I'm reported to be, your Honor.

THE COURT: All right. Well, it's a pleasure.

Who else do we have here?

MR. MUDD: Good morning, your Honor. Charles Mudd on behalf of Consumers Union, local counsel. And we have --

which is relating to our motion that we would like to have heard -- Deirdre Mulligan and Will DeVries from the Samuelson Law Clinic.

THE COURT: And it's Mr. DeVries who is a senior law student, correct?

MR. MUDD: That's correct.

THE COURT: Is there an objection to his appearing?

MR. FINK: Your Honor, we don't want to agree to have to argue against additional people here. They don't have standing. They have submitted their brief. The policy issues are of record. We just don't want to have to argue against another lawyer here today.

MR. LAFF: Skylink has no objection.

THE COURT: I understand the objection to be not that Mr. DeVries is a senior law student, but that you don't --

MR. FINK: Correct.

THE COURT: Right. I don't know whether we really need to hear from so many lawyers, lawyers to be, et cetera, but the motion, Mr. DeVries' motion will be allowed, or the motion on behalf of -- I guess it's not Consumer Union. It's --

MR. MUDD: It is Consumers Union.

THE COURT: That motion is allowed.

All right. How will we proceed today?

Let me give you some background on where I am. As you can see, I have a significant amount of reading material in this case, a good chunk of which I have had a chance to read. There are some things that have been filed more recently, and I haven't gotten through all of that.

It probably won't be a secret to you that the issues are novel. Obviously one of the issues relates to the copyright -- the Digital Millennium Copyright that's brand new to all of us.

But in addition, I don't claim to be an expert on matters of technology, copyright law or software, or even garage door openers and their technology. So I hope you won't hesitate and won't feel that you are insulting my intelligence if you take the more -- if you assume that you are talking to somebody with the intelligence of a sixth grader, that would be fine with me.

To the Court of Appeals, no, I didn't mean it.

(Laughter.)

THE COURT: This is just a long way of saying please don't hesitate to make things as clear as you can. If you really are going too slowly for me, I will be happy to let you know.

We have cross-motions, correct? I mean, they are fully briefed motions I should say.

MR. FINK: My understanding is it's just a one-sided motion.

THE COURT: Chamberlain's motion.

MR. FINK: Yes.

THE COURT: It's fully briefed on both sides.

We also have had a couple of additional. I'll need you to weigh in on the matter.

Given that it's your motion then, Mr. Fink, perhaps you would like to begin, and then I will hear from Skylink and the amicus lawyers who would like to be heard and then I will hear again from you.

MR. FINK: Okay. Thank you, your Honor.

I am going to use the handicap or the crutch of a power point to help me and all of us hopefully get through. I did give your clerk a copy of the slides and I have given a copy to opposing counsel.

The case obviously deals with security measures in garage door openers. And just by way of background, I have listed on this slide some variety -- some variations of security measures leading to the one at issue here.

The basic identification code using dip switches is one of the earliest technologies where you just put dip switches set to a certain setting in the transmitter, other dip switches in the receiver that have to match the same number. So they each have a matching number.

Then an advance on that was the putting of the identification code in the software in the transmitter and then having the transmitter transmit it to the receiver so that the receiver can then learn it. And that's the '364 patent that Chamberlain has, which is actually at issue here on another count in the complaint. You have seen it in the Lynx case that you've got here.

THE COURT: Right.

MR. FINK: Now, the thing that's new here is the rolling code, which is a separate number that's transmitted along with the identification code. So the transmitter sends both an ID code and then this rolling code, which is essentially a counter. And the counter is a counter that counts both in the transmitter and the receiver. That's the security measure that is at issue here in this claim.

The rolling code technology. What happens is the transmitter has a rolling code, meaning a counter, that clicks with every activation of the transmitter. Then the receiver has a counter that keeps track of the rolling codes that are received from the transmitter. So they have to essentially keep in sync. The counter and the transmitter and the receiver need to be in sync. If they are out of sync, then the garage door opener doesn't normally operate.

I have abbreviated garage door opener as GDO for this slide show.

So the problem and the way it's a security measure is what happens if the homeowner presses the button inadvertently, not when he is not near his garage door opener? So he clicks the counter and the transmitter, but the counter and the receiver is not clicked at the same time. That's the way the counters can go out of sync.

This is kind of a security measure because if a foreign transmitter would try to click and it doesn't have the right count -- it's not in sync with the receiver -- then it won't operate. But here we have to get into this problem here because the way the security measure has been breached relates to the resynchronization back-up function, if you will, of the rolling code system.

To talk a little bit about a -- a little give, if you will, that is built into a typical rolling code system, there is a forward window. If the operator inadvertently is pushing the button out of range of the garage door opener one or two times or however many times within reason, the forward window is the window in the counter and the receiver that will say, yes, okay, I will still accept this counter because it's within a certain window which is close but not exactly to the sync counts that the receiver expects.

Now, the Chamberlain receivers all have a forward window, which is the next 4,096 rolling code counter values, which actually sounds like a lot, but it turns out that the

counters in Chamberlain count three every time. So you take 4,096 divided by three, and that's essentially how many times the transmitter can click out of range and still be within that forward window so that the receiver will still accept the next transmission and operate the garage door opener.

THE COURT: The 4,096 divided by three is, so far as Chamberlain can tell, adequate --

MR. FINK: Correct.

THE COURT: -- for the life of a garage door opener?

MR. FINK: Yes, your Honor. What happens is if you have a resync, if there is a problem and it gets out of that forward window, I am going to talk about how you resync it to get it back to even again.

THE COURT: To match.

MR. FINK: So the 4,000 is just kind of a reasonable number that they picked.

Now, the rear window is important here as opposed to the forward window. The rear window means if you sent a rolling code and the garage door opener remembers what's already been sent, then it won't respond to it the next time. Because then it realizes that this is a recently-used rolling code and it doesn't want to respond to that. It won't respond to the past number of clicks, X number of

clicks, as having been already used. It just ignores them.

The reason for that is because if a code grabber, which I will talk a little more about, happens to replay a previously used code, that's the way you can break into a garage door opener. So the rear window is cut off. If it's been a recently-used rolling code, the garage door opener will not respond to it at all. Chamberlain has a rear window for the last 1,024 rolling code counter values. So if the --

THE COURT: Would that be divided by three?

MR. FINK: Exactly. So 300 -- the last 300-some rolling code clicks, if you will, of the transmitter that were received by the receiver would be ignored because it's in the rear window.

Now, the next slide talks about code grabbing. This is where somebody records with some kind of a radio receiver the transmission sent, and then he is able to play it back identically using a transmitter.

If it's a nonchanging code, such as the older dip switch or learning receiver that don't have any counter or any rolling code feature, the playback would work. Now, the playback would not normally work against a rolling code system because it would play back a recorded rolling code that's in the rear window.

Now, the need for resynchronization. This is

getting into the area where Skylink has figured out essentially a way to get around the rolling code system. What happens if the transmitter is so far out of sync it's beyond the forward window? Well, Chamberlain realizes that could happen.

So what they do is they assume what happens if a user has a key fob, which is the transmitter on the key chain, he bumps in his pocket while he's at a vacation home for the summer, he clicks the transmitter out of range of his home garage door opener, whatever the number was, 1,000 times. So now the transmitter is getting clicked and it goes beyond the forward window.

Chamberlain wanted to build in a feature to allow that homeowner when he comes back from his vacation house or whatever to be able to resynchronize it. The way the resynchronization works is -- for Chamberlain what it does is it ignores the first value, the first click of the transmitter because it's not within the forward window. But then it realizes, aha, it's not in the forward window. I will now listen to the next transmission and see if the two counts are in a proper sequence and otherwise in the same format to be understood by the garage door opener.

So it receives count 3,001 and 3,002 in sequence, and then it will then assume this must be the right transmitter because it's following our particular rolling

code sequence. It has the ID code that's matched. So it's going to assume that this is the right transmitter and recognize it as valid.

So that system then resyncs, and the counter and the receiver will then click forward however far it has to go to match again with the transmitter and now they are back in exact sequence.

THE COURT: Okay.

MR. FINK: The one exception I have put in here just so it's clear is -- this is something Skylink has also figured out -- if it just so happens that there has been a clicking so far that the transmitter has actually gone all the way around, clicked through all the numbers and has come back into the rear window, that transmission is ignored completely. The resync feature won't start when a code is received in that rear window. So that rear window is the one area where you can't even have a resync.

I have tried to use a graphic depiction here because you can imagine the counter being like counts on a wheel. Hopefully this will be of some value in looking at this.

If you look at the line straight up at the top, it says "last received value." That's where the counter is in the receiver as of the last time it received a valid transmission. The forward window is to the right. For the

next 4,096 values it will operate if it receives any code in that forward window. To the left is the minus 1024. That's the rear window. That's where the receiver will ignore any transmission of code values, rolling code values in that rear window.

But since there are so many counts in this counter, you can see the vast majority, at least in this graphic depiction, is in the area where you are in neither the forward window or the rear window. In that area it will resync. That's the resync area of this wheel. We have written in there "resync two valid rolls in sequence" and it will resync.

Now we go to model 39. How does it figure this out so that it doesn't have a counter and it doesn't use rolling codes? Well, as a general information, Skylink's Model 39 does operate a variety of garage door openers. It has settings called brand jumpers. On the instructions they tell you how to set the jumpers for every brand of garage door opener. As we put in our papers, the instructions have one grouping of brand jumpers -- I think it's group nine -- which is the brand jumper for the Chamberlain rolling code garage door openers. So it does have one setting that works with Chamberlain and only Chamberlain rolling code garage door openers.

In that setting what does it do? In that setting

it sends three codes that never change. They have picked out three codes that they figured out -- they know how to send three codes that are the same codes every time that will trigger the resync. So the three codes are fixed and unchanging and they are not rolling codes. They don't operate the rolling code counter in the Chamberlain garage door opener. Instead, as I will try to show here in the next slide, what those three codes do is mimic the ability to resync every time.

The three codes. The first code I will just call X because they can arbitrarily pick that, whatever number in the counter that is. I off the top of my head don't know what that number is. But each of their transmitters has this number.

Then the second code that they send is minus 1800. That gets it out of the rear window. So that then the Chamberlain transmitter realizes, aha, it's not in the forward or rear window. This is a code that could be listened to. And if the next code after it is in sequence, it will trigger a resynchronization.

So there is a third code that the Skylink transmitter sets, which is X minus 1800 and plus 3. So now the second and third codes are in sequence. They are out of the rear window. And, therefore, the Chamberlain receiver recognizes these as being valid codes, the rolling codes,

and resyncs.

Now I put on your slide what happens if the first code happens to be in the forward window. Well, then it just operates the garage door opener. But then the next time it would press the button, it would be the resync. I also wrote in here, "If the first code is in the rear window, the garage door opener ignores it," but it then can listen to the second and third codes, which would have to be out of the rear window and it will resync.

The last line I put in here, "If the first code is not in the forward window or rear window, then the garage door opener listens to the second and third codes," which are in sync, and considers a resynchronization situation.

So the three codes are X, X minus 1800 and X minus 1800 plus 3. Those are just three codes that are repeatedly sent with every press of the button.

The three codes mimic the resync feature every time. The three fixed codes do not operate the rolling code counter. And the rolling code counter in the garage door opener remains stuck in one of those fixed code values sent by the Model 39. It's just never going to be clicking like it normally would.

Now, the problem with Model 39 is that it can be code grabbed. This is why it's a circumvention of the security of the garage door opener. If somebody records

those three codes, a code grabber, then he can replay those three codes and that will be the same thing as if the Model 39 itself transmitted the codes. That will resync the garage door opener and it will open the garage door.

So the very feature of rolling code was to defeat the code grabber. That's exactly what is being defeated by Model 39 because now the code grabber situation is back in play again. You might as well not have a rolling code system because you have now defeated it. This is a circumvention, which we -- as we will get into, which we say is not authorized and violates the Digital Millennium Copyright Act.

I have a slide here that says, "These Are the Essential Facts." Essentially the way these systems work is undisputed from my understanding of the record. I am sure we will -- there has been a lot of bluster about the facts on the record. But I think what I have just gone through from any honest review of the record was shown to be essentially undisputed and in our view enough to establish liability as a matter of law.

So now I will turn to the Digital Millennium Copyright Act.

Access control is at issue here. 1201(a)(2) prohibits selling a device for circumventing a technological measure that effectively controls access to a work protected

under law.

There is also a definition: What does "circumventing a technological measure" mean? It's defined right in the Act. "To descramble," et cetera, and I have underlined, "to avoid, bypass, remove or deactivate or otherwise impair a technological measure."

That's what we say is going on with the Skylink device. That it is essentially avoiding, bypassing, deactivating and otherwise impairing the rolling code feature, which we say is a technological measure.

I go to the definition of "technological measure" in the Act. "A device that effectively controls access to a work if the measure in the ordinary course of its operation requires the application of information or a process or a treatment, with the authority of the copyright owner, to gain access to the work."

So what we are saying is in the ordinary course of operation the transmitter has to send information. It's the application of that rolling code information that is required here to gain access.

THE COURT: Maybe you will get to this, but how do you define "the work"?

MR. FINK: I will get to that, yes.

Chamberlain fits this definition. Rolling code is a technological measure that controls access. The software

in the GDO is a work protected under this title.

It seems to me -- well, maybe I will get to that right now.

THE COURT: All right.

MR. FINK: The argument is that somehow you have got to not give protection under the Digital Millennium Copyright Act because there is not a process of copying the software or otherwise doing something that is essentially a right protected under the copyright law.

But I don't know how you gain access to this device or to software other than what they are doing. They were sending a code that then gets received by the software, embedded software in the receiver, and then the embedded software in the receiver reacts to that code and operates the garage door opener.

It wouldn't do that but for the fact that it's found a way to get around the rolling code system. It's now bypassing that rolling code security feature and going directly to the software microprocessor and the receiver and operating the garage door opener.

To say that it doesn't apply or that what's protected is something other than that is to essentially say you have got to do something that's the equivalent of a violation of the copyright, which would be copying it or circulating it or something.

But that's not what the statute says. That's not what the drafters intended. As we said in our brief, this is a new -- brand new right created under the -- by Congress above and beyond copyright infringement. And just like in the *Lexmark* case and the other two cases we have cited -- more particularly, I guess, the *Lexmark* case is the one where there was not an issue of downloading or receiving information. *Lexmark* is exactly like us. It was defined as gaining access to the work in order to be able to use that work to operate whatever that software operates. That's exactly what's going on here.

Model 39 circumvents this technological measure. I think I have already addressed that. It circumvents the rolling code security measure and defeats it. I think that's pretty clear.

There is an issue of authorization. The Act requires without authority of the copyright owner. Chamberlain is the copyright owner. Chamberlain owns the copyright and the software. It does not authorize anyone to circumvent the rolling code security measure.

Here is the slide where we were just discussing -- I was just discussing earlier. The access control is a broad -- intended to be a broad coverage according to the legislative history. Software, copyright and computer software is recognized under the copyright laws. There is

no question about computer software being copyrightable.

Lexmark -- this case we are essentially saying is like *Lexmark*. This is a case where you are gaining access to software embedded in a microprocessor in a receiver for the purpose of using that software to operate the garage door opener.

The plain meaning of "access" we say is clearly in accord with that. You have to deviate from the plain meaning of gaining access in order to find this kind of protection is not warranted.

Right now what I am doing is I am going to respond to a few of the main arguments that I have seen in their briefing.

THE COURT: Okay.

MR. FINK: Then I will be done, at least for the time being.

One of the arguments was, well, the Model 39 does a whole lot of other things. It doesn't just circumvent Chamberlain's rolling code. It operates all the other garage door openers.

Well, what we are saying is there is a part of the Model 39 that does. All it does is circumvent Chamberlain's rolling code. That's the Group 9 in their instructions that I was talking about. This is the *Realnetworks* case. It was right on point. It had the same situation where only a part

of the accused product violated the Digital Millennium Copyright Act and that's sufficient.

The next defense that I see that Skylink is focusing on, as well as one of the amicus, was the reverse engineering. That's -- I quoted the statute here in the next two slides. I will probably just go beyond that. But the point -- the reason I did was each of those sections talks about "for the sole purpose of identifying and analyzing elements of the program."

The reason for that is this section is a reverse engineering section. It is not an authorization to traffic in circumvention devices. It is an authorization to allow reverse engineering research, which may from time to time require circumvention of a security measure that's protecting copyrighted work.

The fact that it authorizes circumvention for a limited purpose and it allows a sharing of that information by others was clearly not intended to be essentially a gutting of a provision of the statute. To say that you can now circumvent the device, you reverse engineer it, you figure out how to do it, and then to argue that that permits wholesale public dissemination would essentially completely gut the statute.

We don't think that that's -- it's clearly not intended according to legislative history. We have cited

this case -- I believe it's called *Reimerdes*. I'm not pronouncing it right. R-e-i-m-e-r-d-e-s. That case specifically addressed this point. It agrees with us that this section is very limited and does not allow public dissemination of means of circumvention that are discovered through the process of reverse engineering.

Now, the reverse engineering exception we say does not apply for that reason and another very important reason; and, that is, the reverse engineering section requires interoperability. It allows certain limited circumvention for the purpose of achieving interoperability.

Well, here Model 39 is not interoperable under the statute. The statute is very clear. It specifies that it means, "the ability of computer programs to exchange information and of such programs to mutually use the information which has been exchanged. Intended to cover computers talking to each other."

Here the Model 39 and the Chamberlain garage door opener, if anything, they have a one-way conversation. Model 39 does not exchange or use information received from the Chamberlain rolling code garage door opener. It transmits, but it never receives anything. So there is never any exchange of information or a mutual use of that information. So it simply is not interoperable under that definition in the Digital Millennium Copyright Act.

The next defense, if you will, I guess argument, I would say is that they are complaining about what's registered and what's not here. What we submitted were -- we registered the original versions of the rolling code software. We didn't register every single version. There are over 25 versions.

We have submitted the papers and the affidavit of Jim Fitzgibbon to say that essentially there are minor changes that were made. The functionalities remained identical. They are essentially derivative works.

But that's even beside the point because the Digital Millennium Copyright Act doesn't even require registration. We don't have to register anything to be able to bring an action under the Digital Millennium Copyright Act. We did so out of an abundance of caution.

The copyright laws clearly protect a work of authorship, including a computer program, from the moment of its creation. There is absolutely no need for registration in any event. The case law is clear that computer programs such as this are clearly copyrightable.

I think the last slide here is a reminder that right now we have three cases that are very helpful to us, recent cases, including the *Lexmark* case. I don't believe there is a single case that can be cited against us at this point. The courts are coming down by interpreting the plain

language of the statute and enforcing it.

Essentially I think what's going on here, there is a lot of complaints about how the statute reads, and the Consumers Union and the other amicus here essentially have complaints directed to the fact that this statute exists and the way it's written. I don't think this is the place or the forum to rewrite that statute.

There are clearly things going on that they can do. One is the hearings in the copyright office in the Library of Congress to create rules, CFR rules, administrative rules on exceptions. But here I think the Court is obligated to enforce the law and the plain meaning of the Act. I think these three cases which we've cited, *Lexmark*, *Realnetworks* and *Reimerdes*, all fully support what we say and address virtually every argument Skylink has raised here and rejected it.

So that's it. I think the basic operation is undisputed on Model 39 and the Chamberlain rolling code security. Based on that, we think there is really no dispute. It's an issue of law. Does the Act apply or doesn't it? We think it does and summary judgment should be entered in our favor.

THE COURT: Thank you, Mr. Fink.

Mr. Nimmer.

MR. NIMMER: Your Honor, could I ask Mr. Fink to

put back on the screen for the Court's convenience this slide (indicating)?

MR. FINK: Sure.

MR. NIMMER: Thank you very much.

MR. FINK: What number is it?

MR. NIMMER: 18.

Good morning, your Honor.

THE COURT: Good morning.

MR. NIMMER: I would like to talk about the purpose of the DMCA and then to proceed to the slide.

Congress passed the Digital Millennium Copyright Act in order to solve a chicken-and-egg problem. It was concerned about the development of the Internet. On the one hand no one would log onto the Internet if there were not a lot of robust content, it did not contain the movies that people wanted to see and the books that they wanted to read. But on the other hand, the studios and the publishers would not make their goods available over the Internet unless there were adequate security.

So in order to solve that chicken-and-egg problem of who goes first, Congress passed Section 1201, which provides on the one hand content would be made available digitally. Studios would sell digital disks and book publishers would upload their content to the Internet. And on the other hand, there would be legal protection for the

lock that is placed on that work, so that anyone who picks the lock would be culpable for a new violation, the anticircumvention violation of Section 1201. That's clear from the legislative history of the DMCA. That was the purpose for which Section 1201 was legislated.

Now, in this case, your Honor, we have a failure of Chamberlain's technology to conform to the very purpose for which Section 1201 was passed. Chamberlain does not have an independent copyrightable work and then a lock that is affixed to its work.

Instead what Chamberlain has is a system. That system includes a small amount of software, and that software is at one and the same time the allegedly copyrightable work and also the alleged technological protection measure, the circumvention of which brings us to court today.

Let's look at the language of the statute in order to determine why Chamberlain's cause of action does not meet it.

Section 1201(a)(2), which we will get to in a moment. Right now we are on Section 1201(a)(3).

Section 1201(a)(2) makes it illegal to circumvent a technological protection measure -- that's one thing -- that effectively controls access to a copyrighted work. That's the second thing.

Congress had two things in mind. On the one hand, a technological protection measure; and then on the other hand, a copyrighted work.

Now, Chamberlain would be able to state a cause of action if the statute read, contrary to fact, anyone who circumvents a copyrighted technological protection measure that effectively controls access to itself has violated the law, because under Chamberlain's point of view there simply needs to be one type of work, a putatively copyrighted work that acts as a putative lock to itself.

But that is not the language that Congress implemented. Congress had two separate items in mind in Section 1201(a)(2). On the one hand, the lock, the technological protection measure; and on the other hand, the copyrighted work. So there is a fundamental mismatch between Chamberlain's theory and the language of the statute.

In addition, the language that appears in Mr. Fink's slide also shows the inapplicability of the DMCA to Chamberlain's theory.

Section 1201(a)(3), which appears in slide 18, indicates that that fundamental term, "circumventing a technological measure," requires as a prerequisite that the activity take place without the authority of the copyright owner.

Now, let's go back to Mr. Fink's example of the family that goes on vacation all summer and the clicker has been pressed magically 1,372 times or magically a number amount of times that bring it back within the reverse window. When the family comes home from vacation they will not be able to open their garage door because by bad luck they happen to fall within the rear window.

Now let's imagine that the teenage boy who's a member of the family is technologically adept and knows how to circumvent the technology in order to open up his family's garage door and get the family out of the rain. The question arises has that purchaser of the Chamberlain garage door violated the Digital Millennium Copyright Act by opening up their own garage door?

Section 1201(a)(1) says that a user who circumvents a technological protection measure has violated the DMCA. Section 1201(a)(2) says that anyone who sells a product or a service or a device that helps that user has trafficked in something that violates the DMCA.

So the fundamental question before this Court is: Has the teenage boy violated the DMCA by opening up his own garage door? The language that the statute uses is exactly the language up at the top, "Circumventing a technological measure."

So we have to ask, when that family comes home

from vacation have they circumvented the technological measure by opening up their own garage door? There are only two possibilities: Yes or no.

First possibility: Yes, the family has violated a technological measure. That is -- I would like the Court to pose the question squarely to Mr. Fink to find out his answer. If Mr. Fink says yes, then he is claiming that when a family is unfortunate enough to make the decision to buy a Chamberlain garage door, they no longer have access to their own house except at the sufferings of Chamberlain. I would submit that that is an impossible construction. I would submit that the statute gives the answer.

Does that take place without the authority of the copyright owner? Absolutely not. By selling a Chamberlain garage door, Chamberlain has implicitly given authority for the user to open up his garage door, whether through his teenage boy or through another means, such as buying a Skylink 39 transmitter, which we will get to in a moment.

So let's imagine that the answer is no. When the family comes home from vacation they are not violating Section 1201(a)(1) by opening up their own garage door, notwithstanding that they have to jimmy the Chamberlain technology to do so.

The reason that they are not in violation of Section 1201(a)(1) is the language in front of you. They

have acted in fact with the authority of the copyright owner rather than without the authority of the copyright owner as would be necessary to violate the DMCA.

Once that question has been answered with respect to Section 1201(a)(1) in the negative, the exact same answer inexorably follows with respect to Section 1201(a)(2).

Skylink has sold a device, its Model 39 transmitter, which allows the families that have bought Chamberlain garage doors to open up their own garage doors. Therefore, Skylink has not circumvented a technological measure. It has simply allowed users to act with the authority of the copyright owner; in other words, to open up their own garage door.

In this respect, your Honor, this case is fundamentally different from the *Lexmark* case. In *Lexmark* the plaintiff, which was *Lexmark*, alleged that its own users were violating Section 1202(a)(1) when they went and bought anything other than a *Lexmark* after-market product. *Lexmark* the plaintiff alleged, we have given you a price-point benefit by placing you in a special program, and you are obligated because of that to only buy *Lexmark* cartridges after the fact.

That is a fundamental difference from this case because Chamberlain, as I say, cannot come here with a straight face and allege that its customers have lost the

right to open up their own garage doors if they do so through any means other than buying an authorized Chamberlain clicker and using it. For that reason we would submit, your Honor, that even if this Court were to follow the rationale of the *Lexmark* case, the opposite result has to pertain here.

I would also quote to the Court a portion of the legislative history of the Digital Millennium Copyright Act from the commerce committee which anticipates something not totally far afield from the situation that confronts the Court.

I quote from page 44. "The law also would not prohibit certain kinds of commercial key-cracker products, e.g., a computer program optimized to crack certain 40-bit encryption keys. Such machines are often rented to commercial customers for the purpose of quick recovery of encrypted data."

In other words, Congress realized that in this situation and also when people lost their passwords, which Congress also mentioned on page 44, there would be situations in which users lost the ability to access their own works under certain scenarios.

Now, the question arises if the user accesses his own work through a key-cracker product or through recovering his password, does he violate the Digital Millennium

Copyright Act? Congress addressed that issue by saying no. Under that circumstance there is not activity without the authority of the copyright owner because we don't imagine the copyright owners are going to try to keep their own customers from accessing their own works.

We have the same situation here, your Honor, in which Chamberlain effectively is trying to keep its own customers from opening up their own garage doors and is objecting if Skylink is facilitating those customers in opening up their own garage doors.

Your Honor, Ms. Greene is going to cover the factual deficiencies in this case in terms of how Skylink did not primarily design its product for the purpose of code grabbing or marketed for the purpose of code grabbing. Instead the purpose of Skylink is to allow customers to open up their own garage door. But I could like to cover a few more points about the Digital Millennium Copyright Act before I turn the podium over to her.

First of all, the United States Supreme Court unanimously in the *Feist* decision ruled that not all copying of a copyrightable work amounts to infringement. Instead the essential ingredient is that there be copying of constituent protected elements of the copyrighted work.

That same sensibility we submit, your Honor, informs analysis under the DMCA. It is not the technical

action of access to a work that happens to be technically a copyright-protected work that violates the DMCA. Instead in line with the intent behind the legislation, it is disabling the CSS on a DVD in order to watch the copyrighted movie or decrypting one's way into a password-protected site in order to read a book that's protected by copyright or obtaining a download of software without authorization and without paying the customary fee in order to use that software on one's own machine. All of those would be classic access to a work protected by copyright.

Congress did not intend when one machine interoperates with another machine to obtain a certain functionality that that would amount to a violation of the DMCA. I anticipate that Mr. DeVries will talk about the antisocial policy implications of that particular construction of the DMCA.

But in terms of looking at the language of the statute, it suffices to realize that when Congress used the words "circumventing a technological protection measure that effectively controls access to a work protected by copyright" it did not have in mind one machine talking to another. Instead it had in mind the examples of the *Reimerdes* case and the *Realnetworks* case in which people obtained unauthorized ability to listen to music, to watch movies, to copy movies, et cetera, et cetera, not when

machines were talking to each other.

That brings us to another deficiency in Chamberlain's case, which arises under Section 1201(f)(2). Mr. Fink put up the slides of both (f)(1) and (f)(2), but the interoperability defense that Skylink urges on the Court today arises solely under Section 1201(f)(2), which says that notwithstanding the prohibitions of the DMCA, a person may develop and employ a technological means to circumvent a technological measure for the purpose of enabling interoperability of an independently-created computer program.

So the question is: Do we have two interoperable independently-created computer programs? In the *Lexmark* case there was copying of the *Lexmark* toner program. For that reason there was not independent creation.

In this case, by contrast, the record is clear that Mr. Troy developed his own independent computer program for use in the Skylink 39 transmitter. So on the one hand we have an independently-created computer program.

Now, the further question is: Is it interoperable with a different computer program? Well, according to Mr. Fink, there is a computer program within the Chamberlain garage door opener. So, therefore, we do have two computer programs.

The final question is: Do they operate

interoperably in the language of the statute? Chamberlain would have us believe no, they are not interoperable because they do not exchange data. But if we apply a modicum of common sense to the analysis, your Honor, we see that inevitably they are interoperable. Indeed, we would not be standing in court today if the Skylink product were unable to open up the Chamberlain garage doors.

Of course, the allegation of the complaint is that the Skylink 39 model does open up the Chamberlain garage door because it operates the -- because it triggers the software in order to open up the garage door. In order for that to happen there has to be an exchange of data. One has to go to the Skylink 39 and program it in the appropriate way so that when it transmits data it will be the appropriate data in order to open up the garage door.

So under any common sense reading of Section 1201(f)(2) and (f)(4), your Honor, there is an exchange of information that allows two computer programs to operate interoperably. Now, for that reason the affirmative defense of 1201(f) is also applicable and dispositive of this case.

I have two quick final points, your Honor, and then I will cede to Ms. Greene.

First of all, Mr. Fink did not mention another essential ingredient for liability under the Digital Millennium Copyright Act, and that is injury. If we turn to

Section 1203(a) of the Digital Millennium Copyright Act, Title 17, United States Code, Congress has limited standing to bring a 1201 violation to, "Any person injured by a violation of Section 1201."

Unlike copyright infringement, which does not have damage or injury as an element of the offense, in order to proceed with a cause of action under the DMCA, the plaintiff has the burden of establishing injury. Nothing in Mr. Fink's presentation even alleged injury, and we will hear from Ms. Greene about why the evidence does not establish injury in this case.

The final legal point that I would like to make is because we have not had an opportunity to file anything in response to the reply that Chamberlain had is the following: The reply contains lengthy quotations from something called the section-by-section analysis as if that were definitive legislative history.

I would like to point out to the Court that the section-by-section analysis is inapposite for all of Section 1201. It represents simply Chairman Howard Coble's after-the-fact personal views about the legislation. And insofar as he offered personal views about Section 1201, they were rejected by the conference committee, which was -- which consisted of both the Senate and the House, which put together the final language of Section 1201 as enacted.

I would refer the Court to the discussion in Millennium Copyright Section 12(a).15(d) for a more comprehensive analysis as to why the section-by-section analysis does not constitute authority for the interpretation of Section 1201.

Your Honor, for all those reasons, we submit that summary judgment under the Digital Millennium Copyright Act must be denied to Chamberlain.

Thank you very much.

THE COURT: Thank you, Mr. Nimmer.

MS. GREENE: Thank you, your Honor.

I am just going to talk briefly about why the elements of a summary judgment motion have not been satisfied by Chamberlain, which is the threshold inquiry the Court, of course, must make before going on to the legal issues.

It is Chamberlain's burden in the first instance to establish a prima facie case of a violation of the Digital Millennium Copyright Act. It has failed in two respects.

First, it's not met its burden to establish that its software is a copyrighted work entitled to protection. All Chamberlain has submitted are two copyright registrations. However, those copyright registrations on their face show that they were filed six years after first

publication. As a result, under Section 410(c) of the Copyright Act there is no prima facie case established by those registrations.

Other than the registrations, Chamberlain has submitted no evidence that the software is copyrightable. And that is Chamberlain's burden.

But even if the Court decides to give some weight to those registrations -- it is within the discretion of the Court to do so -- Chamberlain still hasn't met its burden of showing that the registered software is subject to copyright protection.

First of all, Chamberlain's own witness, Mr. Fitzgibbon, has admitted in deposition that the registered software is not the software that Chamberlain uses in its products. So we don't know whether the software that Chamberlain actually uses has elements that are protected by copyright law.

When we pointed this out in our opposition, Chamberlain responded with a supplemental declaration of Mr. Fitzgibbon. He addresses the deficiency in two sentences in paragraph 8. But those two sentences similarly do not establish Chamberlain's burden that this is a work protected by copyright.

What does Mr. Fitzgibbon say? He says that all versions of the software contained in Chamberlain's GDO sold

from 1996 to the present have the same rolling code functionality as the software contained in Chamberlain's copyright registrations.

Well, functionality does not establish copyright protection. In fact, functionality is not copyrightable because copyright, as the Court knows, protects expression.

Then the second sentence in Mr. Fitzgibbon's supplemental declaration purports to describe how the software has been changed. Putting aside the evidentiary problems with that, what he says still does not establish that the software is copyrightable. He says, for example, that there was a rewriting of the software to operate with a microchip microcontroller. But that doesn't tell us whether the rewriting eliminated any elements that might have been subject to copyright protection.

So what we have here, your Honor, is a failure of proof by Chamberlain even to show that their software is a work protected by copyright, an element under the statute. At a minimum there are disputed issues of fact in that regard.

Second, it is Chamberlain's burden to show injury. That is an element of a DMCA violation. Mr. Nimmer explained that as a legal matter.

Chamberlain's only evidence offered on that point is a hearsay statement by Mr. Gregory of what he was told by

a Lowe's buyer as to why Chamberlain was no longer being carried by Lowe's. That is insufficient to establish their burden.

But even if the Court decides that it will credit that evidence, Skylink has introduced in response evidence to dispute the reason that Lowe's is no longer carrying Chamberlain products.

In particular, we submitted a letter from Lowe's to Chamberlain explaining they were no longer going to carry any Chamberlain products, including garage door operators and accessories, because of cost-containment issues, brand identification, et cetera. So there is a disputed issue of fact as to whether there has been any injury to Chamberlain at all.

Then there are other numerous disputed issues of fact which preclude summary judgment. I will briefly go over a few of those. Many of them are set out in our papers and in our Rule 56.1 response.

The whole issue of whether there are in fact code grabbers is disputed and whether the rolling code system is really designed to deter code grabbers. It appears from Mr. Fink's presentation that the basis for the claim that there is unauthorized access is that there are code grabbers out there who are buying the Model 39 to open Chamberlain garage doors. However, there, of course, has been no

evidence of that.

So we get to disputed issues of fact regarding whether Skylink's Model 39 transmitter is primarily designed or produced for circumvention by code grabbers. In fact, the evidence we submitted is to the contrary. It's not.

There are issues as to whether Skylink's Model 39 has other commercially significant uses besides use by code grabbers. The evidence is replete that Skylink markets its products to users to open their own doors, Chamberlain doors, other manufacturers' doors, et cetera. Again, disputed issues of fact.

THE COURT: I am sorry. One moment.

Your view is that Chamberlain is arguing that the technology -- that Skylink is marketing to code grabbers.

MS. GREENE: That is the argument that Chamberlain appears to be making, yes.

THE COURT: As opposed to people who lost their garage door opener.

MS. GREENE: Yes.

THE COURT: And don't want to buy another Chamberlain one.

MS. GREENE: Yes.

THE COURT: You know, I am sure this is an uninformed question, but how different is this, apart from the notion that somebody -- you wouldn't want somebody

driving his car into your garage who doesn't belong there. How different is this from buying the -- what's the word that I want -- the generic remote for your TV?

MS. GREENE: This is exactly like that, your Honor. This is -- if I lose my garage door opener, if I want my husband or my teenage daughter to have one, I as the consumer, as the person whose door it is who wants to get in, I will go to the store and I will choose to buy either a Chamberlain product or a Skylink product or any other.

It's marketed -- we submitted the marketing materials, the packaging itself, which shows that the product is compatible with numerous manufacturers, including Chamberlain, including many others. That's what our product is. It is marketed as an alternative for a consumer to open their own door.

THE COURT: So you would characterize this as analogous to the product that you can buy if you lose your Panasonic remote and you go buy something at the grocery store that permits you to program it and use it?

MS. GREENE: That's exactly what it is.

THE COURT: I am sure Mr. Fink is going to respond to that. But all right.

MR. FINK: Yes.

MS. GREENE: You can see from Skylink's own packaging, submitted by both sides as a matter of fact, that

it is marketed for use as a universal garage door opener. If you lose your transmitter or you want to give one to a friend or to another family member, you can go to a store and purchase it as one of your choices.

THE COURT: All right.

MS. GREENE: Thank you, your Honor.

THE COURT: Thank you.

I have one more lawyer to hear from and then I'll hear you, Mr. Fink.

MR. FINK: I am sorry. Go ahead.

THE COURT: This is Mr. DeVries, correct?

MR. DeVRIES: Correct.

Good morning, your Honor. Thanks for letting me appear here and also for granting Consumers Union this time.

We just wanted to quickly highlight the broad implications of this case and the important consumer harms that are at issue here.

Allowing the DMCA to be used to leverage control over an aftermarket, as with garage door universal remotes, or, as you mentioned, with television remotes, poses the same threat to consumers -- higher prices, less product innovation, less consumer choice -- that are seen whenever markets are artificially suppressed. Fortunately, the proper reading of the law, as Skylink's counsel has briefed, does not allow for this type of claim and avoids these types

of harms.

The consumer harms, however, are serious. Chamberlain alleges that there is no evidence for them. The DMCA is a new law, your Honor. There hasn't been enough examples to see how this would be affected, but the consumer harms resulting from improper suppression of competition are well-known. Unfortunately, any antitrust suit or intellectual property misuse would show that consumers see less choice, they see higher prices and they see less product innovation when there is not competition on the market.

More importantly, this case is broader than just garage door openers. Your Honor mentioned universal television remote controls. That would be only the first next step. Those universal television remotes you couldn't purchase -- under this reading of the DMCA you couldn't purchase without the authorization of the manufacturer or you would have to buy components all manufactured by the same manufacturer if you wanted to use a remote that worked with your DVD player and your VCR and your television all in one device.

After television remotes, the next step would be other consumer products. All these products contain small bits of computer code. Nowadays computer code is ubiquitous. It's in toaster ovens. It's in SUVs. It's in

virtually every product you buy.

Imagine your cell phone battery. In your cellular phone, if you wanted to replace your battery, those batteries have small computer chips in them. You would have to buy a battery authorized by that manufacturer in order to replace your battery or buy an extra one.

Think about computer peripherals that you might purchase, a monitor for your computer, an extra mouse, a keyboard. All those would have to be purchased from the original manufacturer. The end result would be higher prices. There would be less innovation because the producers would have a protected market. They do not have competition in those markets. And consumers would have less choice.

Perhaps the most shocking impact could be in the auto parts industry. This is an industry that employs over three million people. It is a multibillion-dollar industry. All of those oil filters, those wiper blades, replacement tires even could include a small computer chip. It's very cheap to manufacture. It's readily available. You could only buy those from the manufacturer.

Now, this would be a boom, I am sure, to Diamler-Chrysler, to Ford Motor Company. But it would be a pox, I think, on consumers. They would not be able to shop around for the best prices in these replacement parts. All

of the legions of people who are employed manufacturing these products and selling them could only buy the authorized parts either made by the manufacturer or licensed by them.

Fortunately, though, the proper reading of the statute avoids these harms as Congress intended. As Mr. Nimmer went over in his presentation, 1201(a) and 1201(f), the interoperability exemption, both prevent claims like this one from going forward. This is exactly what Congress wanted.

Professors Nimmer, Professor Ginsberg, author of perhaps the second-most well-respected treatise on copyright, the Second Circuit and the quarterly decision, virtually everyone except Chamberlain recognizes that the legislative intent of this law was to encourage distribution of digital content and to combat piracy.

The legislators want to encourage new developments in these products. They wanted to get these out to consumers. They did not want to prevent consumers from being able to purchase products like universal television remotes, like replacement auto parts or like universal garage door openers.

Here, unlike what Congress intended, there is no allegation of infringement, not direct, not vicarious, not contributory. There is not even a downstream possibility of

any piracy occurring at any point in this. All this is is a producer trying to tell consumers that they are not allowed to use what products they want to open their own garage doors.

Frankly, this case is being watched, your Honor. Other producers are following this suit. Perhaps the only other application that's even similar has been the *Lexmark* case. Before that one no one had tried to apply the DMCA in this matter. Consumers Union fears that these consumer harms would grow and become even more of a plague upon the after-markets industry if this case were found for Chamberlain.

We urge you to reject the reading of the DMCA that so obviously conflicts with Congressional intent. It so obviously conflicts with the reading of the law, and it so fully undermines the markets that support consumer choice, that support lower prices and support innovation.

Thanks very much.

THE COURT: Thank you, Mr. DeVries.

Mr. Fink.

MR. FINK: A lot of arguments there. I will try to hit the ones that I can remember that seemed important.

THE COURT: Okay.

MR. FINK: All of those arguments were addressed in our briefing. So clearly we can look at that.

The issue about whether software can control access to itself, I think that's a nonissue. There is nothing in the statute that says that one part of the software controls access and the other part is the protected work. There is nothing in the statute that says they can't be part of an overall piece of software, which is what we have here.

The authority issue is probably the one that Mr. Nimmer focused on the most. What I think is going on is they are trying to argue an implied license defense essentially which doesn't exist under copyright law as a matter of fact. There is no such defense.

This argument was exactly the argument rejected in the *Reimerdes* case which said that it would essentially gut the statute if you said that someone can traffic in a circumvention product so long as they are selling it to people who are trying to circumvent a security measure that they are not supposed to. Here the idea is that the statute protects against trafficking in these products for the benefit of Skylink but for the prejudice of the copyright owner Chamberlain who has an access control and a technological measure.

Now, what about the users? That's a different section of the statute. Frankly, I would have to look at that a lot more closely. I think there is -- a fair reading

of that statute also says users aren't allowed to circumvent the security measure. If people have complaints about the way that reads, then I think the answer is to change the statute, not to essentially ignore the language here.

THE COURT: So you are saying with respect to Mr. Nimmer's hypothetical teenage son, the teenage son is in violation of the Digital Millennium Copyright Act if he is able to mess around with the remote opener and make it work?

MR. FINK: Here is what I am saying. I am saying probably that's true based on the other section, although I haven't focused on that. But at a minimum, somebody, a third-party who is trafficking in products to give to that teenager is clearly in violation of the Act. The statute and the legislative history support that reading.

THE COURT: The ill that it appears to me the statute is aimed at is the one that we are all so familiar with, that we have got, speaking of teenage sons, our teenage sons and daughters downloading music from the Internet, downloading potentially movies from the Internet. People in China and, for that matter, in this country somehow getting hold of copyrighted works via mechanisms. It's related in some fashion at least to -- well, maybe it's -- maybe it's even directly related to descrambling equipment that is sold in the gray market to people who then use it and hook up and are able to get access to cable that

they would otherwise not get access to.

The difference it seems to me here is that the garage door opener inside the garage, the item to which the user is trying to speak or trying to communicate belongs to the user. It isn't as though he or she is reaching out for a film or a movie he didn't make. He is reaching out to the equipment inside his own garage door and saying: Talk to me. I lost the way that I normally talk to you or I forgot or I damaged or harmed my speaking mechanism. But now I want to use something else and get hold of you and make you open my door.

Isn't that a difference?

MR. FINK: That's a difference in terms of the two provisions in the statute. (a) and (b) addresses that.

Furthermore, I believe the case law has an example of the DVD protection. The buyer buys a DVD and he is not allowed to circumvent the security measure to prevent him from copying it.

THE COURT: Well, the DVD you mean the actual DVD?

MR. FINK: Yes.

THE COURT: Okay. But if he somehow -- I am sure it happens -- somehow damages the on/off mechanism of his DVD player and he is able to go buy a remote or go buy a universal remote switch, he then will be able to turn it on and play a protected DVD.

In any case, when I purchase a book or a DVD or a CD nobody thinks I have purchased the creation itself. I can't go then distributing that as my own. I have only purchased the right to watch it in my home. Typically there is all kinds of regulations you are familiar with. You can't do a commercial showing of a DVD that you happened to have purchased. You can't invite friends over and say, okay, $5 each. You can't do that.

My understanding of this is that it's closer to what happens in I think everybody's home all the time. You lose something. You break something. It no longer works. You, unfortunately, misprogram the thing and now you want to straighten it out again. The mechanism for viewing the DVD still belongs to me. The DVD -- the intellectual property doesn't belong to me, but the physical DVD player certainly does.

MR. FINK: The reason I don't think that applies, your Honor, is it doesn't say with authority of the owner of the copy of the software. It says with authority of the copyright owner. That's Chamberlain. That's the way the statute is worded.

The reason -- this gets into what's the difference between this and the remote controls for a TV?

THE COURT: Yes.

MR. FINK: Remote controls for TV don't have a

security issue. They don't even have security protection in those devices.

THE COURT: Well, the security issue that got mentioned at least in some of the briefs was the airplane flying overhead problem.

MR. FINK: Let's talk a little bit about what is a security issue.

THE COURT: Before you turn to that, we all have heard about these stories where some neighbor hits his remote and your TV turns on. We have all heard these stories. Now, maybe where you live it's not that close. Or some kid outside in the bushes. We have all heard those stories.

MR. FINK: Right.

THE COURT: Wouldn't it be nice to be able to circumvent that?

MR. FINK: Well, that's not what the purpose of rolling code security is. That's, as you say, a story everybody heard. One of the salesmen for Chamberlain relayed that story.

What this rolling code feature is protecting against is -- we are not worried about marketing to code grabbers. We are worried about marketing to consumers who have bought garage door openers who have security measures that protect them against break-in from a code grabber who

happens to listen in to a homeowner who is using this device. That's a real liability issue possibly for Chamberlain. Chamberlain has gone to great extents to be able to say this a secure system.

To now allow someone to market a product which essentially circumvents that security feature, that's a real issue. That's different than worrying about whether remote controls are available for TVs. This is the same thing for car door openers.

THE COURT: Well, what about when you market your garage door opener and you tell people: If you don't use our product to open your garage door, you are at risk of having your home broken into?

MR. FINK: How about if Chamberlain does that or Skylink?

THE COURT: No. If Chamberlain would do it as a way of trying to encourage people not to go buy the Skylink product.

MR. FINK: Well, they may have to do that. They are working hard to try to figure out how to solve the problem of Skylink now selling devices that circumvent the rolling code.

THE COURT: Okay. I am sorry. I didn't mean to interrupt your flow.

MR. FINK: That's all right.

I think that's -- that issue of authority and who is authorized to allow this, I think it's a red herring to say authority has been given to the buyers to allow Skylink to sell on the open market a device that is a direct violation of the Act, because the Act says with authority of the copyright owner, not the copyright -- the purchaser of the copy. The copyright owner is Chamberlain under the statute. It has to be authority from Chamberlain.

This issue about copy control, the copying of the DVDs or the copying of the other cases, yes, those talk about copying, but those are under 1202(b). We are talking about something above and beyond copying protection.

We are talking about access control, which is a separate section of the Act. If you are going to -- if there is going to be any difference at all, I think this may be the case. This is a case where you are not concerned about copying like those other cases. You are concerned about access control for security reasons. That's just the way the statute is worded.

I think -- honestly, I think if you look on the web site for the copyright office, there is a whole lot of people going in and complaining about all these potential horrible things and the results. It's up to the copyright office to enact regulations or to create exceptions under this user provision 1201(a)(1), and the copyright office is

addressing that. The consumers or the other amicus have submitted a lot of papers in that regard.

As far as the interoperability goes, it's admitted that it's a one-way communication. I think again that that clearly doesn't fall within the definition.

The injury issue. The question is essentially whether Chamberlain has standing here. I went back and re-read the Rule 56(1) statements. All this argument about hearsay and who said what, the one thing that's undisputed is Chamberlain was selling their product to Lowe's and Lowe's stopped buying that product in favor of the Skylink Model 39. That's undisputed on the record.

Furthermore, there is a presumption that there is irreparable harm if there is a violation of this Act. We cited a couple of these other cases that I have found in the context of preliminary injunction, that there was a presumption of irreparable harm.

As far as the software, is it copyrightable? What did we submit? We submitted the software, the original software that has the rolling code features written in it. The minor variations over time have been discussed at length in Mr. Fitzgibbon's deposition. They have had all kinds of opportunities to challenge whether or not that software has been changed in any significant way relating to this case. He has clearly shown that it's simply been various models of

garage door openers that have come out over the years, but the rolling code aspect has remained unchanged. That is what's part of the original registration.

I want to make sure that it's clear we are not concerned about marketing to code grabbers. I think the question was raised there. We are concerned about selling a product which now exposes homeowners to code grabbers.

The homeowners have to -- just so you know, they have to take the Skylink device and learn it into their Chamberlain garage door opener. There is a learning process, just like the Chamberlain rolling code transmitter. There are two numbers that are sent. Skylink also sends a number that has to be learned. They have to program in the Skylink Model 39. It's programmed in. After that it will operate on the process that we have discussed earlier.

So this isn't a situation where we are worried about Skylink selling this to a code grabber and then they operate the Model 39 and break into somebody's garage door opener. That's not what we are worried about. That couldn't happen because Skylink's product still has to be learned by the Chamberlain GDO in the program mode.

THE COURT: Okay.

MR. FINK: Finally, just to address the argument of the amicus briefly. I think we did address it all in the briefs. But I think the point that perhaps is most

important is the legislative history is not just about protecting against copying that shouldn't be done by breaking in through security measures.

The legislative history also says that part of the statute is to encourage the innovation of security measures. Congress wanted security measures to be protected and encouraged under the statute. That's exactly what the rolling code system is.

I think this is a legitimate fair reading of the Digital Millennium Copyright Act and its history is to protect exactly this kind of security system. It's not just one way. It's protecting both what is -- protecting the ability to have copyrightable subject matter distributed out there in a controlled way, but on the other side of the coin to protect those and encourage those who are creating innovative security measures.

We cited legislative history that said it would be a mistake to just focus on the kinds of things that were of concern at the time they enacted the statute, the various products out there. Their intention was to allow this to be flexible to apply to the new technology that's -- it wasn't brought to their attention at the time. I think this rolling code feature applies not just to our product, but it's clearly a significant security feature protecting software in a lot of industries. We have cited some of the

patents and some of the other uses of rolling code security measures.

So that's it unless you have any questions.

THE COURT: The rolling code in your view protects the software?

MR. FINK: Pardon me? The rolling code security measure protects access to the software.

THE COURT: It protects communication with the software, right?

MR. FINK: Protects against somebody communicating to gain access to operate the computer and the software in the computer, gaining access to the --

THE COURT: But not then to distribute the software?

MR. FINK: We're not concerned about distribution in this case. It's concerned about using that software.

THE COURT: All right. Thank you.

MR. FINK: Are we done? The one thing I did want to say, your Honor, is they filed a number of objections to evidence. I am not sure how to handle that, but I certainly would like to provide a written response because it's hard to go through all those objections orally.

THE COURT: As you can see, Mr. Fink, there isn't nearly enough paper that's been filed in this case. So certainly I would expect that you would want to respond to

that.

MR. FINK: Okay. We will file a response, say, within seven days.

THE COURT: That's fine.

Mr. Nimmer.

MR. NIMMER: Thank you, your Honor. If I could close with two very brief points.

Mr. Fink mentioned that the *Reimerdes* court simply focused on an (a)(2) violation because of the possibility of unauthorized access. I would like to point out that Judge Kaplan's opinion was far more nuanced than that. On page 315 of 111 F.Supp.2d he characterized what is the net of this all and says the following:

"DeCSS is a free, effective and fast means of decrypting plaintiffs' DVDs and copying them to computer drives. DivX permits compression of the decrypted files to sizes that readily fit on a writable CD-ROM. Copies of such CD-ROMs can be produced very cheaply and distributed as easily as other pirated intellectual property."

He concluded by calling this "a growing threat."

The gravamen of what gave rise to liability in the *Reimerdes* case was the possibility that was prohibited by Section 1201(a)(2), that users would obtain unauthorized access on a massive basis to copyrighted works, and for that reason they would no longer purchase those works. That is

precisely the threat that is absent here. Instead, the possibility here is that users will open up their own garage doors and they will do so with a technology other than Chamberlain's.

Now, the second point is that Mr. Fink said that he does not know whether the user at home is culpable, but clearly Skylink in his view is culpable because it has acted without the authorization of the copyright owner.

That is an incorrect way of analyzing the statute, your Honor. Every time the law imposes vicarious liability, it requires as a prerequisite that there be someone who commits the underlying offense. Thus, if A sues X for vicarious copyright infringement, there has to be a Y or a Z out there who committed copyright infringement or else the cause of action will inevitably fail.

It's the same thing under Sections 1201(a)(1) and 1201(a)(2). (a)(2) comes into effect only if someone provides a component or a service or a product that facilitates the underlying activity that violates the statute. That underlying activity is (a)(1); namely, circumventing a technological measure without the authority of the copyright owner. So it's impossible for Skylink to violate 1201(a)(2) unless there is a primary violator under 1201(a)(1).

And we've seen that there is not a primary

violator. There is no evidence that code grabbers exist. There is evidence, however, that individuals want to get into their own homes by opening up their own garages. Those individuals act with the authority of the copyright owner. And Mr. Fink had the opportunity to say we think all of our customers have violated the DMCA, but he declined to make a pronouncement on that subject. That declination until it is made is fatal to the cause of action under Section 1201(a)(2).

Now, it so happens there is indeed a doctrine of implied license under copyright law. In fact, *Associates versus Cohen*, an opinion by Judge Kazinski in the Ninth Circuit, is on point, and I could provide the Court with Seventh Circuit authority.

But one may not reason by analogy because the language of the statute is explicit that there can be a 1201(a)(1) violation only if individuals act without the authority of the copyright owner. We submit that when the teenage boy helps the family get into the home after vacation he has not violated Section 1201(a)(1). For that reason it is impossible for Skylink to have violated Section 1201(a)(2).

Thank you, your Honor.

MR. FINK: Can I reply briefly, your Honor?

THE COURT: Sure.

MR. FINK: As far as the issue of are we worried about only protecting against illegal copying, it's clear that no copyright infringement is required under 1201(a)(2). That's the legislative history and the case law. So it is not just limited to concern about illegal copying, if you will.

As far as the vicarious liability on 1201(a)(2), you have got to read the statute. It specifically says that you may not traffic in products that are for the purpose of circumventing. It does not -- I repeat. It does not have any requirement under any user having violated Section 1201(a)(1). They are entirely separate, and there is no statutory requirement or any case which would even hint that 1201(a)(2) requires an underlying violation by the user of the material that's being -- of the product that's being trafficked on the open market.

THE COURT: Does it have to enable that?

MR. FINK: It has to -- it says it's primarily designed for the purpose of circumventing a technological measure that controls access to work protected under this title. So, so long as it is enabling or it's designed for the purpose of circumventing the measure, it violates the statute.

THE COURT: So in your view any Chamberlain GDO owner that buys a Skylink -- what's the word I want? -- the

transmitter is, in fact, violating the Digital Millennium Copyright Act?

MR. FINK: No, no. The seller is. The sellers of those products are violating the Act because it's offered to the public to provide or otherwise traffic in the technology. 1201(a)(2) is an antitrafficking statute. You are not allowed to sell the stuff on the open market.

THE COURT: It's okay to use it. You just can't sell it.

MR. FINK: 1201(a)(2) says nothing about use. It only talks about trafficking in this product. It's a different section of the Act that talks about whether it's a violation to actually circumvent a security measure. That's 1201(a)(1).

THE COURT: That's what I am asking. Isn't it a logical conclusion from your argument that your client's customers are all in violation of 1201(a)(1)? The language is no different. It's aimed at a different group.

MR. FINK: I would say under the statutory language that's true.

THE COURT: Do you intend to bring an enforcement action against those customers?

MR. FINK: No, no. We're not bringing any. We haven't intended to bring any actions against actual users. We are bringing it against the person trafficking in this

product under 1201(a)(2), not under 1201(a)(1).

THE COURT: Okay. Thank you.

MR. FINK: Thank you.

THE COURT: Thank you all for your presentations and for your briefs.

I expect to issue a written ruling. It won't be next week. I would hope it will be toward the end of next month. At that time, assuming the motion is denied, I will have you back in for a status. And if it's granted, you will be off to the Court of Appeals.

Thanks.

MR. FINK: Thank you, your Honor.

MR. NIMMER: Thank you, your Honor.

MS. GREENE: Thank you, your Honor.

(An adjournment was taken at 12:10 p.m.)

* * * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

F_____ August 1, 2003.
Official Court Reporter