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THE DMCA RULEMAKING AND DIGITAL LEGAL VERNACULARS

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Introduction

The DMCA Rulemaking is a process that occurs every three years in which the U.S. Copyright Office considers exemptions to Section 1201 of the Digital Millennium Copyright Act, which prohibits the circumvention of DRM (digital rights management, or the “locks” on digital content). During this process, the copyright office invites industry groups, NGOs, and the public to argue for exemptions for legitimate non-infringing uses. In this paper, I look at the DMCA rulemaking as a venue for the development and exhibition of vernacular legal expertise, a process by which everyday people—those outside of legal and lawmaking roles—gain legal knowledge in specific areas. I argue that the DMCA rulemaking process is a venue for individuals to collaboratively share and shape their vision for a fairer intellectual property regime. However, the rulemaking process also reveals a complicated vision of digital citizenship, where individuals argue for rights within a U.S. framework while simultaneously envisioning themselves as sovereign digital citizens. In my broader study, I use rhetorical analysis to examine the ways in which everyday people argue for their rights online, and how these arguments are indicative of vernacular legal expertise. I merge this rhetorical analysis with perspectives from science and technology studies and the legal field in order to illustrate how the ways in which law and technology are discussed and reconfigured by laypeople can have a constitutive effect on future legislation.

Context

While much has been written about the DMCA itself, the 1201 rulemaking process has not been widely studied. This is due in part to the fact that it is somewhat anomalous compared to other rulemakings, because the DMCA rulemaking receives a significant amount of comments written by everyday people seeking exemptions (whereas other rulemakings may be dominated by industry groups, expert submissions, or form letters). For this reason, some scholars (Yackee and Yackee, 2006) studying rulemaking processes exclude the DMCA as an anomaly. However, others, such as Gabriel Michael (2014) argue that it is this precisely why the DMCA rulemaking should be studied more closely – it represents a salient issue for everyday people.

In this paper as well as my larger study, I argue that the DMCA rulemaking reveals the law as rhetorically constituted and allows a space for everyday citizens to intervene,

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through discourse, in the legal structures that govern them. Many scholars studying both on- and offline phenomena have noted the ways in which laws originate within everyday experiences and cultural practices (Braman, 2006; Hasian, 2000) In the case of the DMCA rulemaking, when NGOs such as the Electronic Frontier Foundation (EFF) form coalitions with grassroots actors, legal arguments can be combined with vernacular narratives about the specific impacts of the DMCA. What results is a distillation process whereby the fragmentation of online discourse can be both filtered and clarified into coherent requests for exemption, while still maintaining a vernacular character. As Gabriella Coleman (2009) has noted, many technologists and software engineers become active in “legal tinkering”—a process by which they construct new legal meanings and theories of free speech—because the law requires a similar set of skills to working with computer language (421). Intellectual property activism, while not the exclusive realm of engineers, attracts a similarly literate and impassioned collective of citizens who have found that restrictive anti-circumvention laws interfere with their day-to-day lives in some way.

Analysis

This study examines the publically available records from the 2015 Rulemaking, which includes several rounds of public comment as well as the Copyright Office’s final ruling. Several common threads run across all of these documents. Most importantly, perhaps, is the sense of ownership that individuals feel towards their devices and software. This is deeply tied to the belief that ownership permits an all-encompassing set of rights, which are in turn tied to the idea of citizenship. A common theme that I have found throughout my work on digital rights is the discursive evolution of technological principles (like DRM) into rights issues, a process that is certainly evident in the DMCA proceedings. In past years, groups like the Electronic Frontier Foundation have teamed up with remixers to add an exemption for video and audio remixing for the purpose of critique. These efforts derived from the ways that individuals were using technology in their day-to-day lives, and culminated in the successful passage of 1201 exemptions.

In the 2015 rulemaking, many writing individual comments individuals frame themselves as good citizens, and they see the limitation of their abilities to circumvent DRM on devices that they own to be fundamentally in violation of their rights as both US citizens and property-owners. One exemplary comment in this vein invokes the right to own and use property as one sees fit, concluding with “This is a liberty that should be self evident in our democratic republic whose supreme law is the U.S. Constitution” (“Combined Comments,” 212). Yet, despite their appeals to a distinctly American set of rights, the second strongest theme among the public comments is a mistrust of the government and an invocation of digitally-literate citizens as a powerful and sovereign collective. Many of the public comments also indicate that users do not believe the government will listen to everyday individuals over corporations and other moneyed interests. For example, one comment reads: “... it’s time the US administration started doing what it’s consistently failed to do for decades, which is to act for the people” (“Combined,” 36). Regarding corporations, the sentiment is similarly pessimistic. Commenters believe that companies’ strict insistence on anti-circumvention is an act of greed and can see little logical basis for companies to prohibit customers from circumventing DRM for the purposes of seemingly innocuous activities such as backing up media, use in a classroom, or fixing something that is broken or outdated.

Thus, while citizenship and property are linked in a distinctly American way, many arguments also bolster the notion of the internet as a sovereign territory that governments fundamentally cannot control. The commenters have a sense that their citizenship confers upon them particular rights, yet they inherently mistrust the citizenship-granting body of the state, favoring instead the laws of the “electronic frontier.” Many comments evoke a sense of inevitability, saying that a “line in the sand” has to be drawn, that everyday people have had enough, and that the boundless possibilities for innovation online will prevail.

Conclusion

As Isin and Ruppert (2015) argue, the digital citizen is defined by making rights claims online. In this sense, commenters in the DMCA Rulemaking assert themselves powerfully as digital citizens. However, given that the Rulemaking process is grounded in U.S. law, the commenters also assert a sort of “dual citizenship,” invoking their rights as Americans alongside their fundamental mistrust of the United States government and their unshakeable faith in the forward march of digital progress. This, I claim, illustrates the role of vernacular legal expertise in the DMCA Rulemaking. As individuals encounter law and policy and gain more fluency in the law, the ways in which they argue for their rights have a distinctively vernacular character, bringing together traditional and nontraditional legal perspectives. In a proceeding like the 1201 Rulemaking, these vernacular rights claims can lead directly to changes to the law.

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