

No. 04-1118

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**UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

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THE CHAMBERLAIN GROUP, INC.,

*Plaintiff-Appellant,*

v.

SKYLINK TECHNOLOGIES, INC.,

*Defendant-Appellee.*

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF ILLINOIS IN CASE NO. 02-CV-6376,  
JUDGE REBECCA R. PALLMEYER

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**BRIEF OF DEFENDANT-APPELLEE**

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March 29, 2004

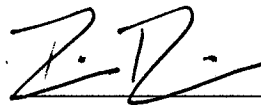
**I. CERTIFICATE OF INTEREST**

Counsel for Appellee Skylink Technologies, Inc. certifies the following:

1. The full name of every party or amicus represented by us is:  
Skylink Technologies, Inc.
2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by us is:  
None.
3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are: None.
4. There is no such corporation as listed in paragraph 3.

5. The names of all law firms and the partners or associates who appeared for the party or amicus now represented by us in the trial court or agency or are expected to appear in this Court are: Irell & Manella LLP (David Nimmer, Andra Barmash Greene, Richard de Bodo, Peter Christensen, David Djavaheerian); Michael Best & Friedrich LLC (Charles A. Laff, Michael A. Steigel, Brian J. Lum).

Dated: March 28, 2004



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## II. TABLE OF CONTENTS

	<u>Page</u>
I. CERTIFICATE OF INTEREST .....	i
II. TABLE OF CONTENTS .....	iii
III. TABLE OF AUTHORITIES .....	v
IV. STATEMENT OF RELATED CASES .....	viii
V. STATEMENT OF THE CASE .....	1
VI. STATEMENT OF THE ISSUES .....	2
VII. STATEMENT OF THE FACTS .....	3
VIII. SUMMARY OF THE ARGUMENT .....	6
IX. ARGUMENT .....	15
A. Legal Background Regarding The DMCA .....	15
B. The Undisputed Facts Establish That Chamberlain Authorized Its Customers To Use Other Companies' Transmitters To Operate Their GDOs .....	18
1. The District Court Correctly Held That Chamberlain's Customers Are Authorized To Operate Their GDOs Using Skylink's Transmitters. ....	19
2. Chamberlain's Purported Evidence Does Not Support Its Claim That Customers Are Not Authorized To Operate Their GDOs With Other Companies' Transmitters. ....	26
C. Chamberlain's Legal Positions Are Incorrect .....	36
1. Chamberlain Seeks To Impose A New Authority Requirement Not Present In The DMCA .....	36
2. The District Court Properly Placed The Burden Of Establishing Circumvention On Chamberlain. ....	52

D.	The Record Supports The District Court's Grant Of Summary Judgment On At Least Three Other Grounds. ....	63
1.	Skylink's Transmitters Do Not "Avoid" Chamberlain's GDO Software. ....	64
2.	The "Technological Protection Measure" In Chamberlain's GDOs Is The Fixed Identification Code, Not The Rolling Code.....	67
3.	Chamberlain's Rolling Code Subroutine Controls Access To Internal Software Processes, Not To A Copyrighted Work. ....	69
X.	CONCLUSION AND STATEMENT OF RELIEF SOUGHT .....	74
XI.	CERTIFICATE OF COMPLIANCE .....	75

### III. TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Cases</u>	
<i>Atari Games Corp. v. Nintendo of America, Inc.</i> , 975 F.2d 832 (Fed. Cir. 1992) .....	69
<i>Baker v. Selden</i> , 101 U.S. 99 (1879).....	14, 69
<i>Carmen v. San Francisco Unified School Dist.</i> , 237 F.3d 1026 (9th Cir. 2001) .....	5, 34, 37
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986).....	25, 53, 55, 59
<i>Duncan v. Walker</i> , 533 U.S. 167 (2001).....	25, 37, 58
<i>Feist Publications, Inc. v. Rural Telephone Services, Co.</i> , 499 U.S. 340 (1991).....	71
<i>Gates Rubber Co. v. Bando Chemical Industries, Ltd.</i> , 9 F.3d 823 (10th Cir. 1993) .....	70, 73
<i>Glaxo Group Ltd. v. Torpharm, Inc.</i> , 153 F.3d 1366 (Fed. Cir. 1998) .....	12, 63
<i>Hewlett-Packard v. Repeat-O-Type Stencil Manuf. Corp.</i> , 123 F.3d 1445 (Fed. Cir. 1997) .....	60
<i>IMS Inquiry Management Sys., Ltd. v. Berkshire Information Sys., Inc.</i> , 2004 WL 345556 (S.D.N.Y. Feb. 23, 2004) .....	13, 65, 66
<i>In the Matter of Certain Universal Transmitters for Garage Door Openers</i> , Inv. No. 337-TA-497 (Initial Determination), 2003 WL 22811119 (Nov. 4, 2003) (affirmed by Commission, Nov. 24, 2003).....	passim
<i>Lexmark Int'l, Inc. v. Static Control Components</i> , 253 F. Supp. 2d 943 (E.D. Ky. 2003).....	passim
<i>Martz v. Xerox, Inc.</i> , 77 F.3d 1109 (8th Cir. 1996) .....	10, 30, 31

<i>Met-Coil Sys. Corp. v. Korner Unlimited, Inc.</i> , 803 F.2d 684 (Fed. Cir. 1986).....	10, 28, 56
<i>ProCD, Inc. v. Zeidenberg</i> , 86 F.3d 1447 (7th Cir. 1996).....	29
<i>RealNetworks, Inc. v. Streambox, Inc.</i> , 2000 WL 127311 at *2- 3 (W.D. Wash. 2000).....	72
<i>SMS Sys. Maintenance Servs., Inc. v. Digital Equip. Corp.</i> , 188 F.3d 11 (1st Cir. 1999).....	31
<i>Sony Computer Entertainment America, Inc. v. Gamemasters</i> , 87 F. Supp. 2d 976 (N.D. Cal. 1999).....	72
<i>Sorenson v. Sec. of the Treasury</i> , 475 U.S. 851 (1986).....	23, 42
<i>The Chamberlain Group, Inc. v. Skylink Technologies, Inc.</i> , 292 F. Supp. 2d 1023 (N.D. Ill. 2003).....	1
<i>The Chamberlain Group, Inc. v. Skylink Technologies, Inc.</i> , 292 F. Supp. 2d 1040 (N.D. Ill. 2003).....	1, 8
<i>United States v. Univis Lens Co.</i> , 316 U.S. 241 (1942).....	60
<i>Universal City Studios, Inc. v. Corley</i> , 273 F.3d 429 (2d Cir. 2001).....	passim
<i>Universal City Studios, Inc. v. Reimerdes</i> , 111 F. Supp. 2d 294 (S.D.N.Y. 2000), <i>aff'd sub nom.</i> <i>Universal City Studios, Inc. v. Corley</i> , 273 F.3d 429 (2d Cir. 2001).....	passim
<i>Walsh v. Schlecht</i> , 429 U.S. 401 (1977).....	31
<i>Wells v. Franzen</i> , 777 F.2d 1258 (7th Cir. 1985).....	35
<i>Whitted v. Gen. Motors Corp.</i> , 58 F.3d 1200 (7th Cir. 1995).....	35
<b><u>Statutes and Rules</u></b>	
15 U.S.C. § 14.....	31
15 U.S.C. § 2302(c).....	31

17 U.S.C. § 102(b) .....	14, 69
17 U.S.C. § 106 .....	70
17 U.S.C. § 501(a) .....	70
17 U.S.C. § 1201(a)(1).....	passim
17 U.S.C. § 1201(a)(2).....	passim
17 U.S.C. § 1201(a)(3)(A) .....	passim
17 U.S.C. § 1201(b)(2).....	70
17 U.S.C. § 1201(f)(1) .....	50
17 U.S.C. § 1201(g)(2).....	50
17 U.S.C. § 1201(j)(2) .....	50
Fed. R. Civ. Proc. 56(e) .....	35
Fed. R. Evid. 901 .....	35
16 C.F.R. § 700.10 .....	31

**Other Authorities**

H.R. Rep. No. 105-551, Part 1, 105th Cong., 2d Sess. (1998).....	15
Melville B. Nimmer & David Nimmer, 3 <i>Nimmer on Copyright</i> § 12A.02[B][1] (2002).....	15
S. Rep. No. 105-190, 105th Cong., 2d Sess. (1998).....	15



#### IV. STATEMENT OF RELATED CASES

Appellee Skylink Technologies, Inc. submits the following statement of related cases pursuant to Rule 47.5 of this Court:

No appeal in or from the same civil action in the lower court was previously before this or any other appellate court.

There are no cases known to counsel to be pending in this or any other court that will directly affect or be directly affected by this Court's decision in the pending appeal.

Skylink disagrees with the assertion in Appellant The Chamberlain Group, Inc.'s Statement of Related Cases that the International Trade Commission ("ITC") Investigation entitled *In re Certain Universal Transmitters for Garage Door Openers*, Investigation No. 337-TA-497, will directly affect or be directly affected by this Court's decision. That Investigation is no longer "pending," and has already has been terminated in Skylink's favor. Indeed, in that investigation, Skylink prevailed on a motion for summary determination that was essentially identical to the motion for summary judgment at issue in this appeal. Both motions were granted on essentially the same basis: that Chamberlain had authorized its customers to operate the Chamberlain garage door openers they purchased using other

companies' transmitters (including Skylink's), and therefore, there was no violation of the Digital Millennium Copyright Act.

V. **STATEMENT OF THE CASE**

Skylink provides the following additional information not included in Chamberlain's Statement of the Case: The district court's August 29, 2003 opinion denying Chamberlain's motion for summary judgment regarding its Digital Millennium Copyright Act ("DMCA") claim (A14-41) appears as *The Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, 292 F. Supp. 2d 1023 (N.D. Ill. 2003). The district court's November 13, 2003 opinion granting Skylink's motion for summary judgment on Chamberlain's DMCA claim (A1-12) appears as *The Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, 292 F. Supp. 2d 1040 (N.D. Ill. 2003).

**VI. STATEMENT OF THE ISSUES**

1. Whether the district court correctly granted defendant/appellee Skylink Technology, Inc.'s motion for partial summary judgment.

## VII. STATEMENT OF THE FACTS

Two separate and independent tribunals granted summary judgment based on the undisputed evidence submitted below.

Appellant The Chamberlain Group, Inc. ("Chamberlain") sells garage door openers ("GDOs"), but does not tell its customers that they are prohibited from operating their GDOs using transmitters manufactured by other companies – even though Chamberlain knows that customers will need additional or replacement transmitters and that Appellee Skylink Technologies, Inc. ("Skylink") supplies them. (A4-5, A8, A4615-4616, A5203-5204, A5746-5747, A5812-5816); *see* Appellant's Brief, 3. For a transmitter to operate a Chamberlain GDO, its unique identification code must be stored by the homeowner in the GDO's memory; Chamberlain's GDOs are designed so that identification codes of other companies' transmitters (including Skylink's) can be stored in their memories. (A4-5, A11, A5746-5747, A5715, A5812-A5813); *see* Appellant's Brief, 5-8. Moreover, Chamberlain itself sells universal transmitters that are designed to open GDOs manufactured by other companies – *i.e.*, precisely the conduct

which gives rise to Chamberlain's DMCA claims.<sup>1</sup> (A5, A40, A4616-4617, A5746-5747, A5813-5814)

Chamberlain concedes that it does not tell customers that they are prohibited from using other companies' transmitters. In fact, Chamberlain offered excuses to the district court for its failure to communicate such a prohibition. (A6-9, A25, A4615-4616, A5179-5180) Nevertheless, Chamberlain contends that its customers should divine that they are prohibited from using other companies' transmitters to open their GDOs because: (i) Chamberlain's limited warranties for its GDOs (which Chamberlain changed during this litigation) only cover Chamberlain parts and accessories, and not other companies' accessories, (A4960-4961, A5211-5286); *see* Appellant's Brief, 29-30; *and* (ii) Chamberlain's website instructs customers how to program the identification codes of Chamberlain's and other companies' GDO transmitters into their Chamberlain GDOs so that they will be recognized and may open the GDOs,

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<sup>1</sup> Skylink need not contest Chamberlain's technical explanations regarding its GDOs and Skylink's transmitters. (As discussed below, Chamberlain's technical explanations demonstrate that Chamberlain has no valid DMCA claim.)

but the text of these instructions mentions only Chamberlain's transmitters by name. (A4960-61, A5208-5210); *see* Appellant's Brief, 29-30.<sup>2</sup>

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<sup>2</sup> Skylink does not need to address Chamberlain's assertions regarding "code grabbers," because the purported existence of "code grabbers" is irrelevant to whether Chamberlain's customers are authorized to open their GDOs using other companies' transmitters. (A5461-5462, A5385-5386) Indeed, given the issue's irrelevance, Chamberlain's repeated references to "code grabbing" appear designed solely to impugn Skylink and its products and to distract attention from Chamberlain's inability to satisfy the requirements for a valid DMCA claim. Nonetheless, Skylink notes that Chamberlain's "evidence" regarding purported "code grabbing" is non-existent: (i) Chamberlain has been unable to establish that any act of "code grabbing" has ever occurred, and (ii) Chamberlain's rolling code transmitters themselves are susceptible to "code grabbing." (A19, A24, A1728, A1767-1771, A1774-1792, A1996-1997). Moreover, none of the supposed evidence on which Chamberlain currently relies was submitted in opposition to Skylink's motion for summary judgment, *see* Appellant's Brief, 4 (citing A3105-3121, A3130-3131, A3209-3215, A3230-3274, A3277, A3287, A3308), and for that reason such "evidence" provides no basis for overturning summary judgment. *See, e.g., Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001) (grant of summary judgment will not be overturned based on evidence not submitted with opposing party's opposition papers, even if evidence appears elsewhere in the district court's file).

## VIII. SUMMARY OF THE ARGUMENT

Chamberlain, the leading domestic manufacturer of GDOs, brought this action for patent infringement and other claims to prevent Skylink from selling universal transmitters which can be used as replacement and additional transmitters for Chamberlain's GDOs. After extensive litigation and dismissal of Chamberlain's other causes of action, Chamberlain is now pursuing a single claim in this appeal: its contention that the Digital Millennium Copyright Act of 1998 (the "DMCA"), an act passed to protect copyrighted content in the digital environment, prohibits Skylink from offering universal transmitters, and prevents homeowners from using transmitters made by companies other than Chamberlain to open their Chamberlain garage doors.

For Chamberlain to maintain its DMCA claim, it must establish that it can satisfy the DMCA's "circumvention" requirement. Under the pertinent provision of the DMCA, "circumvention" of a technological measure" is defined to require that the technological measure be avoided or bypassed "*without the authority of the copyright owner.*" 17 U.S.C. § 1201(a)(3)(A).

Chamberlain always has sold its GDOs without placing any restriction on which transmitters could be used with them. (A5-A8, A4615-4616,



A5179-5180) Now, after years of unrestricted sales, Chamberlain argues that its customers should not be permitted to purchase or use replacement or additional transmitters made by companies other than Chamberlain.

Two tribunals independently have ruled that summary judgment must be granted in favor of Skylink on Chamberlain's DMCA claim. Both the ITC and, in the case underlying this appeal, the United States District Court for the Northern District of Illinois, have held as a matter of law that homeowners do not act "without the authority" of Chamberlain and therefore do not violate the DMCA when they operate Chamberlain GDOs using transmitters sold by Skylink.

First, in an ITC investigation initiated by Chamberlain, Skylink moved for summary determination based on Chamberlain's authorization to its customers to use other companies' transmitters. *In the Matter of Certain Universal Transmitters for Garage Door Openers*, Inv. No. 337-TA-497 (Initial Determination), 2003 WL 22811119 (Nov. 4, 2003) (affirmed by Commission, Nov. 24, 2003). The United States government (specifically, the Investigative Attorneys of the Office of Unfair Import Investigations) supported Skylink's motion and also sought summary determination in Skylink's favor. *Id.* On November 4, 2003 summary determination was

granted, and the ITC found that Chamberlain had failed to adduce evidence that its customers are not authorized to use other companies' transmitters to operate Chamberlain GDOs. *Id.*

The ITC's decision was issued while a virtually identical motion for summary judgment was pending in the district court case underlying this appeal. Shortly after the ITC decision, the district court also granted summary judgment in Skylink's favor. (A1-12); *see The Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, 292 F. Supp. 2d 1040 (N.D. Ill. 2003). Chamberlain now appeals from the district court's judgment.

In granting summary judgment, the district court correctly held that Section 1201(a)(2) requires "circumvention of a technological measure," and that "circumvention" requires conduct occurring "without the authority of the copyright owner." (A7); *see* 17 U.S.C. §§ 1201(a)(2), 1201(a)(3)(A).

The district court held, based on the undisputed evidence submitted by Skylink, that Chamberlain's customers *are* authorized to operate their Chamberlain GDOs using other companies' transmitters. (A8-12) There was no dispute, for instance, that Chamberlain sells its GDOs to customers without announcing any prohibition and without telling customers that they lack authorization to operate their GDOs except by using Chamberlain's

transmitters. (A5, A8); *see* (A4615-4616, A5746-5747, A5813-5816)

Moreover, Chamberlain makes these unrestricted sales despite knowing that its customers will need additional or replacement transmitters, and that Skylink supplies them. *Id.* It is undisputed that, as designed, Chamberlain's GDOs can be programmed to store and then recognize Skylink's transmitters' identification codes, so that Skylink transmitters will open Chamberlain's GDOs. (A4-5, A11, A5746-5747, A5715, A5812-A5813); *see* Appellant's Brief, 5-8. Finally, Chamberlain itself sells universal transmitters that can open GDOs manufactured by other companies, but claims that Skylink violates the DMCA when it does the same thing. (A5); *see* (A4616-4617, A5746-5747, A5813-5814). Based on these undisputed facts, the district court – like the ITC – held that, as a matter of law, Chamberlain could not establish that its customers lack authorization to operate their GDOs using Skylink's transmitters, and therefore cannot maintain its claim for violation of Section 1201(a)(2). (A8-12); *see Matter of Universal Transmitters*, 2003 WL 22811119 at \*17-22.

The district court also held that Chamberlain failed to submit any evidence that could possibly raise a disputed issue of fact relating to Section 1201(a)'s "authorization" element. (A9-12) The only "evidence"

Chamberlain offered as support for its position was (i) limited warranties for Chamberlain's GDOs which do not provide warranty coverage for non-Chamberlain parts or accessories, and (ii) printouts from Chamberlain's website containing instructions that can be used to program Chamberlain and non-Chamberlain transmitters, but which mention only Chamberlain transmitters by name. (A4960-4961, A5208-5286); *see* Appellant's Brief, 29-30. However, Chamberlain's post-sale, unilateral statements in its warranties, owners' manuals or on its website do not create any restrictions on its customers' conduct, or otherwise constitute a lack of authorization relating to other companies' transmitters, and therefore are not material to the authorization or circumvention issues. *Met-Coil Sys. Corp. v. Korners Unlimited, Inc.*, 803 F.2d 684, 687 (Fed. Cir. 1986) (after-the-fact notices are "not part of the circumstances at the time of the sale," and "are of no use in ascertaining the intent of [the seller] and its customers at the time of the sales."); *Martz v. Xerox, Inc.*, 77 F.3d 1109, 1112 (8th Cir. 1996) (warranty limitations do not restrict consumer conduct; consumer is authorized to forego warranty); *see Matter of Universal Transmitters*, 2003 WL 22811119

at \*19-21 (Chamberlain's new warranties are not relevant to customers' authorization).<sup>3</sup>

To overcome its lack of evidence, Chamberlain now argues that a DMCA plaintiff may satisfy the "authorization" element by producing *no* evidence whatsoever – in effect, Chamberlain asks that the Court establish a presumption that a DMCA defendant such as Skylink acts without authority. But the plain language of the statute sets forth the *prima facie* elements that Chamberlain must satisfy, which include circumvention; as with every other statutory element, a DMCA plaintiff is required to offer evidence establishing that the conduct in issue is not authorized. 17 U.S.C. §§ 1201(a)(2), 1201(a)(3)(A).

Chamberlain next argues that even if it has authorized its customers to use its products however they please and without restriction, other manufacturers still are not authorized to sell related products for use with the

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<sup>3</sup> Summary judgment may be affirmed based on either of the district court's two alternative grounds (*i.e.*, Chamberlain's failure to adduce evidence on the required element of authorization, or the undisputed facts offered by Skylink which established authorization). Indeed, in Chamberlain's ITC action against Skylink, both the ITC and the Government attorneys determined that, in addition to these other grounds, Chamberlain has *expressly* authorized its customers to use other companies' transmitters. *Matter of Universal Transmitters*, 2003 WL 22811119 at \*14-15.

original product. As Skylink demonstrates below, however, Chamberlain's arguments are contrary to the DMCA's statutory scheme and language, and also ignore the fact that, based on Chamberlain's own allegations and evidence, Skylink has not avoided or bypassed Chamberlain's technology, but rather has used it in an intended manner. *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 444 (2d Cir. 2001) (relevant issue is whether alleged trafficker's customers have been authorized by the copyright owner).

Finally, separate and independent from the rationale adopted by the district court, this Court may affirm summary judgment on any ground supported by the record. *See, e.g., Glaxo Group Ltd. v. Torpharm, Inc.*, 153 F.3d 1366, 1371 (Fed. Cir. 1998) (summary judgment may be affirmed on grounds not considered below so long as supported by the record).

Judgment in Skylink's favor was proper on at least three grounds not reached by the district court, but nevertheless established in the record by Chamberlain's own admissions regarding its GDO technology.

First, Chamberlain admits that Skylink's transmitters operate Chamberlain's GDO software not by bypassing it, but by using a feature (resynchronization) that Chamberlain included with its software. (A4618-4619, A5746-5747, A5812-5816); *see* Appellant's Brief, 8-10. Accordingly,

Chamberlain cannot meet the DMCA's requirement that Skylink's transmitters "avoid" or "bypass" Chamberlain's purported protection measure. 17 U.S.C. §§ 1201(a)(2), 1201(a)(3)(A); *see IMS Inquiry Management Sys., Ltd. v. Berkshire Information Sys., Inc.*, 2004 WL 345556 (S.D.N.Y. Feb. 23, 2004) (no "circumvention" where protection measure is operated in designed manner, regardless of whether person operating measure is not authorized to operate measure); *Matter of Universal Transmitters*, 2003 WL 22811119 at \*16 (Skylink's transmitters do not circumvent Chamberlain's GDO software because operation of resynchronization procedure is an intended feature of Chamberlain's GDO software).

Second, as the ITC held, the technological protection measure contained in Chamberlain's GDOs is the fixed identification code, *not* the rolling code subroutine. (A5203-5206, A5746-5747, A5812-5816); *see* Appellant's Brief, 5; *Matter of Universal Transmitters*, 2003 WL 22811119 at \*14-15 ("Chamberlain's copyrighted program will never execute if an improper fixed transmitter identification code is received."). Chamberlain does not and cannot claim that Skylink has circumvented Chamberlain's identification code measure. (A5173)

Third, Chamberlain's description of its GDOs demonstrates that its GDO software controls "access" only to the internal electrical *processes* in the GDOs. Appellant's Brief, 7 (citing A22, A83-86, A2390-2392) (emphasis added); *see* (A5203-5206, A5812-5816). Chamberlain thus cannot meet the requirement that its technological measure controls access *to a copyrighted work*. 17 U.S.C. § 1201(a)(2); *see* 17 U.S.C. § 102(b) (computer processes not copyrightable); *Baker v. Selden*, 101 U.S. 99, 102-103 (1879) (processes not part of copyrighted work).

For each of these reasons, this Court should affirm the district court's entry of judgment in Skylink's favor.



## IX. ARGUMENT

### A. Legal Background Regarding The DMCA.

Congress enacted the DMCA, codified in relevant part at 17 U.S.C. § 1201 *et seq.*, "to make digital networks safe places to disseminate and exploit copyrighted works," to protect copyrighted content in the digital environment, and "to make available via the Internet movies, music, software, and literary works that are the fruit of American creative genius." H.R. Rep. No. 105-551, Part 1, 105th Cong., 2d Sess. (1998); Melville B. Nimmer & David Nimmer, 3 *Nimmer on Copyright* § 12A.02[B][1] (2002) (*quoting* S. Rep. No. 105-190, 105th Cong., 2d Sess. (1998)). This case involves garage door openers.

Chamberlain brought a claim against Skylink under Section 1201(a) of the DMCA. Section 1201(a)(1) proscribes direct acts of circumventing a technological measure:

No person shall circumvent a technological measure that effectively controls access to a work protected under this title [*i.e.*, the Copyright Act].

17 U.S.C. § 1201(a)(1). "Circumvention," as used in DMCA Section 1201(a), is defined in Section 1201(a)(3)(A):

[T]o '*circumvent a technological measure*' means to [1] descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, [2] without the authority of the copyright owner.

17 U.S.C. § 1201(a)(3)(A) (brackets added). Thus, a party can be held to have circumvented a technological measure, giving rise to a DMCA violation, only when two requirements are satisfied:

- [1] a technological measure is "avoided"; and
- [2] such avoidance occurs "without the authority of the copyright owner."

*Id.* (Skylink will refer to this two-pronged statutory definition as the "circumvention test," and to its elements as "prong [1]" and "prong [2].") For ease of reference, Skylink also will use the single term "avoid" to refer to each of the DMCA's enumerated forms of conduct that satisfy prong [1] of the circumvention test.)

While Section 1201(a)(1) prohibits *direct circumvention*, Section 1201(a)(2) imposes *derivative liability* on those who "traffic" in circumvention devices:

No person shall manufacture, import, offer to the public, or otherwise traffic in any technology, product, service, device, component, or part thereof, that –

(A) is primarily designed or produced for the purpose of *circumventing a technological measure* that effectively controls access to a work protected under this title;

(B) has only limited commercially significant purpose or use other than to *circumvent a technological measure* that effectively controls access to a work protected under this title;  
or

(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in *circumventing a technological measure* that effectively controls access to a work protected under this title.

17 U.S.C. § 1201(a)(2) (emphasis added). According to Section 1201(a)(2), to be liable under the DMCA, the manufacturers or sellers of "circumvention devices" are not required to satisfy the two requirements of circumvention themselves. Instead, they must produce or market technology that is used or can be used by others to circumvent (as defined in Section 1201(a)(3)(A)).  
*See* 17 U.S.C. § 1201(a)(2)(A)-(C).

Chamberlain has not accused Skylink itself of avoiding or bypassing Chamberlain's technological measure and therefore of directly circumventing Chamberlain's technology under DMCA Section 1201(a)(1). Instead, Chamberlain has accused Skylink of trafficking in circumvention devices, as prohibited by DMCA Section 1201(a)(2). (A1615-1617); *see*

Appellant's Brief, 27 (Section 1201(a)(1) is "not at issue here"). The only parties that Chamberlain alleges avoid or bypass Chamberlain's technological measure (or who may potentially do so) are the owners of Chamberlain's GDOs who use Skylink's transmitters to open their garage doors. (A1615-1617); *see* Appellant's Brief, 27-29.

**B. The Undisputed Facts Establish That Chamberlain Authorized Its Customers To Use Other Companies' Transmitters To Operate Their GDOs.**

The district court and the ITC each correctly held – based on the same undisputed evidence – that Chamberlain cannot establish that Skylink's transmitters are made, used or marketed for "circumvention" of Chamberlain's rolling code subroutine, and that therefore, summary judgment must be granted on Chamberlain's Section 1201(a)(2) claim against Skylink. Because Chamberlain has authorized its customers to operate their GDOs using transmitters manufactured by other companies, customers using Skylink's transmitters with their Chamberlain GDOs cannot by definition satisfy Section 1201(a)(2)'s requirement of conduct occurring "without the authority of the copyright owner" (*i.e.*, prong [2] of the circumvention test), and therefore cannot possibly "circumvent"

Chamberlain's technological measure, as the term is defined in Section 1201(a). Because Skylink sells transmitters that are not used by customers (and indeed, cannot be used by customers) to "circumvent" Chamberlain's GDO software, Skylink does not traffic in "circumvention" devices prohibited by the DMCA. For these reasons, both the district court and the ITC correctly held that as a matter of law, Chamberlain cannot satisfy prong [2] of the circumvention test ("without the authority of the copyright owner"), and cannot succeed on its DMCA claim.

**1. The District Court Correctly Held That Chamberlain's Customers Are Authorized To Operate Their GDOs Using Skylink's Transmitters.**

The district court correctly interpreted and applied the language and requirements of Section 1201. First, the district court correctly explained that Section 1201(a)(2) requires "circumvention of a technological measure." (A7); *see* 17 U.S.C. § 1201(a)(2). This, in turn, requires conduct occurring "without the authority of the copyright owner." (A7); *see* 17 U.S.C. § 1201(a)(3)(A). Applying these statutory elements, the district court correctly recognized that if users are authorized to operate their GDOs with

non-Chamberlain transmitters, then there can be no circumvention and thus no liability under Section 1201(a)(2). (A7-9)

The district court next considered whether, based on the undisputed evidence submitted with Skylink's motion, Chamberlain's customers are authorized to operate their Chamberlain GDOs using other companies' transmitters. *Id.* It noted that there was no dispute that Chamberlain:

- sells its GDOs to customers without any prohibition on their use of other companies' transmitters, and never informed its customers that they were prohibited (or that Chamberlain would seek to prohibit them) from using transmitters made by other companies with Chamberlain's GDOs – not when they bought the GDOs, not in the documents they received when they bought the GDOs, and not in any materials provided or available to customers thereafter. (A5-8); *see* (A4615-4616, A5179-5180);<sup>4</sup>

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<sup>4</sup> Indeed, Chamberlain conceded this point to the district court, arguing that its failure to impose express restrictions should be excused because it purportedly had no reason to tell customers that they were not allowed to purchase or use other companies' transmitters. (A6)

- made its decision not to impose any restrictions on its customers despite knowing that its customers would need additional or replacement transmitters, and that Skylink supplies them. (A5, A8); *see* (A4615-4616, A5746-5747, A5813-5816);
- sells GDOs that can be programmed to store and then recognize Skylink's transmitters' identification codes, so that Skylink transmitters will open Chamberlain GDOs. (A4-5, A11); *see* (A5746-5747, A5715, A5812-5813);  
*and*
- itself sells universal transmitters that can open GDOs manufactured by other companies. (A5); *see* (A4616-4617, A5746-5747, A5813-5814).<sup>5</sup>

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("Chamberlain concedes that it never warned customers against using unauthorized transmitters but explains that it did not do so because it had no idea that other transmitters could be made to operate its rolling code GDOs."); *see also* (A8-9, A25, A5179-5180).

<sup>5</sup> Chamberlain attempts to distinguish its universal transmitters from Skylink's transmitters because Chamberlain's transmitters do not open "rolling code" GDOs manufactured by other companies. Appellant's Brief, 38. Chamberlain's conduct is not consistent with any such distinction. For instance, Chamberlain never has informed its customers that they may use

The district court held that, based on these undisputed facts, Chamberlain could not possibly satisfy prong [2] of the circumvention test, could not establish circumvention, and therefore could not maintain any claim for violation of Section 1201(a)(2). The ITC and the United States government have similarly concluded that Chamberlain cannot establish a valid Section 1201(a) claim. *Matter of Universal Transmitters*, 2003 WL 22811119 at \*23 (granting summary determination).

Chamberlain's position regarding the DMCA necessarily requires not only that *Skylink* is violating the DMCA, but also that all of Chamberlain's own *customers* are violating federal law (and thus are subject to the DMCA's civil and criminal penalties) when they open their GDOs with anything other than a Chamberlain-made transmitter. (A10-11) Section 1201(a)(2)'s prohibitions on "trafficking" in circumvention devices logically depend on underlying "circumvention." 17 U.S.C. § 1201(a)(2)(A)-(C). The term

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other companies' transmitters with their fixed code GDOs, but not rolling code GDOs. (A8, A4615-4616, A5179-5180) If Chamberlain wanted to alter the status quo and limit its customers' authorization to purchase and use replacement transmitters as to certain new models of GDOs (*e.g.*, those having rolling code), it easily could have done so by telling its customers what is and is not authorized. It chose not to do so – presumably because of the anticipated market backlash when customers discover that they are not



"circumvention," which is defined in Section 1201(a)(3)(A) for purposes of both Section 1201(a)(1) and 1201(a)(2), must mean the same thing when it is used in Section 1201(a)(1) as it does in Section 1201(a)(2). *Sorenson v. Sec. of the Treasury*, 475 U.S. 851, 865 (1986) ("The normal rule of statutory construction assumes that 'identical words used in different parts of the same act are intended to have the same meaning.'). Thus, if there is "circumvention" for purposes of Section 1201(a)(2), as Chamberlain contends, Chamberlain's customers also must be liable for direct "circumvention" under Section 1201(a)(1).

Chamberlain admitted to the district court that its position means that its own customers are violating the DMCA when they open their garage doors to get inside:

*The Court:* So in your view any Chamberlain GDO owner that buys a Skylink . . . transmitter is, in fact violating the Digital Millennium Copyright Act? . . . . 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 [than that of Section 1201(a)(2)]. It's aimed at a different group.

*Mr. Fink* [Chamberlain's counsel]: I would say under the statutory language that's true.

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permitted to operate the GDOs they have purchased unless they promise to buy Chamberlain's aftermarket products.

(A4617, A5716, A5746-5747, A5809-5810) Indeed, Chamberlain argued below that its customers violate the DMCA not only if they use Skylink's transmitters, but whenever they open their GDOs using *any* means other than a transmitter sold by Chamberlain. (A4617-4618, A5746-5747, A5774-5776, A5795-5797) As the ITC observed in granting summary determination, "[i]t is rather curious why Chamberlain would take such an extreme position, considering that, if marketed as such, few homeowners would be inclined to purchase such a product." *Matter of Universal Transmitters*, 2003 WL 22811119 at \*19.<sup>6</sup>

Based on the undisputed evidence, the district court rejected Chamberlain's contention that its customers are prohibited from using other companies' transmitters to operate their GDOs. (A7-12) First, the district court found that Chamberlain had failed to submit any evidence that could possibly satisfy the DMCA's "lack of authorization" requirement. (A9-12) The district court properly rejected Chamberlain's claim that this statutory

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<sup>6</sup> Hoping to tone down its "extreme" position, Chamberlain now argues that its customers might escape liability for using Skylink's transmitters regardless of Skylink's liability. Appellant's Brief, 27-29. As discussed in part IX(C)(1) below, however, Chamberlain's position is wrong because it would create an untenable inconsistency in the statute.

element may be satisfied where, as here, a plaintiff presents no evidence whatsoever. (A7) Indeed, Chamberlain's proposed construction of the DMCA improperly reads the "without authority" requirement out of the statute. *Id.*; *see, e.g., Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to 'give effect, if possible, to every clause and word of a statute.'"). Rather, as the party opposing summary judgment, Chamberlain was obligated to show a triable issue of fact regarding its customers' lack of authorization to use other companies' transmitters. *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) ("A complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.").

Second, Skylink itself presented undisputed evidence that Chamberlain's customers *are* authorized to operate their Chamberlain GDOs using other companies' transmitters. (A7-9) Chamberlain knows that its customers may need additional or replacement transmitters, knows that companies such as Skylink are providing them, and itself sells universal transmitters for use with other companies' GDOs. *Id.* Chamberlain's GDOs

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Chamberlain's admission to the district court regarding the necessary result of its construction of the DMCA was accurate.

can be programmed to store and then recognize the identification codes of other companies' transmitters (including Skylink's), so that those transmitters will open Chamberlain's GDOs. (A4-5) Based on these undisputed facts, Chamberlain's failure to impose any restrictions on its customers regarding use of other companies' transmitters constituted an implicit authorization to its customers to use whatever transmitters they choose, including transmitters made by Skylink. *Id.*

Based on the undisputed evidence, the district court, like the ITC, correctly granted summary judgment in favor of Skylink.

**2. Chamberlain's Purported Evidence Does Not Support Its Claim That Customers Are Not Authorized To Operate Their GDOs With Other Companies' Transmitters.**

Chamberlain takes issue with the district court's ruling that the evidence it presented in opposition to Skylink's motion failed to raise any disputed facts regarding Chamberlain's authorization to its customers. Chamberlain claims that the following three items suffice as material disputed facts requiring reversal:

- Chamberlain's GDO owners' manuals posted on Chamberlain's website mention Chamberlain transmitters by name, but not Skylink's products;
- Chamberlain rewrote its GDO warranties during this case and specified for the first time that they only cover Chamberlain parts and accessories; *and*
- Rolling code technology is "relatively new," so there is "no history of sale of universal transmitters that circumvent rolling code security measures."

Appellant's Brief, 29-30. According to Chamberlain, these purported facts support a reasonable inference that "homeowners . . . are not authorized to circumvent[] the Chamberlain rolling code security system with Skylink's universal transmitters." Appellant's Brief, 30. But none of these items constitutes evidence that Chamberlain prohibited its customers or otherwise withheld authorization to use transmitters manufactured by other companies. Accordingly, there is no basis for reversal.

**a. Chamberlain's Website Does Not Create A Factual Dispute Regarding Users' Authorization.**

Chamberlain first argues that its website provides instructions for programming replacement *Chamberlain* transmitters, but not other companies' transmitters. (A5178, A5211-86, A5459-5461); *see* Appellant's Brief, 29-30 (referring to information available on website as Chamberlain's "GDO owners manuals"). Contrary to Chamberlain's suggestion, "[t]he mere fact that Chamberlain's webpage and owners' manual only mentions its own products in no way demonstrates its intention to prohibit customers from using any competing products." (A9) Chamberlain does not, for instance, assert that its website contains any restriction or prohibition on the use of non-Chamberlain transmitters or any warning not to use them.

Indeed, even if Chamberlain had attempted to add language on its website explicitly purporting to restrict customers' use of its GDOs with other companies' transmitters, such post-sale statements cannot create legally cognizable restrictions on consumers' conduct. Such after-the-fact notices are "not part of the circumstances at the time of the sale," and "are of no use in ascertaining the intent of [the seller] and its customers at the time of the sales." *Met-Coil Sys. Corp. v. Korners Unlimited, Inc.*, 803 F.2d 684,

687 (Fed. Cir. 1986); see *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452-1453 (7th Cir. 1996) (shrinkwrap license requires "acceptance" by consumer; consumer must be *informed of license* and accept goods).

Chamberlain has not, for instance, adduced evidence that customers must visit Chamberlain's website and agree to such restrictions before purchasing or using their GDOs.

**b. Chamberlain's Altered Warranties Do Not Create A Factual Dispute Regarding Users' Authorization.**

Chamberlain's recently revised warranties also cannot create a dispute of material fact. Chamberlain's position is that because buried on the last page of one of its recently revised manuals, in the boilerplate language of the warranty section, is a statement that Chamberlain's limited warranty does not cover "unauthorized parts or accessories," Chamberlain should be held to have prohibited its customers from ever using non-Chamberlain transmitters. Appellant's Brief, 29-30. There is no basis for this assertion. Chamberlain's manuals and warranties contain no statement providing that customers are prohibited from using non-Chamberlain transmitters (or Skylink transmitters) with their Chamberlain GDOs, and do not even contain a

statement that Skylink transmitters are encompassed by the warranty's reference to "unauthorized parts or accessories." (A5211-5286)

Fundamentally, Chamberlain's purported warranty "evidence" has nothing to do with the issues raised in this appeal. Summary judgment was proper based on Chamberlain's failure to establish prong [2] of the circumvention test (*i.e.*, the undisputed fact that Chamberlain placed no valid restrictions on its customers, or otherwise limited their authorization, regarding their use of non-Chamberlain transmitters). Chamberlain's revised warranty simply provides that Chamberlain will repair or replace certain defective GDOs, but only if they have been maintained and operated in a certain way. The warranty is an obligation undertaken or offered to be undertaken by Chamberlain – *not* an obligation undertaken by Chamberlain's customers – and it does not prevent customers from buying Chamberlain GDOs and operating them however they please. *Matter of Universal Transmitters*, 2003 WL 22811119 at \*21 (Chamberlain's new warranties do not satisfy prong [2] of the circumvention test).

In *Martz v. Xerox, Inc.*, 77 F.3d 1109 (8th Cir. 1996), the Eighth Circuit addressed warranties similar to Chamberlain's which "require that the customer use only Xerox copy cartridges." *Id.* at 1110. It held that the



warranties did not "force customers to buy Xerox cartridges" or operate as a restriction on customers:

Although the warranty does condition its continuation on the use of Xerox cartridges, a warranty is only one way of receiving service for a new Xerox copier. . . . An owner of a new Xerox copier could forego the benefits of the warranty, buy service from Xerox or an independent provider, and purchase cartridges from the vendor of its choice.

*Id.* at 1112; *see SMS Sys. Maintenance Servs., Inc. v. Digital Equip. Corp.*, 188 F.3d 11, 20-21 (1st Cir. 1999) (service warranty does not restrict customer's choice of service provider).

As in *Martz*, a customer can buy a Chamberlain GDO and choose *not* to avail herself of the warranty. Chamberlain's warranty thus does not restrict a consumer's ability to choose whatever replacement or additional transmitter she pleases. If anything, the warranty demonstrates that users are authorized to decide whether to use non-Chamberlain transmitters, even though such conduct may not be covered by the limited warranty.<sup>7</sup>

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<sup>7</sup> If Chamberlain's revised warranty were interpreted to prohibit customers from using non-Chamberlain accessories, as Chamberlain maintains, it likely would violate the Clayton Act and Magnuson-Moss Warranty Act (and related FTC regulations) prohibiting illegal tie-ins. 15 U.S.C. §§ 14, 2302(c); *see also* 16 C.F.R. § 700.10. Contractual documents, like warranties, must be interpreted to conform with the law. *See Walsh v. Schlecht*, 429 U.S. 401, 408 (1977).

**c. The "Relative Newness" Of Rolling Code Does Not  
Create A Factual Dispute Regarding Users'  
Authorization.**

Chamberlain's last alleged disputed fact is that because "rolling code technology is secure and relatively new, and [] there is no history of sale of universal transmitters that circumvent rolling code security measures . . . , a jury could reasonably infer that homeowners do not expect to circumvent, and are not authorized to circumvent, the Chamberlain rolling code security with Skylink's transmitters." Appellant's Brief, 30 (citations omitted). Chamberlain's assertions cannot support reversal of the district court's judgment.

First, evidence that rolling code is a relatively new security feature cannot satisfy Chamberlain's obligation to establish prong [2] of the circumvention test. Such evidence has no bearing on whether users are restricted by Chamberlain from operating their Chamberlain GDOs using Skylink's transmitters. 17 U.S.C. § 1201(a)(3)(A). Chamberlain admits that its customers previously were authorized to operate their older-model, non-rolling code GDOs with other companies' transmitters. If Chamberlain now

wants to restrict its customers' authorization to operate their newer-models GDOs, it should have told them so.

Second, Chamberlain's purported evidence does not support the propositions for which it is cited. Chamberlain cites to the deposition testimony of one of its employees for the proposition that "there is no history of sales of universal transmitters that circumvent rolling code security measures." Appellant's Brief, 30 (citing A2414-2415). Chamberlain's deponent's actual testimony was that *Chamberlain* does not sell a universal transmitter that operates other companies' rolling code GDOs. (A2414-2415) This testimony cannot support Chamberlain's much broader proposition that there is no history of sales of such transmitters by anyone. Chamberlain also cites to a declaration by the same employee (filed in connection with a previous motion, not Skylink's summary judgment motion) for the proposition that "rolling code technology is secure and relatively new." Appellant's Brief, 30 (citing A3103-3104). But according to Chamberlain's declaration, rolling code GDOs have been sold since at least 1996. (A3104) Moreover, Chamberlain's declarant does not state any facts regarding the purported "security" of rolling code GDOs. (A3103-3104)

Third, the rules of appellate practice bar a party that loses on summary judgment from relying on evidence that it failed to present in opposing the summary judgment motion. *See, e.g., Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001) (party opposing summary judgment must submit disputing evidence with papers opposing summary judgment; improper to rely on appeal from grant of summary judgment on matters not submitted in opposing papers). Here, *none* of the purported evidence cited by Chamberlain regarding rolling code GDOs was submitted to the district court in opposition to Skylink's motion for summary judgment. (A2414-2415, A3103-3104) It is fundamentally unfair for Chamberlain to ask this Court to reverse based on evidence that it failed to submit in opposition to the motion from which this appeal arises.

Chamberlain's purported "facts" do not support a reasonable inference that users are not authorized to use Skylink transmitters to operate their Chamberlain GDOs. Chamberlain's appeal must therefore be rejected.

**d. Chamberlain's Evidence Is Inadmissible.**

An additional reason for affirmance is that Chamberlain's purported controverting evidence is not admissible.<sup>8</sup> The documents submitted by Chamberlain *never were authenticated*. (A5382-5384); *see* Fed. R. Civ. Proc. 56(e); Fed. R. Evid. 901. For example, Chamberlain did not provide any supporting declaration or other evidence as to authorship, date, or manner of production of Chamberlain's documents. *Wells v. Franzen*, 777 F.2d 1258, 1262 (7th Cir. 1985) (documents "unaccompanied by certifying affidavits or other means of authentication, as required by Rule 56(e), Fed.R.Civ.P., . . . cannot be considered").<sup>9</sup> Chamberlain's evidentiary failure provides a separate, independent basis for affirming summary judgment.

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<sup>8</sup> Skylink timely objected to and moved to strike Chamberlain's submission of improper evidence. (A5381-5386)

<sup>9</sup> Chamberlain asserted below that its warranty and website statements are self-authenticating pursuant to Federal Rule of Evidence 902(7). The law is to the contrary. *See Whitted v. Gen. Motors Corp.*, 58 F.3d 1200, 1204 (7th Cir. 1995) ("[M]aterials submitted for summary judgment must be otherwise admissible. Fed.R.Civ.P. 56(e). As the district court found, the Nova owner's manual would not be admissible in trial as self-authenticating. Federal Rule of Evidence 902(7) provides that trade inscriptions affixed in the course of business, indicating ownership or control, need not be supported by extrinsic evidence to establish genuineness of commercial labels. The owners' manual is not a trade inscription and admitting the manual because it had a trade inscription on its cover does not comport with the rule.").

**C. Chamberlain's Legal Positions Are Incorrect.**

To make up for its lack of evidence, Chamberlain concocts two legal arguments regarding the purported requirements of and burdens under Section 1201. Chamberlain's legal arguments are inconsistent with both the plain statutory language of the DMCA and the caselaw applying it.

**1. Chamberlain Seeks To Impose A New Authority Requirement Not Present In The DMCA.**

Chamberlain argues that even if the district court correctly held that its customers are authorized to use other companies' transmitters, Chamberlain still can pick and choose which companies (like Skylink) are permitted to make and sell those transmitters. Chamberlain asserts that even providing authorization to all of its customers does not satisfy the authorization requirement under Section 1201(a)(3)(A); Chamberlain contends that it must separately provide authorization to every other manufacturer that proposes to sell transmitters to its customers. Appellant's Brief, 23-29. Chamberlain's effort to create this new and additional "authorization" requirement is contrary to the DMCA's plain language.

**a. Under The Plain Statutory Language, There Is No Circumvention Where The Person Avoiding A Technological Measure Is Authorized.**

While Chamberlain admits that there is no issue of direct circumvention by Skylink, it nevertheless contends that its failure to authorize avoidance *by Skylink* is determinative of this appeal. Chamberlain argues, for instance:

*Under the DMCA, a trafficker in circumventing technology must be authorized by the copyright owner to sell such technology. . . . Whether the purchasers of Chamberlain's GDOs have been impliedly authorized to use non-Chamberlain additional or replacement transmitters to use their GDOs is irrelevant to the anti-trafficking liability of Skylink.*

Appellant's Brief, 23-26 (emphasis added).<sup>10</sup> This argument mistakes the statutory requirements.

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<sup>10</sup> Chamberlain argues that it explicitly restricted Skylink's authorization by (1) sending pre-lawsuit correspondence to Skylink, and (2) filing its complaint in this action. But as discussed below, if Chamberlain authorized its customers to operate their GDOs using non-Chamberlain transmitters, Chamberlain's purported statements to Skylink do not matter. 17 U.S.C. § 1201(a)(3)(A). In any case, there is no evidence of any pre-lawsuit correspondence regarding the DMCA between Chamberlain and Skylink. *See* Appellant's Brief, 41 (asserting existence of such correspondence without citation). Chamberlain's effort to rely on purported evidence that it did not submit to the district court in its opposition papers does not provide a basis for overturning the district court's summary

As noted above, the DMCA defines "circumvention" as:

[1] "to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure,"

[2] "without the authority of the copyright owner."

17 U.S.C. § 1201(a)(3)(A). By its plain terms, the definition indicates that if the acts of descrambling, decrypting, or otherwise avoiding are performed "without [] authority," there is circumvention; conversely, if these acts are performed *with authority*, there is *not* circumvention. *Id.*

Chamberlain acknowledges that Skylink does not itself avoid Chamberlain's technological measure. Rather, according to Chamberlain, only Chamberlain's GDO customers avoid the technological measure (assuming they use Skylink transmitters). (A1615-1617); *see* Appellant's Brief, 27-29. Because circumvention cannot occur absent avoidance of a technological measure, Skylink does not, by definition, circumvent

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judgment decision. *See, e.g., Carmen*, 237 F.3d at 1031. Moreover, if Chamberlain were correct that its complaint could be used to establish a lack of authorization to Skylink, the authorization requirement would become meaningless because it would be automatically satisfied by every DMCA complainant. *See, e.g., Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to 'give effect, if possible, to every clause and word of a statute.'").



Chamberlain's technology. 17 U.S.C. § 1201(a)(3)(A). To the extent that the district court was correct that Chamberlain's GDO customers – who may be avoiding Chamberlain's technological measure – all have Chamberlain's authority to use non-Chamberlain transmitters, nothing they do can constitute "circumvention" either.

This consideration means that Skylink cannot possibly be liable for trafficking in "circumvention devices." For Skylink to be liable as a trafficker under Section 1201(a)(2), it must make or sell technology that is primarily designed to circumvent, or can only be used to circumvent, or is marketed with the knowledge that it will be used to circumvent. 17 U.S.C. § 1201(a)(2)(A)-(C). But unless there are (or could be) underlying acts of circumvention by those using Skylink's transmitters, Skylink cannot be held liable as a "trafficker" in circumvention devices. The district court correctly held that where Chamberlain has authorized its customers to operate their GDOs with any transmitters they choose, there is no possibility of underlying circumvention, and thus no violation of Section 1201(a)(2). (A7-12)

Chamberlain criticizes the district court's analysis of the authorization requirement, arguing that the district court confused the standards in Section

1201(a)(1) with those applicable under Section 1201(a)(2). Appellant's Brief, 14-15. But Congress was particularly careful and specific in defining "circumvention" for purposes of Section 1201(a). As noted above, Section 1201(a)(3)(A) defines the phrase "circumvention of a technological measure." That definition expressly applies for purposes of "this subsection." 17 U.S.C. § 1201(a)(3)(A). The statutory definition therefore expressly applies to both provisions (a)(1) and (a)(2).

Congress incorporated a separate and different definition of the phrase "circumvent protection afforded by a technological measure" for purposes of the next subsection (*i.e.*, subsection 1201(b)). 17 U.S.C. § 1201(b)(2)(A). Congress unmistakably intended that one definition of circumvention apply for purposes of the two provisions of subsection 1201(a), and another for purposes of subsection 1201(b). The district court's determination that the standards applicable under Section 1201(a)(1) also apply under Section 1201(a)(2) is inexorable under the statutory scheme.

When evaluating allegations of *direct circumvention* under Section 1201(a)(1), a court must consider whether the party who has avoided the alleged protection measure was authorized to do so. *See Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 317 n.137 (S.D.N.Y. 2000)

("avoidance of an access control measure is not 'circumvention' within the meaning of the statute unless it occurs 'without the authority of the copyright owner'"), *aff'd sub nom. Corley*, 273 F.3d 429. Thus, if Chamberlain had sued a user of Skylink's transmitters for direct circumvention under Section 1201(a)(1), the district court would have been required to consider whether the user herself had avoided Chamberlain's technological measure, and whether the user was authorized to do so. As a corollary, under Section 1201(a)(1), no finding of circumvention may be made where the party who avoids a technological measure is authorized to avoid that measure. *Id.*; see 17 U.S.C. § 1201(a)(3)(A).

Section 1201(a)(2) likewise requires underlying "circumvention." But Chamberlain proposes that, under this provision, "circumvention" takes on a different meaning and requires a different analysis; Chamberlain asserts that the "avoidance" and "authorization" elements of the circumvention test now refer to different groups of people. Instead of evaluating whether the party who has avoided or bypassed the alleged protection measure (*i.e.*, the user of a Skylink transmitter, who also happens to be a Chamberlain customer) was authorized to avoid, Chamberlain claims that Section 1201(a)(2) requires that the alleged *trafficker* be separately authorized by the copyright holder.

Thus, according to Chamberlain, a court must *not* consider the authority of the party who avoids the technological protection measure. Under Chamberlain's construction, and unlike under Section 1201(a)(1), "circumvention" *will* exist even where the person who avoids a technological measure is authorized to do so – if such avoidance is accomplished with a device obtained from a trafficker who is not itself authorized to avoid.

Chamberlain's construction cannot hold. Under it, a homeowner would not have "circumvented" Chamberlain's rolling code subroutine for purposes of Section 1201(a)(1) by using a Skylink transmitter to open a Chamberlain GDO because the "authorization" element of the circumvention test has not been met. But when Skylink is sued under subsection (a)(2), *the very same conduct by the very same homeowner* would satisfy both prongs of the circumvention test, and would constitute "circumvention." There is no basis for this disparate result. *Sorenson v. Sec. of the Treasury*, 475 U.S. 851, 865 (1986) ("The normal rule of statutory construction assumes that 'identical words used in different parts of the same act are intended to have the same meaning,'" particularly where the statute includes an "explicit definition" of the term). If Congress had wanted "circumvention" to mean

two different things under Section 1201(a), it would have provided two different statutory definitions applicable to that subsection, instead of explicitly legislating to the contrary that one definition would apply throughout that subsection (and another to a separate subsection).

Under *Reimerdes* and the plain language of Section 1201(a), the district court was correct in construing "circumvention" under Section 1201(a)(2) to mean the same thing that it does under Section 1201(a)(1). Chamberlain's construction, under which the same statutory term with the same statutory definition has different meanings should be rejected.<sup>11</sup>

**b. Reimerdes Does Not Support Chamberlain's  
Disparate Construction.**

As support for its proposal that the Court must consider only the alleged *trafficker's* authority – not that of those who use the trafficker's products – Chamberlain relies heavily on the district court's opinion in

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<sup>11</sup> Chamberlain repeatedly argues that Skylink was obligated to obtain Chamberlain's authorization to sell "circumventing equipment." *See, e.g.* Appellant's Brief, 23 (arguing that copyright owner must authorize trafficker to sell the "circumventing product"). But by definition, circumvention occurs only "without the authority of the copyright owner." 17 U.S.C. § 1201(a)(3)(A). There can be no such thing as "circumventing equipment" once Chamberlain, as the copyright owner, has authorized its customers to use other companies' transmitters.

*Reimerdes*. Chamberlain misunderstands *Reimerdes*. Contrary to Chamberlain's assertions, *Reimerdes* supports Skylink's construction of Section 1201(a), and confirms the statutory analysis above.

In *Reimerdes*, eight motion picture studios sued to stop distribution of software designed to break the "CSS" encryption system used to protect DVD copies of motion pictures. 111 F. Supp. 2d at 303. The plaintiffs extensively licensed CSS decryption "keys" to third parties, such as consumer electronics manufacturers. *Id.* at 310. The defendants posted an unlicensed version of decryption software, called "DeCSS," on their website for distribution to the public. *Id.* Defendants argued that this public distribution of unlicensed decryption software was permissible under Section 1201(a)(2) because DVD purchasers were not prohibited by the Copyright Act from decrypting the DVDs they purchased. *Id.* at 317 n.137. The *Reimerdes* court rejected this contention, finding that purchasers of DVDs had not been authorized to decrypt the DVDs sold by the plaintiffs. *Id.*

According to Chamberlain, *Reimerdes* stands for the proposition that "a trafficker is authorized under the DMCA only if the copyright owner consents to the actual bypassing activity of the trafficker." Appellant's Brief,

24. Chamberlain's proposed interpretation of *Reimerdes* is contrary to the opinion, as well as to the key DMCA provision. The whole premise of Section 1201(a)(2), and of Chamberlain's claim against Skylink, is that an alleged trafficker (*i.e.*, Skylink) does not itself engage in "actual bypassing activity" (to use Chamberlain's phrase). Rather, a claim against a person engaging in "actual bypassing" is cognizable under subsection (a)(1), not subsection (a)(2). As explained above, in a subsection (a)(2) case the only persons purportedly engaged in "bypassing" a technical measure are the *users* of the alleged trafficker's products – not the trafficker itself (*i.e.*, Chamberlain acknowledges that it does not allege that *Skylink* bypasses its GDO software, but rather only that Chamberlain's *customers* bypass its GDO software when they use Skylink's transmitters).<sup>12</sup>

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<sup>12</sup> Chamberlain casts *Reimerdes* as if it related solely to users' conduct in viewing "DVDs with alternative software." Appellant's Brief, 24. However, the *Reimerdes* court rejected the defendant's arguments about the potential alternative uses of its decryption software, recognizing that the software was designed primarily to enable *unlawful copying*. *Id.* at 314 ("it is entirely feasible to decrypt a DVD with DeCSS, compress and synchronize it with DivX, and then make as many copies as one wishes by burning the resulting files onto writeable CD-ROMs [or] transmi[tt]ing pirated copies over the Internet"). Here, on the other hand, there is no possibility of such copyright infringement – or even access to copyrighted material – by users of Skylink's transmitters.

In support of its construction of *Reimerdes*, Chamberlain cites to the court's statement that "[t]he DMCA proscribes trafficking in technology that decrypts or avoids an access control measure without the copyright holder consenting to the decryption or avoidance." Appellant's Brief, 24. This is simply a restatement of the definition for circumvention. See 17 U.S.C. § 1201(a)(3)(A). Chamberlain attempts to rewrite the court's statement to say that "the DMCA proscribes trafficking in technology that decrypts or avoids an access control measure without the copyright holder consenting to the decryption or avoidance [*by the alleged trafficker*]." But that is not what the court said. The *Reimerdes* court's observation that the DMCA requires *unauthorized* decryption or other avoidance of a technological measure does not resolve the question of *who* must be authorized. Chamberlain's assertion that the alleged *trafficker* must be authorized simply assumes Chamberlain's own incorrect conclusion. Moreover, Chamberlain's claim that *Reimerdes* requires that a copyright holder consent to any "decryption or avoidance" *by a trafficker*, even if correct, would have no application here because Chamberlain does not claim – and there are no facts to support – that *Skylink* has "decrypted or avoided" Chamberlain's GDO software.



Chamberlain similarly misconstrues *Corley*, which affirmed *Reimerdes*. According to Chamberlain, *Corley* held that "analysis of the 'authorization' subsection of the DMCA . . . depends on whether user or trafficker liability is at issue," and that "authorization to use protected software does not equate to authorization to traffic in circumventing technology for use of protected software." Appellant's Brief, 25-26. But as with *Reimerdes*, Chamberlain misunderstands and overstates *Corley*. Addressing the alleged trafficker's argument that it is exempted from liability based on the authority of the purchaser of the DVD to "view" the DVD, the court stated:

The basic flaw in this argument is that it misreads subsection 1201(a)(3)(A). That provision exempts from liability those who would 'decrypt' an encrypted DVD with the authority of the copyright owner, not those who would 'view' a DVD with the authority of a copyright owner. . . . This is actually what subsection 1201(a)(3)(A) means when read in conjunction with the *anti-circumvention* provisions. When read together with the *anti-trafficking* provisions, subsection 1201(a)(3)(A) frees an individual to traffic in encryption technology designed or marketed to circumvent an encryption measure if the owner of the material protected by the encryption measure authorizes the circumvention.

*Corley*, 273 F.3d at 444. Again, Chamberlain proposes to insert language not adopted by the court: Chamberlain reads *Corley* as if the Second Circuit

had stated that there is no DMCA violation where "the owner of the material protected by the encryption measure authorizes [*the trafficker to engage in*] the circumvention." As with *Reimerdes*, that is not what the court said. Rather, *Corley's* statement is consistent with the district court's conclusion that once customers are authorized by Chamberlain to use other companies' transmitters, Skylink need not make the additional showing that it too is authorized to sell transmitters to Chamberlain's authorized customers. Chamberlain again assumes its own incorrect conclusion.

Moreover, *Corley* supports the exact opposite of what Chamberlain proposes. The Second Circuit – like the district court here – recognized that a copyright owner may "either explicitly or implicitly" authorize avoidance of its technological protection measure. *Id.* at 444. However, it found that the parties in that case "offered no evidence that the Plaintiffs have either explicitly or implicitly authorized DVD buyers to circumvent encryption technology." *Id.* Unlike here, the defendant's argument on this point was completely unsupported. *Id.*

If Chamberlain were correct that it is the authority of the *trafficker* that matters under subsection (a)(2), it would have been irrelevant to the *Corley* decision whether the parties had presented evidence regarding

authorization *to DVD buyers*. In recognizing that such evidence would have been decisive, *Corley* directly contradicts Chamberlain's position that circumvention under Section 1201(a)(2) requires analysis only of the alleged trafficker's authority.

Neither *Reimerdes* nor *Corley* support Chamberlain's contention that circumvention has a different meaning and requires a different analysis depending on whether Section 1201(a)(1) or Section 1201(a)(2) is in issue. Chamberlain's reliance on these cases is misplaced.

**c. The DMCA's Exceptions To Liability For Direct Circumvention Do Not Change The Analysis.**

Finally, Chamberlain tries to argue that the standards for circumvention applicable under Sections 1201(a)(1) and 1201(a)(2) are different by pointing to certain exceptions to liability for direct circumvention. Appellant's Brief, 28. While the DMCA provides for the establishment of exemptions, to be promulgated by the Librarian of Congress, for certain acts of direct circumvention, even where traffickers are

not exempted, 17 U.S.C. § 1201(a)(1)(C)-(E), such exemptions have nothing to do with the issues presented in this case.<sup>13</sup>

Chamberlain appears to argue that because there may be situations where traffickers are liable under the DMCA but underlying users are exempted, user liability cannot matter for purposes of trafficker liability. Chamberlain's reasoning is faulty because the DMCA's exemptions are just that – exemptions. They *presuppose* that "circumvention" has taken place, and that DMCA liability exists for users (as well as traffickers), but they furnish an excuse anyway, which is limited to user liability. In escaping liability, however, the circumventer has not garnered the "authority of the copyright owner" to avoid a technological measure (if she had, there would be no circumvention and so no need for an exemption). At best, the individual acts "with the authority of" the person promulgating the exemption (*i.e.*, the Librarian of Congress).

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<sup>13</sup> Chamberlain further asserts that the DMCA provides protection for traffickers that is not afforded to users. Appellant's Brief, 28 (citing §§ 1201(f)(2)-(3), 1201(g)(4), 1201(j)(4)). Though this issue is irrelevant to this appeal, Chamberlain is mistaken: for each of the statutory provisions that Chamberlain cites as support for this proposition, there are companion provisions exempting users. *See* 17 U.S.C. §§ 1201(f)(1), 1201(g)(2), 1201(j)(2).

In this case, in contrast, the issue is whether there is (or even could be) any underlying circumvention using Skylink's transmitters – not whether an exemption excusing circumvention may apply. By considering Chamberlain's authorization to its customers, the district court appropriately analyzed whether prong [2] of the circumvention test has been satisfied (or could ever be satisfied) for purposes of Section 1201(a)(2). (A11-12) Based on Chamberlain's authorization to its customers, no circumvention is possible for purposes of Section 1201(a)(2), so the issue of exemptions never arises. *Id.*<sup>14</sup>

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<sup>14</sup> Chamberlain advances various arguments purporting to show that Chamberlain's customers have not validly authorized Skylink to operate Chamberlain's GDOs. Appellant's Brief, 40-45. Putting aside the logical flaw in claiming that a customer who purchases and operates a Skylink transmitter to open her Chamberlain garage door has not authorized Skylink as to the GDO, Chamberlain's arguments are beside the point. Because homeowners are authorized by Chamberlain to operate their own Chamberlain GDOs with Skylink transmitters, the transmitters are not circumvention devices subject to Section 1201(a)(2), regardless of any "mutual assent" between homeowners and Skylink. Similarly, no facts support Chamberlain's allegation that Skylink falsely advertises its transmitters as "compatible" with rolling code, and that allegation is not relevant to Chamberlain's DMCA claim. Appellant's Brief, 11, 43. Indeed, recognizing that its allegation has no merit, Chamberlain has dismissed its false advertising claim against Skylink. (A4, A13)

**d. Conclusion: Chamberlain's Additional "Trafficker Authorization" Requirement Is Not Supported.**

Having authorized its customers to purchase and use other companies' transmitters, Chamberlain now claims that Skylink nevertheless must present evidence that it too is authorized to sell its transmitters to these customers. Chamberlain's assertion that the Court must determine this appeal solely by reference to *Skylink's* authorization is at odds with the statutory language and the caselaw. Rather, in determining whether Chamberlain could meet the "circumvention" requirement under Section 1201(a)(2), the district court properly considered the authority of owners of Chamberlain GDOs to operate the GDOs they have purchased.

**2. The District Court Properly Placed The Burden Of Establishing Circumvention On Chamberlain.**

Chamberlain also seeks to avoid summary judgment by arguing that the district court should have placed the burden of proof on Skylink. Appellant's Brief, 45-47. This argument fails on two grounds. First, as discussed, the undisputed evidence presented to the district court supports summary judgment for Skylink. (A4-9, A4615-4617, A5179-5180, A5203-5204, A5746-5747, A5812-5816) Thus, this is not a case that need be

decided based on which party had the burden of proof. Second, contrary to Chamberlain's assertion, the plain statutory language and the caselaw place the burden of establishing the authorization element squarely on Chamberlain.

**a. Chamberlain Failed To Present Evidence Satisfying  
The Authorization Requirement.**

As the party opposing summary judgment, Chamberlain had the burden to show a triable issue of fact as to matters on which it bears the burden of persuasion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). "A complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* Here, summary judgment was proper based on Chamberlain's failure to adduce material evidence regarding consumers' authorization to operate their GDOs using Skylink's transmitters.

Chamberlain's Section 1201(a)(2) claim requires that Skylink's transmitters be made, used or marketed to "circumvent a technological measure." 17 U.S.C. § 1201(a)(2). As explained above, the DMCA's definition of "circumvent a technological measure" requires avoidance "without the authority of the copyright owner." 17 U.S.C. § 1201(a)(3)(A).

Thus, contrary to Chamberlain's contention, the district court correctly determined that lack of authority is part of Chamberlain's prima facie burden in proving that customers are circumventing Chamberlain's technological measure and that Skylink is violating Section 1201(a)(2). (A7)

Chamberlain argues, purportedly based on *Corley*, that Skylink has the burden of negating the "authority" element because, according to Chamberlain, the court "appeared to place the burden on the defendants" in *Corley*. Appellant's Brief, 46. However, *Corley* does not address the burdens applicable under the DMCA, and its procedural posture is completely different from this case.

In *Corley*, unlike here, the *plaintiff* already had adduced evidence in the district court that DVD purchasers were *not* authorized to decrypt the CSS encryption system used to prevent copying of digital movies. *Corley*, 273 F.3d at 436-437; *Reimerdes*, 111 F. Supp. 2d at 309-310. Moreover, in *Corley*, unlike here, "[d]efendants offered no evidence" regarding authorization. 273 F.3d at 444; *see* (A10, A39-40) (rejecting Chamberlain's reading of *Reimerdes/Corley* based on plaintiff's submission of evidence regarding consumers' lack of authority). In light of the plaintiffs' prima facie showing in *Corley* – a showing which Chamberlain failed to make here – the



defendants in that case were obligated to adduce disputing evidence. Their failure to provide any controverting evidence was fatal. But *Corley* does not support Chamberlain's assertion that Skylink has the burden of disproving prong [2] of the circumvention test even though Chamberlain failed to make any prima facie showing on that element.

**b. Chamberlain's Analogy To The Copyright And Patent "Implied License" Defense Does Not Negate The DMCA's Statutory Language.**

Chamberlain cites to copyright and patent cases regarding "implied license" as purported support for its burden of proof argument. Appellant's Brief, 31-32, 46. Those cases cannot relieve Chamberlain from establishing each statutory element of its DMCA claim because here there is no issue of license, and Skylink does not seek to establish that it or its customers have an implied license. Rather, as an essential element of its DMCA claim, Chamberlain must establish that users of Skylink's products are not authorized to avoid the rolling code subroutine contained in Chamberlain GDOs. 17 U.S.C. §§ 1201(a)(2), 1201(a)(3)(A). Skylink is not required to disprove this statutory element or to prove authorization as an affirmative defense. *Celotex Corp.*, 477 U.S. at 326 (on summary judgment motion,

opposing party has burden to show a triable issue of fact as to matters on which it bears the burden of persuasion).<sup>15</sup>

Chamberlain's appeal to patent caselaw regarding implied license is particularly unavailing. Where a patent implied license is asserted, summary judgment in favor of the defendant is appropriate where the defendant submits evidence of an unrestricted sale – just as Skylink has done here. *See, e.g., Met-Coil*, 803 F.2d at 687 (defendant's burden on summary judgment regarding implied license met by adducing evidence of unrestricted sales). Where such a showing is made, it becomes the *plaintiff's* obligation to adduce competent evidence of valid restrictions. *Id.* (defendant "established a prima facie case [based on evidence of unrestricted sale], thereby shifting the burden of going forward to [plaintiff. Plaintiff] offered

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<sup>15</sup> Chamberlain's suggestion that the district court should have applied the *substantive* requirements for implied license is completely unsupported. Appellant's Brief, 30-33. For instance, Chamberlain's contention that Skylink must show that "a party has been hired to make a work for the benefit and use of another" makes no sense in the context of this DMCA case. Appellant's Brief, 31. Likewise, Chamberlain appeals to implied license caselaw as purported support for its assertion that "[t]he question of implied authorization is a fact-intensive question for which summary judgment is rarely appropriate." Appellant's Brief, 32-33. But this Court has held that "the existence of an implied license is a question of law." *Met-Coil Sys. Corp. v. Korners Unlimited, Inc.*, 803 F.2d 684, 687 (Fed. Cir.

nothing to carry its burden." ).<sup>16</sup> Thus, even if Chamberlain were correct that the patent "implied license" standard should be applied under the DMCA, summary judgment still was proper.

In sum, based on the plain statutory language, the district court properly held that it is Chamberlain's burden to establish prong [2] of the circumvention test. Chamberlain's effort to foist its burden on Skylink cannot succeed.

**c. Chamberlain Failed To Meet Its Burden.**

Chamberlain next asserts that, regardless of which party has the burden of establishing prong [2] of the circumvention test, this element is deemed to be established where no evidence is presented by either side. On the contrary, for Chamberlain to state a valid DMCA claim, there must be some concrete evidence that a user has exceeded its authority. 17 U.S.C. § 1201(a)(3)(A). Chamberlain's proposed approach would effectively (and improperly) read the "without authority" requirement out of the statute. *See,*

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1986) (affirming summary judgment to alleged infringer based on patentee's unrestricted sale of product).

<sup>16</sup> *Compare* Appellant's Brief, 37 ("Here the District Court pointed to Chamberlain's inaction to support an implied license, *i.e.*, Chamberlain's failure to place express restrictions on its GDOs. This inaction is not enough to create an implied license as a matter of law.") (providing no citation).

e.g., *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to 'give effect, if possible, to every clause and word of a statute.'").

As part of establishing a prima facie case under Section 1201(a), a plaintiff might demonstrate that the conduct in issue constitutes a violation of the copyright infringement statute, see *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 437-438 (2d Cir. 2001) (affirming injunction under DMCA where defendant trafficked in software that permitted users to commit copyright infringement), or that it violates a shrinkwrap license restricting customers' rights to use a product in a particular way. See *Lexmark Int'l, Inc. v. Static Control Components*, 253 F. Supp. 2d 943, 947-948 (E.D. Ky. 2003). Likewise, a pattern of licensing restrictions and limitations regarding the technology necessary to decrypt encryption software might indicate that decryption without an express license is not authorized. See *Reimerdes*, 111 F. Supp. 2d at 310, 317; see also (A10, A39-40). Here, however, *no evidence* was submitted to the district court regarding any of these bases negating authorization – or regarding any other viable basis for establishing prong [2] of the circumvention test. Rather, Chamberlain chose not to impose any effective limitations on customers who purchase its rolling code GDOs regarding which type of replacement or

additional transmitter they may or may not use to operate the GDOs.

(A4615-4617) Given Chamberlain's unrestricted sale of its GDOs and its failure to submit evidence that users are not authorized to operate their GDOs with other companies' transmitters, the district court properly entered judgment in Skylink's favor. *Celotex Corp.*, 477 U.S. at 326.

*Lexmark*, a case relied upon by Chamberlain, demonstrates that Chamberlain's failure to present evidence regarding consumers' purported lack of authority is fatal to its DMCA claim. In that case, the plaintiff sold two types of laser printer toner cartridges: (1) "Prebate" cartridges, which were sold at a low price but were subject to a shrinkwrap license agreement that restricted the customer's authorization to access the "toner loading program" and other software in the cartridge to refill the toner, and which required the customer instead to return empty cartridges to the plaintiff for remanufacturing; and (2) "regular" cartridges, sold at a higher price but without the shrinkwrap license and "the 'use and return' conditions that accompany the Prebate cartridges." *Lexmark*, 253 F. Supp. 2d at 947-948. In relying on *Lexmark*, Chamberlain focuses on the court's ruling that avoidance of the plaintiff's technological measure *in violation of the shrinkwrap license* satisfies prong [2] of the circumvention test. But

Chamberlain ignores the *Lexmark* court's additional determination that "[c]onsumers can purchase regular toner cartridges and refill them themselves or have them refilled by a third party remanufacturer" – *i.e.*, where the plaintiff did not affirmatively place a shrinkwrap license or other restriction on its "regular" cartridges, avoidance of the plaintiff's technological measure did not satisfy prong [2]. *Id.* at 948. This is precisely what the district court determined here: that absent evidence of a contractual or other restriction on customers' conduct, Chamberlain cannot establish that its customers act without Chamberlain's authority in using Skylink's transmitters to activate the software in their GDOs.<sup>17</sup>

Chamberlain also cites again to *Reimerdes* and *Corley* as purported support for its position that, even in the absence of any restrictions

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<sup>17</sup> Analogously, in the patent context consumers' rights to use the products they have purchased is well established. *United States v. Univis Lens Co.*, 316 U.S. 241, 249 (1942) ("incident to the purchase of any article, *whether patented or unpatented*, is the right to use and sell it") (emphasis added). "Generally, when a seller sells a product without restriction, it in effect promises the purchaser that in exchange for the price paid, it will not interfere with the purchaser's full enjoyment of the product purchased." *Hewlett-Packard v. Repeat-O-Type Stencil Manuf. Corp.*, 123 F.3d 1445, 1451 (Fed. Cir. 1997). Thus, a purchaser of a patented product has the authority to make "any uses of the product to which the parties might reasonably contemplate the product will be put," regardless that the uses are covered by the seller's patent. *Id.*

promulgated by Chamberlain, its customers are prohibited from opening their own garage doors unless they use a Chamberlain transmitter.

Appellant's Brief, 35-36. In *Corley*, the court found that DVD purchasers, while authorized to "view" copies of the DVD motion pictures they had purchased, were not authorized to "decrypt" the encryption software protecting those DVDs. *Corley*, 273 F.3d at 444. Similarly, in *Reimerdes*, the court rejected the defendant's argument that decryption was authorized simply because it is not prohibited by the Copyright Act. *Reimerdes*, 111 F. Supp. 2d at 317.

This case is different. First, unlike here, the plaintiff in *Reimerdes* submitted evidence demonstrating that DVD purchasers were not authorized to decrypt the encryption software protecting their DVDs from unauthorized copying. As the district court in this case noted:

The district court in *Reimerdes* was looking at a set of facts quite distinct from those presented here: Plaintiff there had encoded its DVDs and licensed the software necessary to circumvent this encoding process to manufacturers of DVD players. As a result, the plaintiff in *Reimerdes* did in fact authorize certain circumvention of its technological protective measure pursuant to a license. It did not authorize circumvention by means of non-licensed software.

(A39-40); *see also* (A10). Here, on the other hand, Chamberlain did not submit any such evidence showing restrictions of users' authorization.

Second, the defendant's legal contention in *Reimerdes* – whereby all conduct not prohibited by the Copyright Act is therefore automatically "authorized" – was unduly overbroad. While conduct may be unauthorized based on a statutory violation (such as a violation of the Copyright Act), there are additional restrictions that may be cognizable under the DMCA as restrictions on users' authority. As noted above, contractual limitations imposed by the copyright holder may act as restrictions. *See Lexmark*, 253 F. Supp. 2d at 947-948. Likewise, other competent evidence regarding restrictions, such as a pattern of restrictive licensing, may satisfy prong [2] of the circumvention test. *See Reimerdes*, 111 F. Supp. 2d at 310, 317. Thus, the *Reimerdes* court correctly rejected the defendant's proposition that the Copyright Act sets forth the universe of restrictions cognizable under Section 1201(a). But *Reimerdes*' holding on this issue does not address the relevant issue here: regardless of the *source* of the restriction on users' authority to use a product (*e.g.*, statute, contract, other restriction), it is a DMCA-plaintiff's obligation to present cognizable evidence regarding that



restriction. 17 U.S.C. § 1201(a)(3)(A). Chamberlain's contention to the contrary is wrong, and its reliance on *Reimerdes* and *Corley* is misplaced.<sup>18</sup>

Chamberlain's unrestricted sale of its GDOs demonstrates that owners of the GDOs are authorized to operate them using Skylink's transmitters. The caselaw cited by Chamberlain does not support a contrary result.

**D. The Record Supports The District Court's Grant Of Summary Judgment On At Least Three Other Grounds.**

Putting the authorization issue aside and ignoring Chamberlain's inability to establish that statutory element, Chamberlain's Section 1201 claim *still* cannot succeed. It is well established that an appellate court may affirm summary judgment on any ground supported by the record. *See, e.g., Glaxo Group Ltd. v. Torpharm, Inc.*, 153 F.3d 1366, 1371 (Fed. Cir. 1998) (summary judgment may be affirmed on grounds not considered below so long as supported by the record). Here, while the district court's ruling

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<sup>18</sup> For these same reasons, Chamberlain's contention that the district court improperly created a "notice requirement" under the DMCA is mistaken. Appellant's Brief, 33-35. Skylink does not contend, and the district court did not hold, that unknowing violations are excused under Section 1201(a). Rather, the district court properly recognized that lack of authorization is a *prima facie* statutory element. (A7) Far from establishing a new requirement for DMCA plaintiffs, the district court's ruling that

focused on Chamberlain's inability to establish prong [2] of the circumvention test, the record also discloses that Chamberlain cannot meet additional statutory requirements.

**1. Skylink's Transmitters Do Not "Avoid" Chamberlain's GDO Software.**

First, Chamberlain's DMCA claim cannot succeed because Skylink's transmitters do not "avoid" Chamberlain's GDO software. "To 'circumvent a technological protection measure' means *to descramble a scrambled work, to decrypt an encrypted work, or otherwise avoid, bypass, remove, deactivate, or impair a technological measure . . . .*" 17 U.S.C. § 1201(a)(3)(A) (emphasis added). But Skylink's transmitters do not "avoid, bypass, remove, deactivate, or impair" Chamberlain's GDO software. Rather, as Chamberlain admits, Skylink's transmitters operate the resynchronization feature that Chamberlain included in its software. (A4618-4619, A5746-5747, A5812-5816); *see* Appellant's Brief, 8-9, 37-38.

Specifically, Chamberlain admits throughout its brief that its resynchronization subroutine is an intentional feature of Chamberlain's GDO

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Chamberlain had failed to submit evidence sufficient to meet that statutory element honors the statutory language.

software that Chamberlain itself chose to include. Appellant's Brief, 8-9; *see* (A4618-4619, A5203-5206, A5746-5747, A5812-5816). Chamberlain further admits that Skylink's transmitters operate with Chamberlain's GDOs by invoking this feature. Appellant's Brief, 38-39 (Skylink's transmitters "trigger the resynchronization feature every time they are used"); *see* (A5746-5747, A5814-5815). Nevertheless, Chamberlain contends that Skylink's transmitters "circumvent" Chamberlain's software by activating the resynchronization feature. Appellant's Brief, 10; *see* (A4618-4619, A5203-5206, A5746-5747, A5812-5816).

A recent DMCA case rejected this exact type of argument and held that unauthorized *activation* of an access control procedure cannot constitute circumvention. In *IMS Inquiry Management Sys., Ltd. v. Berkshire Information Sys., Inc.*, 2004 WL 345556 (S.D.N.Y. Feb. 23, 2004), the defendant had obtained access to information posted on the plaintiff's password-protected website using a password that the defendant obtained illicitly from a third party. *Id.* at \*2. The defendant argued that even if its access to the website was not authorized by the plaintiff, it still had not "committed any act of avoidance or bypass, as it is accused of confronting IMS's password-controlled access in the way precisely intended" (*e.g.*, by

using a plaintiff-generated password). *Id.* at \*10. The district court agreed that accessing the plaintiff's website in this manner was not "circumvention":

Circumvention requires either descrambling, decrypting, avoiding, bypassing, removing, deactivating or impairing a technological measure *qua* technological measure. [D]efendant is not said to have avoided or bypassed the deployed technological measure in the measure's gatekeeping capacity. The Amended Complaint never accuses defendant of accessing the e-Basket system without first entering a plaintiff-generated password. More precisely and accurately, what defendant avoided and bypassed was *permission* to engage and move through the technological measure from the measure's author. . . . Defendant did not surmount or puncture or evade any technological measure to [access the website]; instead it used a password intentionally issued by plaintiff to another entity. . . . Whatever the impropriety of defendant's conduct, the DMCA and the anti-circumvention provision at issue do not target this sort of activity.

*Id.* at \*10-11 (emphasis in original); *see Matter of Universal Transmitters*, 2003 WL at \*16 ("Resynchronization is an important part of Chamberlain's rolling code GDOs. The situation would be different if Chamberlain's rolling code GDO software did not contain a resynchronization function, and only contained a rolling code feature and [Skylink] had conjured up the resynchronization function as a way to operate Chamberlain's rolling code GDOs. But that is not the situation here . . .").

Here, as in *IMS*, Chamberlain designed its GDO software to operate using its resynchronization procedure. (A4618-4619, A5203-5207, A5746-5747, A5812-5816); *see* Appellant's Brief, 8, 38-39. Like the defendant in *IMS*, users of Skylink's transmitters do not avoid or bypass Chamberlain's GDO software when they open their GDOs using the resynchronization feature. Rather, as in that case, Skylink's transmitters utilize a feature that Chamberlain included in its GDOs (and unlike in *IMS*, users of Skylink's transmitters are the precise individuals intended by Chamberlain to use the resynchronization feature). As in *IMS*, there is no avoidance of Chamberlain's rolling code subroutine – just utilization of it.

**2. The "Technological Protection Measure" In Chamberlain's GDOs Is The Fixed Identification Code, Not The Rolling Code.**

Chamberlain's DMCA claim also cannot succeed because the technological protection measure, if any, in Chamberlain's GDO software is the fixed "identification code," not the rolling code subroutine. As Chamberlain explains, a transmitter will not operate its GDOs unless the user first programs the receiver to recognize the transmitter's identification code. (A5203-5206, A5746-5747, A5812-5816); *see* Appellant's Brief, 5;

*Matter of Universal Transmitters*, 2003 WL 22811119 at \*14-15

("Chamberlain's copyrighted program will never execute if an improper fixed transmitter identification code is received."). In other words, merely providing an appropriate rolling code will not grant access to Chamberlain's GDO software – an authorized fixed identification code must be provided before the GDO software will operate. Unlike the rolling code subroutine, which is not required for activation of the GDO (for instance, where the resynchronization subroutine is activated), the identification code must be provided each time Chamberlain's GDO software is activated. *Id.* Thus, the only "access protection measure" in Chamberlain's receiver software (if any) is the identification code, *not* the rolling code or resynchronization functions. Because Chamberlain does not contend that Skylink's customers circumvent Chamberlain's identification code function, its DMCA claim fails. (A5173); *see Matter of Universal Transmitters*, 2003 WL 22811119 at \*14-15 (holding that fixed code, not rolling code, is only "technologic measure" in Chamberlain's GDO software).

**3. Chamberlain's Rolling Code Subroutine Controls Access To Internal Software Processes, Not To A Copyrighted Work.**

Finally, Chamberlain cannot meet the DMCA's requirement that its technological measure control "access to a work protected by [the Copyright Act]." 17 U.S.C. § 1201(a)(2). Chamberlain argues that the DMCA applies where a technological measure controls access only to software *processes*, *not* the copyrightable expression (if any) contained in the software. But copyright protection does not extend to such processes. 17 U.S.C. § 102(b); *see Baker v. Selden*, 101 U.S. 99, 102-103 (1879) (copyright protection does not extend to process, but only to author's original explanation thereof). Patent law, not copyright, is the appropriate vehicle to protect processes performed by a microprocessor:

[P]atent and copyright laws protect distinct aspects of a computer program. Title 35 protects the process or method performed by a computer program; title 17 protects the expression of that process or method.

*Atari Games Corp. v. Nintendo of America, Inc.*, 975 F.2d 832, 839 (Fed. Cir. 1992) (citations omitted).

In a computer program like Chamberlain's GDO software, "[m]ost commonly, processes will be found as part of the system architecture, as

operations within modules, or as algorithms." *Gates Rubber Co. v. Bando Chemical Industries, Ltd.*, 9 F.3d 823, 837 (10th Cir. 1993) (internal quotations omitted). "Section 102(b) is intended, among other things, to make clear that the expression adopted by the programmer is the copyrightable element in a computer program, and that *the actual processes or methods embodied in the program are not within the scope of the copyright law.*" *Id.* at 836-37 (internal quotations omitted) (emphasis added).

Nothing in the DMCA suggests an abandonment of this foundational limitation on the subject matter of copyright. Rather, the DMCA prohibits *only* circumvention of a measure that controls access "to a work *protected under this title.*" 17 U.S.C. § 1201(b)(2) (emphasis added).

In the infringement context, Section 106 of the Copyright Act defines a copyright owner's exclusive rights in a "copyrighted work," including, for instance, the authority to "reproduce the *copyrighted work* in copies." 17 U.S.C. § 106 (emphasis added). A defendant is liable for infringement when "any of the exclusive rights of the copyright holder" are violated. 17 U.S.C. § 501(a). Though Section 106 makes no explicit reference to the Section 102(b) limitations on the subject matter of copyright, courts have



recognized that a copyright owner's Section 106 rights in a "copyrighted work" must be construed in accordance with the limitations set forth in Section 102(b). *See, e.g., Feist Publications, Inc. v. Rural Telephone Services, Co.*, 499 U.S. 340, 346 (1991) (infringement requires not merely copying, but rather copying of "constituent elements of the work that are original").

Unlike under Sections 106 and 501 of the Copyright Act, Chamberlain contends that in applying Section 1201(a)(2) of the DMCA, courts need *not* take heed of limitations to the subject matter of copyright. Appellant's Brief, 4-10, 21-22 (arguing that DMCA violation exists because rolling code controls access to internal GDO processes). Chamberlain can set forth no principled reason why a copyright owner's "copyrighted work" under Sections 106 and 501 (neither of which by their terms refer to the Section 102(b) limitations on the subject matter of copyright) should be construed differently from a copyright owner's "work protected under this title" under Section 1201(a)(2). Rather, as in the infringement context, in determining whether a technological measure controls access to "a work protected under [Title 17]," the Court must distinguish between

copyrightable and non-copyrightable subject matter. 17 U.S.C.

§ 1201(a)(2).<sup>19</sup>

Chamberlain's own admissions regarding its GDO software demonstrate that the software does *not* control access to a protected work:

Chamberlain's copyrighted receiver rolling code computer program controls access to Chamberlain's copyrighted computer program in the receiver [in that the] computer program *does not execute* if an improper identification code or an improper rolling code (*i.e.*, not in the forward window) is received from the transmitter. Once [activated], the copyrighted computer program *sends instructions to the processor for operating the GDO*.

Appellant's Brief, 7 (citing A22, A83-86, A2390-2392) (emphases added); *see* (A5203-5206, A5812-5816) In other words, Chamberlain contends that

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<sup>19</sup> This construction of the DMCA is consistent with the caselaw. *See Corley*, 273 F.3d at 437-438 (affirming injunction where encryption software limits ability to display, copy and manipulate DVD content); *Sony Computer Entertainment America, Inc. v. Gamemasters*, 87 F. Supp. 2d 976, 981-982, 987 (N.D. Cal. 1999) (protection measure controls user's ability to view and control characters in an audiovisual work contained on CD-ROM); *RealNetworks, Inc. v. Streambox, Inc.*, 2000 WL 127311 at \*2-3 (W.D. Wash. 2000) (authentication sequence prevents viewing, listening and copying of video and audio files). Only one case, from the Eastern District of Kentucky, has applied the DMCA absent access to copyrighted expression (though the issue apparently was not raised by the defendant). *Lexmark*, 253 F. Supp. 2d at 947-948. The district court's decision in *Lexmark* is currently on appeal in the Sixth Circuit. To the extent that *Lexmark* suggests that, under Section 1201, a "work protected under [Title 17]" includes internal software process, it should not be followed.

its rolling code software "controls access" to the GDO software in that it determines whether to send an electrical signal (*e.g.*, "instructions") to the receiver software, causing the garage door to operate.

But controlling "execution" of Chamberlain's software (and thus the "operation" of the GDO) is *not* equivalent to controlling access to Chamberlain's "work protected under [Title 17]." Rather, the "execution" and "operation" processes in Chamberlain's software are precisely the subject matter deemed unprotectable under Section 102(b). *See, e.g., Gates Rubber Co.*, 9 F.3d at 836-837. Under Chamberlain's own explanation of the operation of its software, that software does not control access to a protected work, but only to unprotected processes. Because Chamberlain admits that its software controls access only to processes, Chamberlain cannot possibly succeed on its DMCA claim against Skylink.

**X. CONCLUSION AND STATEMENT OF RELIEF SOUGHT**

For all of the foregoing reasons, Skylink respectfully requests that the district court's entry of judgment in favor of Skylink be affirmed.

Dated: March 26, 2004

Respectfully submitted,



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**XI. CERTIFICATE OF COMPLIANCE**

Counsel for Appellee Skylink Technologies, Inc. certifies that this Brief complies with the type-volume limitation of Fed. R. App. Pro. 32(a)(7) because this Brief contains 13,712 words, excluding the parts of the brief exempted by Fed. R. App. Pro. 32(a)(7)(B)(iii).

This Brief also complies with the typeface requirements of Fed. R. App. Pro. 32(a)(5) and the type style requirements of Fed. R. App. Pro. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2002 on a Microsoft Windows 2000 platform in 14 point Times New Roman font.

Dated: March 28, 2004



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