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Safe harbour provides a generous haven for software copied for maintenance

In *Storage Technology v Custom Hardware Engineering & Consulting*, the US Court of Appeals for the Federal Circuit construed 17 USC §117(c) for the first time. This statute provides a safe harbour for service organizations to copy proprietary software in the course of repair and maintenance activities. The case details the haven of protection provided for the maintenance and repair of computer software.

Storage Technology (StorageTek) manufactures automated cartridge libraries for massive amounts of computer data. One cartridge library makes use of two copyrighted software programs that are responsible for controlling and maintaining the library. StorageTek restricts access to the software through a password protection scheme called GetKey.

Custom Hardware Engineering & Consulting (CHE) is an independent business that repairs data libraries manufactured by StorageTek. Instead of obtaining the GetKey password from StorageTek, CHE cracked the key. CHE also copied the two programs onto its random access memory for evaluation and monitoring. CHE did not destroy the copied versions of the software *immediately after* the repair was complete, as the lower court interpreted the statute to require (see Court calls a halt to DMCA violations with preliminary injunction). Rather, CHE continuously used the software while monitoring the data library in the interests of maintenance. StorageTek sued CHE, arguing that this activity constituted copyright infringement and a violation of the anti-circumvention provisions set out in the Digital Millennium Copyright Act (DMCA). The Federal Circuit disagreed.

The Federal Circuit relied primarily on its interpretation of Section 117(c) of the act. This provides that it is not an infringement of copyright if the owner or lessee of the machine obtains a copy of the computer program for purposes:

> *"only of maintenance or repair of that machine, if (1) such a new copy is used in no other manner and is destroyed immediately after the maintenance or repair is completed."*

The key to the court's ruling was the definition of 'maintenance' to include the continuous monitoring of the StorageTek system for problems. The court went on to point out Congress' intent in enacting the safe harbour: to allow a class of companies to fix and maintain computer systems while preventing *commercial* misuse. CHE's activity, being in line with such purposes, was found not to constitute copyright infringement.

The court also refused to find that cracking the GetKey protocol amounted to circumventing a technological measure that effectively controls access to a copyrighted work, in violation of the DMCA. Without a likely finding of copyright infringement, the court reasoned there was no separate DMCA violation, as the DMCA does not create a separate property right.

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