

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

THE CHAMBERLAIN GROUP, INC.,)
a Connecticut corporation,)
Plaintiff/Counterdefendant,)
vs.)
SKYLINK TECHNOLOGIES, INC., a)
Foreign corporation,)
Defendant/Counterclaimant.)
_____)
AND RELATED COUNTERCLAIMS)
_____)

CIVIL ACTION NO. 02 C 6376
The Honorable Judge Pallmeyer
Magistrate Judge Bobrick - 2 2002

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SKYLINK TECHNOLOGIES, INC.'S OPPOSITION
TO THE CHAMBERLAIN GROUP, INC.'S MOTION
FOR SUMMARY JUDGMENT

PUBLIC VERSION

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. BACKGROUND FACTS.....	1
A. "Rolling Code" GDOs Were Introduced In The Late 1990s.	1
B. Chamberlain Has Withheld Facts Regarding The Software It Actually Uses.	2
C. Chamberlain Also Sells Universal Transmitters For GDOs.	3
D. Model 39 Transmitters Operate Rolling Code GDOs Without Copying Rolling Code Software.	3
1. Skylink Is Chamberlain's Only Competitor.	3
2. Skylink's Model 39 Does Not Employ Chamberlain's Software.	4
3. The Model 39 Has Multiple Uses Unrelated To Chamberlain's Rolling Code GDOs.	4
E. Chamberlain Has No Knowledge Of Any Incident Of Code- Grabbing.	5
III. APPLICABLE LAW	6
IV. SUMMARY OF ARGUMENT	7
V. CHAMBERLAIN IS NOT ENTITLED TO SUMMARY JUDGMENT BECAUSE IT HAS NOT MET ITS INITIAL BURDEN.....	8
A. It Is Chamberlain's Burden To Establish A <i>Prima Facie</i> Case For Summary Judgment.	8
B. Chamberlain's Conclusory Declarations Do Not Set Forth Facts.	8
VI. SIGNIFICANT FACTUAL DISPUTES PRECLUDE SUMMARY JUDGMENT	9
A. Standing Alone, Skylink's Rule 56.1 Statement Demonstrates That Chamberlain's Motion Must Be Denied.....	10
B. Disputed Issues Of Facts Preclude Summary Judgment.....	10

	<u>Page</u>
1. Chamberlain Has Not Shown That Its GDOs Contain Any Original, Copyrighted Work.	10
2. Chamberlain Admits That Skylink's Universal Transmitters Have Significant Uses Unrelated To Circumvention.	11
3. Chamberlain Has No Knowledge Of "Code-Grabbing," Or Evidence That It Is Anything More Than A Marketing Ploy.	13
4. Chamberlain's Customers Are Permitted To Operate Their Garage Doors With After-Market Transmitters.	14
5. Chamberlain Has Not Demonstrated Any Injury.....	14
C. There Are Disputed Issues Of Facts Regarding Skylink's Defenses.	15
1. Skylink's Transmitters Satisfy The "Interoperability" Safe Harbor.....	15
2. Skylink Has Presented Admissible Evidence Showing Chamberlain's Unclean Hands And Copyright Misuse.	16
 VII. CHAMBERLAIN ADMITS THAT ITS SOFTWARE DOES NOT CONTROL ACCESS TO A WORK PROTECTED BY COPYRIGHT.....	 17
A. Section 102(b) Of The Copyright Act Precludes Copyright Protection For Internal Software Processes.	17
B. As In The Infringement Context, Chamberlain's "Work Protected Under This Title" Cannot Include Internal Software Processes.	18
1. In The Infringement Context, A "Copyrighted Work" Must Be Construed In Light Of The Limitations Set Forth In Section 102(b).	19
2. A "Work Protected Under This Title" Likewise Must Be Construed In Light Of The Limitations Set Forth In Section 102(b).	19
C. According To Chamberlain, Its Rolling Code Software Controls Access Only To Unprotected Processes.	20
D. The <i>Lexmark</i> Analysis Ignores The Statutory Language.....	22
E. Summary: Chamberlain Admits Controlling Only Access To Processes.....	24
 VIII. CONCLUSION.....	 25

TABLE OF AUTHORITIES

	<u>Page(s)</u>
Cases	
<i>Atari Games Corp. v. Nintendo of America, Inc.</i> , 975 F.2d 832 (Fed. Cir. 1992)	18
<i>Baker v. Selden</i> , 101 U.S. 99 (1879).....	17
<i>CSC Holding, Inc. v. Greenleaf Electronics, Inc.</i> , 2000 WL 715610 at *6 (N.D. Ill. 2000)	22
<i>Feist Publications, Inc. v. Rural Telephone Services, Co.</i> , 499 U.S. 340 (1991).....	19, 20
<i>Feliberty v. Kember Corp.</i> , 98 F.3d 274 (7 th Cir. 1996)	10
<i>Gates Rubber Co. v. Bando Chemical Industries, Ltd.</i> , 9 F.3d 823 (10 th Cir. 1993)	18, 21
<i>In re: Aimster Copyright Litigation</i> , 2002 WL 31006142 at *18 (N.D. Ill. 2002)	6
<i>Jackson v. City of Chicago</i> , 2003 WL 1582198 (N.D. Ill. March 27, 2003).....	9
<i>Lexmark Int'l, Inc. v. Static Control Components, Inc.</i> , 2003 WL 912614 (E.D. Ky. Feb. 27, 2003)	22, 23
<i>Mahurkar v. C.R. Bard, Inc.</i> , 2003 WL 355636 at *4 (N.D. Ill. 2003)	8, 11, 13
<i>Malec v. Sanford</i> , 191 F.R.D. 581 (N.D. Ill. 2000).....	8, 10
<i>Microsoft Corp. v. Logical Choice Computers, Inc.</i> , 2001 WL 58950 at *7 (N.D. Ill.)	19
<i>Nissan Fire & Marine Ins. Co. v. Fritz Cos.</i> , 210 F.3d 1099 (9 th Cir. 2000)	8
<i>Pearl Investments, LLC v. Standard I/O Inc.</i> , 2003 WL 1741211 at *8 (D. Me. April 2, 2003).....	22

	<u>Page(s)</u>
<i>Pickett v. Prince</i> , 52 F. Supp. 2d 893 (N.D. Ill. 1999)	11
<i>Qad, Inc. v. ALN Assoc's, Inc.</i> , 77 F. Supp. 1261 (N.D. Ill. 1991), <i>aff'd in part</i> 974 F.2d 834 (7 th Cir. 1992)	16
<i>RealNetworks, Inc. v. Streambox, Inc.</i> , 2000 WL 127311 at *10 (W.D. Wash. 2000)	12, 22
<i>Ruff v. Partner's Liquidating Trust</i> , 2001 WL 687466 at *2 n.3 (N.D. Ill. 2001)	9
<i>Sony Computer Entertainment America, Inc. v. Gamemasters</i> , 87 F. Supp. 2d 976 (N.D. Cal. 1999)	22, 24
<i>Universal City Studios, Inc. v. Corley</i> , 273 F.3d 329 (2d Cir. 2001)	6, 7, 22
<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 Studios, Inc. v. Corley</i> , 273 F.3d 329 (2d Cir. 2001)	7, 12, 22
<i>Waldrige v. American Hoechst Corp.</i> , 24 F.3d 918 (7 th Cir. 1994)	9
 Statutes and Rules	
17 U.S.C. § 101	18
17 U.S.C. § 102(b)	17
17 U.S.C. § 106	19
17 U.S.C. § 501(a)	19
17 U.S.C. § 1201	1, 6
17 U.S.C. § 1201(a)(2)	passim
17 U.S.C. § 1201(a)(3)(A)	7, 14
17 U.S.C. § 1201(a)(3)(B)	7
17 U.S.C. § 1201(b)(2)	18
17 U.S.C. § 1201(c)(1)	17, 18
17 U.S.C. § 1201(f)(2)	15

	<u>Page(s)</u>
17 U.S.C. § 1201(f)(3)	15
17 U.S.C. § 1203(a)	14
FRCP 56(c)	8
FRCP 56(e)	9
U.S. Const., art. I, § 8, cl. 8.....	20
U.S.D.C. N.D. Ill. Local Rule 56.1(a)(3).....	10
 Treatises	
H.R. Rep. No. 105-551, Part 1, 105 th Cong., 2d Sess. (1998)	6
Melville B. Nimmer & David Nimmer, 3 <i>Nimmer on Copyright</i> , § 12A.02[B][1] (2002)	7

I. INTRODUCTION

Plaintiff/counter-defendant The Chamberlain Group, Inc. is the market leader in sales of garage door openers ("GDOs"). Chamberlain also distributes "universal transmitters" for GDOs. Defendant/counter-claimant Skylink Technologies, Inc. is Chamberlain's only competitor in the universal transmitter market. Chamberlain claims that, by distributing universal transmitters capable of operating Chamberlain's GDOs, Skylink has violated the Digital Millennium Copyright Act of 1998, which is codified in relevant part at 17 U.S.C. § 1201 *et seq.* (the "DMCA"). Chamberlain asks the Court to determine that Skylink is liable as a matter of law.

Chamberlain's motion fails for three reasons. First, Chamberlain relies on bald assertions and legal conclusions. As set forth in Skylink's concurrently-filed evidentiary objections, Chamberlain's assertions and conclusions are not evidence, and cannot support summary judgment. Second, to the extent that Chamberlain does submit evidence, nearly all of Chamberlain's allegedly undisputed facts are disputed by Skylink. For instance, discovery has shown that the very software which Chamberlain sets forth as the foundation of its motion is not even used in Chamberlain's GDOs. Third, Chamberlain's motion demonstrates that Chamberlain's claim under the DMCA cannot succeed. As Chamberlain admits, its version of "rolling code" technology, at most, controls access only to uncopyrightable processes, *not* to any copyrighted work. For all of these reasons, Skylink respectfully requests that Chamberlain's motion for summary judgment on the DMCA be denied.

II. BACKGROUND FACTS

A. "Rolling Code" GDOs Were Introduced In The Late 1990s.

Chamberlain is the dominant player in the GDO market, with a market share of more than 60%. Defendant's Rule 56.1 Statement ("Df.'s 56.1"), ¶ 36. According to Chamberlain, the only other significant GDO market players are . . . Df.'s 56.1, ¶ 37. There are a number of smaller manufacturers of GDOs, such as Linear, Master Mechanic, Moore-O-Matic, Multi-code, Pulsar Allister and Stanley. Df.'s 56.1, ¶ 38.

Traditionally, GDOs operated on a "fixed" code. Df.'s 56.1, ¶ 39. In fixed code GDOs, the same code is transmitted by the GDO transmitter, and accepted by the GDO receiver, each time the transmitter is operated. Df.'s 56.1, ¶ 40. In the last few years, GDO manufacturers have begun selling "rolling" code GDOs. Df.'s 56.1, ¶ 41. Chamberlain did not invent rolling code technology. Df.'s 56.1, ¶ 42.

In rolling code GDOs, the transmitter sends out a different code each time the transmitter is operated, pursuant to an algorithm recognized by both the transmitter and the receiver. Df.'s 56.1, ¶ 43. According to Chamberlain's witness, rolling code was designed to prevent signals from overflying airplanes from operating Chamberlain's GDOs. Df.'s 56.1, ¶ 44 (software designed to prevent "garage door openers opening by planes flying overhead").

Despite the advent of rolling code GDOs, fixed code GDOs remain prevalent throughout the United States. Because rolling code GDOs were not sold until the late 1990s, GDOs installed before that time use fixed code. Df.'s 56.1, ¶ 45. In addition to this installed base, Chamberlain and all other major market players Df.'s 56.1, ¶ 46.

Chamberlain branded its rolling code software "Code Guard Rolling Code," and its GDOs containing rolling code are sold as "Security+"TM products. Df.'s 56.1, ¶ 47. Chamberlain does not place any restrictions on its customers' ability to use an after-market transmitter to operate Chamberlain GDOs or Code Guard Rolling Code software. Df.'s 56.1, ¶ 48.¹

B. Chamberlain Has Withheld Facts Regarding The Software It Actually Uses.

Chamberlain has registered with the Copyright Office two versions of its Code Guard software (the "Registered Software"). Chamberlain's Rule 56.1 Statement ("Pl.'s 56.1"), ¶ 9. In its motion, Chamberlain repeatedly claims that the Registered Software is the software that is actually employed in Chamberlain GDOs. *See, e.g.*, Pl.'s 56.1, ¶ 10 ("[t]he [registered] computer

¹ On the other hand, Chamberlain has been extremely aggressive in litigating against its smaller competitors. In the past few years, Chamberlain has targeted its competitors in at least ten separate actions, filed mainly in this Court. Df.'s 56.1, ¶ 49. Recently, this Court held one of Chamberlain's patents invalid. Df.'s 56.1, ¶ 50. Chamberlain nevertheless attempted to assert the invalid patent against Skylink in this litigation. *Id.*

programs are used to control the operation of Chamberlain's GDOs"). In fact, however, *Chamberlain's GDOs do not use – or even contain – the Registered Software.* Df.'s 56.1, ¶ 51.²

C. Chamberlain Also Sells Universal Transmitters For GDOs.

Universal GDO transmitters are capable of operating many different brands and models of GDOs. They are sold either as replacement transmitters when a customer's original transmitter is lost, or as additional transmitters. Pl.'s 56.1, ¶ 26; *see also* Df.'s 56.1, ¶ 55.

In 1998, Chamberlain entered the universal transmitter market by purchasing a company named "Clicker." Pl.'s 56.1, ¶ 28; *see also* Df.'s 56.1, ¶ 56. Clicker transmitters include Chamberlain's rolling code software, and thus can operate Chamberlain rolling code GDOs, in addition to third party GDOs. Pl.'s 56.1, ¶¶ 28-29, 31; *see also* Df.'s 56.1, ¶ 57.

D. Model 39 Transmitters Operate Rolling Code GDOs Without Copying Rolling Code Software.

1. Skylink Is Chamberlain's Only Competitor.

Skylink has been distributing transmitters for garage doors since about 1992. Df.'s 56.1, ¶ 58. Skylink also distributes other consumer devices, such as home security systems. Df.'s 56.1, ¶ 59. Skylink and Chamberlain are the only significant distributors of universal GDO transmitters in the United States. Df.'s 56.1, ¶ 60 (Q: "How many other manufacturers besides Clicker make universal garage door openers, remote controls?" A: "In the marketplace today, I'm only aware of one competitor in the retail channel of distribution, and that's Skylink.").³

² Skylink has requested that Chamberlain provide information regarding the software actually employed in Chamberlain's GDOs. Df.'s 56.1, ¶ 52. However, Chamberlain has not provided information regarding its actual GDO software. Df.'s 56.1, ¶ 53. Because Chamberlain has failed to produce such information, Skylink has been unable to investigate Chamberlain's claims regarding the operation of its software, or even determine whether the software is copyrightable or, for that matter, owned by Chamberlain. Df.'s 56.1, ¶ 54. Accordingly, Skylink's references to the purported characteristics and operation of the software actually employed in Chamberlain's GDOs are meant only to show that, even pursuant to Chamberlain's explanation of the software, there has been no DMCA violation by Skylink. Skylink's references herein to the software are not, and should not be construed as, an admission that Chamberlain's assertions about the software are accurate.

³ In its opening brief, Chamberlain plays on Skylink's status as a foreign (Canadian) corporation. Opening Brief at 1-2 (contrasting Chamberlain's domestic incorporation with Skylink's foreign status, and

A principal of Skylink has developed a novel method for operating rolling code GDOs without any copying of rolling code software (the "Novel Method"). Df.'s 56.1, ¶ 62. Patent applications regarding the Novel Method are pending. Df.'s 56.1, ¶ 63.

2. Skylink's Model 39 Does Not Employ Chamberlain's Software.

Last year, Skylink began distributing its new "Model 39" universal transmitter. Df.'s 56.1, ¶ 64. Original software employing the Novel Method is contained in the Model 39 (the "Model 39 Software"). Df.'s 56.1, ¶ 65.

The Model 39 does not contain a copy of Chamberlain's rolling code software, nor any other software derivative from or substantially similar to Chamberlain's rolling code software. Df.'s 56.1, ¶¶ 66-67; *see also* Pl.'s 56.1, ¶ 23 (admitting that Model 39 "sends three fixed codes," not a Chamberlain rolling code).⁴ A copyright application for the Model 39 Software has been filed with the United States Copyright Office. Df.'s 56.1, ¶ 68.⁵

3. The Model 39 Has Multiple Uses Unrelated To Chamberlain's Rolling Code GDOs.

The Model 39 was not primarily designed or produced for the purpose of circumventing Chamberlain's rolling code technology. Df.'s 56.1, ¶ 71. Rather, the Model 39 Software is designed to permit Skylink's universal transmitters to open most common GDOs. *Id.* Use of the Model 39 Software is needed to achieve interoperability with Chamberlain's rolling code GDOs. Df.'s 56.1, ¶ 72. Indeed, the Chamberlain employee who designed Chamberlain's rolling code software testified that, before encountering the Model 39 Software, he did not believe it was

noting that Skylink "imports" its transmitters). Chamberlain neglects to mention that all of its products also are foreign made. Df.'s 56.1, ¶ 61.

⁴ Chamberlain did not deposit its software code with the Copyright Office until just before it initiated this litigation, and *after* the Model 39 Software was developed. Opening Brief, Exs. A-B (copyright registrations); Df.'s 56.1, ¶¶ 62-64.

⁵ Chamberlain's currently operative complaint contains no allegation that Skylink has committed any acts of copyright infringement or contributory infringement. Df.'s 56.1, ¶ 69. Skylink's transmitters contain a computer program that was created independently of Chamberlain's rolling code software; it is impossible to copy any portion of, or otherwise infringe Chamberlain's rights in, Chamberlain's rolling code software using Skylink's transmitters. Df.'s 56.1, ¶¶ 65-70.

possible to operate Chamberlain rolling code GDOs without using a copy of Chamberlain's software. Df.'s 56.1, ¶ 73. As Chamberlain recognizes in its motion, he was wrong.

As a corollary to the intended interoperability of the Model 39, there are numerous commercially significant purposes for the Model 39 other than use with Chamberlain's rolling code GDOs. Df.'s 56.1, ¶ 74. Specifically, the Model 39 – like Chamberlain's Clicker products – can open both fixed and rolling code GDOs manufactured by all the major manufacturers. Df.'s 56.1, ¶¶ 75-76. Indeed, the Model 39 can operate 15 different GDO brands, and dozens of different models, only a few of which contain Chamberlain's rolling code. Df.'s 56.1, ¶ 77. Like Clicker transmitters, the Model 39 does not automatically open Chamberlain rolling code GDOs; it will operate a Chamberlain rolling code GDO only when specifically set to do so by the user (*i.e.*, the owner of a Chamberlain rolling code GDO). Df.'s 56.1, ¶ 78; *see also* Opening Brief at 8 (alleging that violation of DMCA occurs *only* when Model 39 is "set to operate a Chamberlain rolling code GDO").

E. Chamberlain Has No Knowledge Of Any Incident Of Code-Grabbing.

Chamberlain maintains that its rolling code software was designed to defeat "code-grabbing." Pl.'s 56.1, ¶ 16. It further claims that the Model 39 undermines this purported security feature. Pl.'s 56.1, ¶¶ 24-25. However, Chamberlain's own witness has admitted that its rolling code software was not designed to prevent "code grabbing," but rather to prevent signals from overflying airplanes from operating Chamberlain's GDOs. Df.'s 56.1, ¶ 79 (Chamberlain rolling code software designed to prevent "garage door openers opening by planes flying overhead"). On this motion, Chamberlain has submitted no evidence that the Model 39 permits airplanes to open Chamberlain GDOs. Df.'s 56.1, ¶ 80.

Discovery has revealed that Chamberlain's contentions regarding "code-grabbing" are little more than a marketing tool. Chamberlain has no knowledge of any act of code grabbing ever having occurred. Df.'s 56.1, ¶ 81. Chamberlain also has no knowledge of any incident

wherein its rolling code technology has successfully deterred a code grabber. Df.'s 56.1, ¶ 82.⁶ Indeed, contrary to Chamberlain's insinuation that fixed-code GDOs are somehow a security risk, Chamberlain itself Df.'s 56.1, ¶ 46.

Even if "code grabbing" were the problem that Chamberlain claims, Chamberlain's rolling code technology would not defeat the practice. Rather, *Chamberlain's rolling code itself can be "code grabbed,"* as Chamberlain has defined that term. Df.'s 56.1, ¶ 85.

III. APPLICABLE LAW

Chamberlain's motion for summary judgment is based on the Digital Millennium Copyright Act of 1998 ("DMCA"), codified in relevant part at 17 U.S.C. § 1201 *et seq.* Unfortunately, "[g]iven the DMCA's relatively recent enactment, there is a dearth of Seventh Circuit precedent interpreting its provisions." *In re: Aimster Copyright Litigation*, 2002 WL 31006142 at *18 (N.D. Ill. 2002).

In part, the DMCA was enacted to implement the World Intellectual Property Organization Copyright Treaty, which requires legal protections and remedies against the circumvention of technological measures used by authors in connection with the exercise of their rights under international copyright treaties. *Universal City Studios, Inc. v. Corley*, 273 F.3d 329, 440 (2d Cir. 2001). The DMCA also was born out of Congress' desire to protect copyrighted content in the digital environment. For instance, in discussing the "Background and Need for The [DMCA]," the relevant House Report states:

The digital environment now allows users of electronic media to send and retrieve perfect reproductions of copyrighted material easily and nearly instantaneously, to or from locations around the world. With this evolution in technology, the law must adapt in order to make digital networks safe places to disseminate and exploit copyrighted works.

H.R. Rep. No. 105-551, Part 1, 105th Cong., 2d Sess. (1998). Likewise, the Senate Report recognizes the DMCA's purpose of protecting copyrighted content:

⁶ Skylink's Model 39 transmitters are not marketed for use by "code grabbers" any more than are Chamberlain's Clicker transmitters. Df.'s 56.1, ¶ 83. Rather, they are marketed to garage door owners for use in accessing their own garages. Df.'s 56.1, ¶ 84.

As part of the ceaseless struggle to keep up with constantly evolving technology, the [DMCA] proposes to "make digital networks safe places to disseminate and exploit copyrighted materials." By creating "the legal platform for launching the global digital on-line marketplace for copyrighted works," its goal is "to make available via the Internet movies, music, software, and literary works that are the fruit of American creative genius."

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)).

To accomplish these goals, the DMCA prohibits, *inter alia*, trafficking in "circumvention" devices – devices that are used to evade technological protection measures employed by a copyright holder to prevent unauthorized access to a work of authorship. *Corley*, 273 F.3d at 440-441. For instance, it is a violation of the DMCA to distribute software designed to bypass the encryption protections used to protect copyrighted digital motion pictures from unauthorized copying. *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 317-318 (S.D.N.Y. 2000), *aff'd sub nom. Corley*, 273 F.3d 329.

Chamberlain's DMCA claim against Skylink arises under Section 1201(a)(2):

No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, 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 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 . . . for use in circumventing a technological measure that effectively controls access to a work protected under this title.⁷

IV. SUMMARY OF ARGUMENT

Chamberlain's DMCA claim is not amenable to summary judgment. Section IV shows that Chamberlain has not met its initial burden to show the absence of factual disputes. Rather,

⁷ "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, without the authority of the copyright owner." 17 U.S.C. § 1201(a)(3)(A). "[A] technological measure 'effectively controls access to a work' if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to a work." 17 U.S.C. § 1201(a)(3)(B).

as set forth in Skylink's evidentiary objections, Chamberlain's purported "evidence" consists of legal conclusions and unsupported assertions. Section V sets forth cognizable evidence disputing Chamberlain's purported facts. Because Skylink has presented admissible evidence disputing nearly all of Chamberlain's factual contentions, summary judgment cannot be granted. Finally, Section VI demonstrates that Chamberlain's motion cannot succeed because, by Chamberlain's own admissions, Skylink has not violated the DMCA. As Chamberlain admits, its rolling code software does not control access to a copyrighted work, but only to the uncopyrightable internal processes of Chamberlain's GDOs.

V. CHAMBERLAIN IS NOT ENTITLED TO SUMMARY JUDGMENT BECAUSE IT HAS NOT MET ITS INITIAL BURDEN

A. It Is Chamberlain's Burden To Establish A Prima Facie Case For Summary Judgment.

The purpose of summary judgment is to identify cases that can be resolved without trial. *See, e.g., Malec v. Sanford*, 191 F.R.D. 581, 582 (N.D. Ill. 2000). Summary judgment should be granted only where the moving party has submitted admissible evidence showing "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FRCP 56(c); *Mahurkar v. C.R. Bard, Inc.*, 2003 WL 355636 at *4 (N.D. Ill. 2003). "In determining whether there is a genuine issue of material fact, the evidence must be viewed in the light most favorable to the party opposing the motion, with doubts resolved in favor of the opponent." *Mahurkar*, 2003 WL 355636 at *4 (citations omitted).

Chamberlain bears the initial burden of showing that no reasonable trier of fact could find other than in its favor. *Id. Where the moving party fails to carry its initial burden, the opposing party has no obligation to come forward with any evidence whatsoever. See, e.g., Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102-1103 (9th Cir. 2000).

B. Chamberlain's Conclusory Declarations Do Not Set Forth Facts.

Because it has not submitted admissible evidence regarding each element of its DMCA claim, Chamberlain has failed to meet its burden to establish a *prima facie* case for summary

judgment. "[S]tatements of material fact must contain allegations of fact and not legal conclusions . . . and must be supported by admissible (non-hearsay) evidence." *Jackson v. City of Chicago*, 2003 WL 1582198 at *1 n.2 (N.D. Ill. March 27, 2003). To support its motion, Chamberlain relies upon the declarations of two employees, Messrs. Gregory and Fitzgibbon, to set forth the facts purportedly entitling Chamberlain to summary judgment. However, rather than setting forth facts regarding Chamberlain's claims, each declarant repeatedly sets forth his own legal conclusions and other non-evidentiary assertions.

For instance, the DMCA requires that Chamberlain's GDOs employ an access control measure. 17 U.S.C. § 1201(a)(2). Chamberlain purports to meet its burden with the unelaborated assertion that "the computer program in the receiver includes an access control or protective measure" Pl.'s 56.1, ¶ 14. Likewise, the DMCA requires that the measure control access to a protected work. 17 U.S.C. § 1201(a)(2). Chamberlain's "evidence" in support of this element is the bald assertion that "[t]he protective measure in Chamberlain's receiver rolling code computer program controls access to Chamberlain's" receiver computer program. Pl.'s 56.1, ¶ 19. As set forth in Skylink's evidentiary objections, there are numerous other examples of Chamberlain's evidentiary shortcomings. Chamberlain has failed to meet its initial burden to submit admissible evidence demonstrating the absence of a factual dispute.⁸

V. SIGNIFICANT FACTUAL DISPUTES PRECLUDE SUMMARY JUDGMENT

Where – unlike here – the moving party *has* met its initial burden, the opposing party may defeat summary judgment by presenting evidence of a disputed factual issue. FRCP 56(e); *see also, e.g., Waldrige v. American Hoechst Corp.*, 24 F.3d 918, 921 (7th Cir. 1994) ("[T]he non-movant need not match the movant witness for witness, nor persuade the court that her case is convincing, she need only come forward with appropriate evidence demonstrating that there is

⁸ Chamberlain must be held to the deficient evidence it has submitted. *Ruff v. Partner's Liquidating Trust*, 2001 WL 687466 at *2 n.3 (N.D. Ill. 2001) (party may not cure inadequate showing on initial motion by submitting new evidence on reply).

a pending dispute of material fact."). Here, Skylink has submitted evidence disputing nearly all of Chamberlain's factual contentions, thereby precluding summary judgment.

A. Standing Alone, Skylink's Rule 56.1 Statement Demonstrates That Chamberlain's Motion Must Be Denied.

Local Rule 56.1 provides the mechanism by which a moving party must set forth the material facts that purportedly entitle the party to summary judgment. Only *material* facts are to be included in a moving party's Rule 56.1 statement. See Local Rule 56.1(a)(3) (requiring submission of "statement of material facts"); *Malec v. Sanford*, 191 F.R.D. 581, 583 (N.D. Ill. 2000) ("the 56.1(a) statement should be limited to *material* facts") (emphasis original). This Court has "broad discretion to enforce rule [56.1]." *Feliberty v. Kember Corp.*, 98 F.3d 274, 278 (7th Cir. 1996). "[T]he Court of Appeals for the Seventh Circuit regularly upholds strict enforcement of Local Rule 56.1." *Malec*, 191 F.R.D. at 582.

Here, in purported satisfaction of its Rule 56.1 obligations, Chamberlain submits a 35-paragraph hodgepodge of allegedly material facts. This Court need not undertake the arduous task of analyzing and ruling upon the true materiality of each "material fact" submitted by Chamberlain. Instead, *Chamberlain should be held to its position that each and every "fact" listed in its Rule 56.1 Statement is material.* Chamberlain's motion must be denied if there is evidence disputing *any* fact listed in Chamberlain's Rule 56.1 Statement. Standing alone, Skylink's Rule 56.1 Statement demonstrates that Chamberlain's motion should be denied because nearly all of the facts alleged by Chamberlain to be material are, in fact, disputed. See Df.'s 56.1.

B. Disputed Issues Of Facts Preclude Summary Judgment.

To defeat summary judgment, Skylink need only present evidence of a single dispute of material fact. FRCP 56(c). Skylink has done far more than that.

1. Chamberlain Has Not Shown That Its GDOs Contain Any Original, Copyrighted Work.

To prevail, Chamberlain must show that there is no factual dispute that its rolling code technology "effectively controls access to a work protected under this title." 17 U.S.C.

§ 1201(a)(2) (emphasis added). There are disputed facts regarding the software actually employed in Chamberlain's GDOs.

Chamberlain alleges that its rolling code technology controls access to the Registered Software. Opening Brief at 1, 4 & 7-8.⁹ But according to Chamberlain's own witness, *Chamberlain's GDOs do not contain the Registered Software*. Df.'s 56.1, ¶ 51 (Chamberlain declarant's testimony that Chamberlain products do not contain registered software disclosed in Chamberlain's motion, that rolling code software is "always a work in progress," and that "there are new versions" of software in Chamberlain GDOs).

Accordingly, Chamberlain cannot take advantage of any presumption arising from the registration of its Registered Software. *See e.g., Pickett v. Prince*, 52 F. Supp. 2d 893, 901 (N.D. Ill. 1999) ("copyright registration will not be sufficient to demonstrate a valid copyright in light of contrary evidence"), *aff'd in relevant part*, 207 F.3d 402 (7th Cir. 2000). Rather, drawing all inferences against the moving party, it must be inferred that the software actually employed in Chamberlain's GDOs is not copyrightable, and not original to Chamberlain. *Mahurkar*, 2003 WL 355636 at *4 (all doubts resolved in favor of party opposing summary judgment). In other words, there is a disputed issue of material fact whether Chamberlain's GDOs contain any protected work proprietary to Chamberlain. Summary judgment must therefore be denied.

2. Chamberlain Admits That Skylink's Universal Transmitters Have Significant Uses Unrelated To Circumvention.

To prevail, Chamberlain also must show that there is no factual dispute that the Model 39 (i) is primarily designed or produced for circumvention, (ii) has only limited significant commercial purpose or use other than for circumvention, or (iii) is marketed for circumvention.

⁹ In fact, Chamberlain appears to contend that the rolling code software (the "protection measure") and the Registered Software (the underlying "work") are one and the same. Opening Brief at 3 (arguing that "protective measure" in receiver software controls access to receiver software). In other words, Chamberlain contends that the Registered Software "controls access" *to itself*. Chamberlain truly seeks to turn the DMCA on its head. 17 U.S.C. § 1201(a)(2) (requiring that protective measure control access to a work protected under this title, not to protective measure itself).

17 U.S.C. § 1201(a)(2). Once again, admissible evidence contradicts Chamberlain's factual contentions regarding the Model 39's purpose, use and marketing.

First, the Model 39 was not primarily designed or produced to circumvent Chamberlain's rolling code technology. Df.'s 56.1, ¶ 71. Rather, the Model 39 Software was designed to permit Model 39 transmitters to open most common GDOs. *Id.*; *see also Reimerdes*, 111 F. Supp. 2d at 319 (finding violation of § 1201(a)(2)(A) where software "was created solely for the purpose of decrypting CSS – that's all it does."); *RealNetworks, Inc. v. Streambox, Inc.*, 2000 WL 127311 at *10 (W.D. Wash. 2000) (no likelihood of success under § 1201(a)(2)(A) where there are some legitimate uses of product).

Second, the Model 39 has numerous commercially significant purposes other than use with Chamberlain's rolling code GDOs. Df.'s 56.1, ¶ 74. For instance, the Model 39 can open both fixed and rolling code GDOs manufactured by all the major manufacturers, including Genie, Wayne Dalton and Chamberlain. Df.'s 56.1, ¶¶ 75-76. Indeed, the Model 39 can operate 15 different GDO brands, and dozens of different GDO models – only a few of which contain Chamberlain's rolling code. Df.'s 56.1, ¶ 77. The Model 39 can operate a Chamberlain rolling code GDO only when specifically set by the user (*i.e.*, the owner of a Chamberlain rolling code GDO) to operate a Chamberlain rolling code GDO. Df.'s 56.1, ¶ 78; Opening Brief at 8 (alleging violation of DMCA occurs *only* when Model 39 is "set to operate a Chamberlain rolling code GDO"); *see also Reimerdes*, 111 F. Supp. 2d at 319 (finding violation of § 1201(a)(2)(B) where defendant's software's *only* use is to decrypt plaintiff's software); *RealNetworks*, 2000 WL 127311 at *10 (no likelihood of success under § 1201(a)(2)(B) where there are at least some legitimate uses for product).

Third, the Model 39 is not marketed for circumvention. Df.'s 56.1, ¶ 83. Rather, the Model 39 is marketed to garage door owners for use in accessing their own garages, whatever brand or model of GDO they may happen to possess. Df.'s 56.1, ¶ 84; *see also RealNetworks*, 2000 WL 127311 at *10 (no likelihood of success under § 1201(a)(2)(C) absent showing by

plaintiff that defendant "urge[s] customer to buy [product] to create derivative works in violation of the Copyright Act.").

Resolving all doubts in Skylink's favor, the evidence shows that the Model 39 is not designed, primarily used, or marketed for circumvention. *Mahurkar*, 2003 WL 355636 at *4. Chamberlain's motion for summary judgment cannot succeed.

3. Chamberlain Has No Knowledge Of "Code-Grabbing," Or Evidence That It Is Anything More Than A Marketing Ploy.

Chamberlain alleges that its rolling code software is designed to defeat "code-grabbing." Pl.'s 56.1, ¶ 16. It further claims that Skylink's Model 39 undermines this purported security feature. Pl.'s 56.1, ¶¶ 24-25. Skylink disputes Chamberlain's factual contentions regarding the purpose of Chamberlain's rolling code, the prevalence of "code grabbers," and the ability to "code grab" Chamberlain rolling code transmissions.

First, Chamberlain claims that "[s]ome time ago, burglars began to use devices known as 'code grabbers' to capture and record the coded signals [sent by GDO transmitters] in order to play them back and illegally open the garage door." Opening Brief at 1. In fact, Chamberlain has no knowledge that any act of code grabbing by a burglar has ever occurred. Df.'s 56.1, ¶ 81. And Chamberlain has no knowledge of any incident wherein its rolling code technology successfully deterred a code grabber. Df.'s 56.1, ¶ 82.

Second, Chamberlain claims that its rolling code software was designed to prevent "code grabbing." Opening Brief at 1. In fact, according to Chamberlain, its rolling code software was designed to prevent signals from overflying airplanes from operating Chamberlain's GDOs, not to prevent code grabbing. Df.'s 56.1, ¶ 79. (Chamberlain has submitted no evidence that the Model 39 permits airplanes to open Chamberlain GDOs.) Df.'s 56.1, ¶ 80.

Third, Chamberlain claims that its rolling code technology cannot be "code grabbed" (as Chamberlain has defined that term). Opening Brief at 3. That is false. Df.'s 56.1, ¶ 85.

Skylink has presented evidence disputing Chamberlain's assertions regarding "code-grabbing." Summary judgment must be denied.

4. Chamberlain's Customers Are Permitted To Operate Their Garage Doors With After-Market Transmitters.

Facts are in dispute regarding Chamberlain's claim that the Model 39 promotes *unauthorized* access to Chamberlain GDOs. "[T]o '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, *without the authority of the copyright owner.*" 17 U.S.C. § 1201(a)(3)(A) (emphasis added). To prevail, Chamberlain must accordingly establish that the Model 39 is designed for, has no significant purpose other than, or is marketed for, *unauthorized* access to Chamberlain's software. 17 U.S.C. § 1201(a)(2).

In fact, the Model 39 assists authorized users of Chamberlain software to access their own garages. Pl.'s 56.1, ¶ 26 (universal transmitter commonly used as a replacement transmitter when customer's original transmitter is lost). Chamberlain apparently contends that, when the owner of a Chamberlain GDO uses a Skylink transmitter to enter his or her own garage, such "access" is unauthorized by Chamberlain. But Chamberlain authorizes its customers to use a replacement transmitter to operate the software included in Chamberlain's GDOs. Df.'s 56.1, ¶ 48 (no "shrink-wrap" or other restrictions set on customers' ability to use Chamberlain software with replacement transmitter). Summary judgment must be denied because Chamberlain has not shown that the Model 39 promotes unauthorized access to Chamberlain's software.

5. Chamberlain Has Not Demonstrated Any Injury.

Only parties "injured by a violation of section 1201 . . . may bring a civil action" under that section. 17 U.S.C. § 1203(a). Skylink has also submitted evidence disputing that essential ingredient of Chamberlain's DMCA claim. Here, Chamberlain's purported injury arises from the loss of its relationship with Lowe's Home Improvement Warehouse. Opening Brief at 5, 9. Chamberlain does not contend that it has lost sales to any customer other than Lowe's as a result of Skylink. Df.'s 56.1, ¶ 86.

Nonetheless, the facts are in dispute regarding the cause of Chamberlain's purported injury. Specifically, Chamberlain's purported lost sales to Lowe's appear to stem from

Chamberlain's own poor performance, not to the Model 39. Df.'s 56.1, ¶ 87 (detailing problems with Chamberlain's "cost containment, brand preference, and product lead-time").¹⁰ Summary judgment must be denied because Chamberlain has not established any cognizable "injury."¹¹

C. There Are Disputed Issues Of Facts Regarding Skylink's Defenses.

In addition to the disputed issues of fact regarding the elements of Chamberlain's DMCA claim, there are disputed issues of fact regarding Skylink's defenses.

1. Skylink's Transmitters Satisfy The "Interoperability" Safe Harbor.

Section 1201 provides a number of "safe harbors" for defendants. For example:

Notwithstanding the provisions of [§ 1201](a)(2) . . . , a person may develop and employ technological means to circumvent a technological measure . . . *for the purpose of enabling interoperability of an independently created computer program with other programs*, if such means are necessary to achieve such interoperability, to the extent that doing so does not constitute infringement under this title.

17 U.S.C. § 1201(f)(2) (emphasis added); *see also* 17 U.S.C. § 1201(f)(3) (means may be made available to others to enable interoperability). Skylink's evidence shows that the Model 39 satisfies the requirements of the "interoperability" safe harbor.

Specifically, the Model 39 Software was independently developed to enable Skylink's transmitters to operate common GDOs. Df.'s 56.1, ¶¶ 62-68, 74-77. Skylink never copied Chamberlain's software. Df.'s 56.1, ¶ 67. The Model 39 Software is employed in the Model 39 to operate software in most common GDOs. Df.'s 56.1, ¶¶ 65, 71, 74-77. Use of the Model 39 Software is needed to achieve interoperability with Chamberlain's rolling code GDOs. Df.'s 56.1, ¶ 72. Moreover, even Chamberlain recognizes that the Model 39 Software does not violate

¹⁰ Chamberlain's "evidence" about Lowe's is simply inadmissible hearsay. Declaration of Richard Allen Gregory, filed December 3, 2002, ¶ 10.

¹¹ Months after filing its motion, Chamberlain filed a supplemental Declaration of John O. Garvey, which recites Chamberlain's costs of upgrading its Clicker products to include rolling code technology. This declaration does not show that Chamberlain has suffered any Section 1203(a) "injury" as a result of Skylink's conduct: Chamberlain's internal decision in 2001 to incur upgrade costs for Clicker logically cannot have resulted from Skylink's later introduction of the Model 39 in 2002. *See* Opening Brief at 5-6 (Clicker investment occurred prior to Model 39's distribution).

its (purported) copyright, as it has not asserted any claim against Skylink for copyright infringement. Df.'s 56.1, ¶¶ 66, 69; *see also* Pl.'s 56.1, ¶ 22. Because admissible evidence indicates that Skylink's conduct falls within the § 1201(f) safe harbor, summary judgment must be denied.

2. Skylink Has Presented Admissible Evidence Showing Chamberlain's Unclean Hands And Copyright Misuse.

Finally, admissible evidence suggests that Chamberlain should not be permitted to enforce its copyrights. "No party can use the limited grant that a copyright confers to gain control of components over which it has no such right. . . . Where a copyright holder attempts to use legal proceedings to protect an improper extension of the copyright, the court may refuse to enforce the copyright." *Qad, Inc. v. ALN Assocs., Inc.*, 77 F. Supp. 1261, 1266 (N.D. Ill. 1991), *aff'd in part*, 974 F.2d 834 (7th Cir. 1992). A copyright should not be enforced when a copyright holder misrepresents its scope to the court and opposing party in order to gain an undue litigation advantage. *Id.* at 1267-68.

In *Qad*, the plaintiff sued for infringement of its manufacturing and accounting software. *Id.* at 1263-64. The plaintiff did not disclose to the court or opposing party that much of its purportedly original software had been copied from a third party's computer program. *Id.* at 1266. The district court held the plaintiff's copyright unenforceable:

[Plaintiff] used its copyright to sue [defendant] and restrain it from the use of material over which [plaintiff] itself had no rights. That is a misuse of both the judicial process and the copyright laws.

Id. at 1267.

Here, as in *Qad*, Chamberlain has sought to restrain Skylink's distribution of the Model 39 by representing to the Court that the Model 39 accesses Chamberlain's Registered Software. Opening Brief at 1, 4 & 7-8. But, as Chamberlain always has known, its GDOs do not even contain the Registered Software. Df.'s 56.1, ¶¶ 51-54. This evidence suggests that, as in *Qad*, Chamberlain seeks to improperly expand its copyrights in the Registered Software in order to

gain control over the software actually used in its GDOs. Resolving all doubts in Skylink's favor, summary judgment must be denied.¹²

VI. CHAMBERLAIN ADMITS THAT ITS SOFTWARE DOES NOT CONTROL ACCESS TO A WORK PROTECTED BY COPYRIGHT

As detailed above, numerous factual disputes preclude summary judgment. These factual issues sound the death knell for Chamberlain's motion. But even ignoring these numerous factual disputes, summary judgment must be denied because Chamberlain has misconstrued and misapplied the DMCA. The DMCA expands a copyright holder's right to prevent unauthorized access to copyrighted works; contrary to Chamberlain's suggestion, the DMCA does *not* expand the subject matter for which copyright protection is available in the first instance. *See* 17 U.S.C. § 1201(c)(1) ("[n]othing in this section shall affect . . . limitations . . . under this title").

A. Section 102(b) Of The Copyright Act Precludes Copyright Protection For Internal Software Processes.

Copyright protection does not "extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated or embodied." 17 U.S.C. § 102(b); *see Baker v. Selden*, 101 U.S. 99, 102-03 (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.

¹² Chamberlain has also taken other improper steps to impair Skylink's rights. For instance, Chamberlain initially sued Skylink on a patent that previously had been held invalid. Df.'s 56.1, ¶ 50. Chamberlain also asserted against Skylink another patent for which Skylink has a valid license. *See* Stipulation of Dismissal, filed March 25, 2003.

Atari Games Corp. v. Nintendo of America, Inc., 975 F.2d 832, 839 (Fed. Cir. 1992) (citations omitted).¹³

The Section 102(b) restriction on copyright protection for processes bears a particularly important and prominent application in the context of computer programs, such as Chamberlain's rolling code software. "A 'computer program' is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result." 17 U.S.C. § 101. In a computer program, "[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). As the *Gates* court explained:

Some concern has been expressed lest copyright in computer programs should extend protection to the methodology or processes adopted by the programmer, rather than merely to the "writing" expressing his ideas. 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).

B. As In The Infringement Context, Chamberlain's "Work Protected Under This Title" Cannot Include Internal Software Processes.

Nothing in the DMCA suggests an abandonment of this foundational limitation on the subject matter of copyright. Rather, the DMCA explicitly affirms traditional limits on copyrightable subject matter by prohibiting *only* circumvention of a measure that controls access "to a work *protected under this title.*" 17 U.S.C. § 1201(b)(2) (emphasis added); *see also* 17 U.S.C. § 1201(c)(1) ("[n]othing in this section shall affect . . . limitations . . . under this title"). Contrary to Chamberlain's suggestion, the DMCA must be construed in accordance with limitations on copyrightable subject matter established in the Copyright Act.

¹³ Chamberlain has a patent on its rolling code process. Df.'s 56.1, ¶ 47. It initially sued Skylink on this patent, but – acknowledging that there has been no patent infringement – later amended its complaint to remove that claim.

control measure, in the ordinary course of its operation, 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).¹⁴

C. According To Chamberlain, Its Rolling Code Software Controls Access Only To Unprotected Processes.

Chamberlain's own admissions reveal that Chamberlain's GDOs do not employ the Registered Software. Df.'s 56.1, ¶ 51. Moreover, Chamberlain has improperly withheld information regarding the software actually employed in Chamberlain's GDOs. Df.'s 56.1, ¶¶ 52-53. Chamberlain's misfeasance has prevented Skylink from examining Chamberlain's actual GDO software to identify and filter any protectable elements. Df.'s 56.1, ¶ 54.

Nonetheless, Chamberlain's own admissions regarding its rolling code software demonstrate that the software does *not* control access to a protected work. Chamberlain posits that its software controls access only to the processes which control the motors in its GDOs, and thereby "operate" the GDOs. Opening Brief at 2-3, 8. As Chamberlain states:

[T]he protective measure in Chamberlain's receiver rolling code computer program controls access to Chamberlain's copyrighted computer program in the receiver that operates Chamberlain's GDOs [in that the] computer program *does not execute* if an improper rolling code is received from an unauthorized transmitter. Once an authorized rolling code transmission is received, the computer program *sends instructions to the microprocessor for operating the GDO.*

Opening Brief at 3 (emphasis added); *see also* Fitzgibbon Decl., ¶ 6 (rolling code software controls GDO operation). In other words, Chamberlain contends that its rolling code software "controls access" to the receiver software in that it determines whether to send an electrical signal ("instructions") to the receiver software, causing the garage door to operate.

¹⁴ In addition to comporting with the statute, such an identification and filtration of non-copyrightable elements may be required to preserve the DMCA within the Constitutionally permissible realm of Copyright law. *See* U.S. Const., art. I, § 8, cl. 8 (copyright laws only may secure "for limited Times to Authors . . . the exclusive Right to their respective Writings"); *Feist*, 499 U.S. at 346 ("unmistakably clear that [the terms 'Authors' and 'Writings'] presuppose a degree of originality").

Chamberlain misses the point of the DMCA. 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 836-37. 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.¹⁵

Chamberlain has not established that its software controls access to "a work protected under [Title 17]." Because facts admitted by Chamberlain show that its software controls access to processes, not copyrightable subject matter, summary judgment must be denied.¹⁶

¹⁵ A different issue might be posed to the extent that software controlled access to *both* copyrighted and uncopyrighted content (*e.g.* an encryption protocol protecting a database that contains both public domain and non-public domain content), but the defendant permitted a user to access only the uncopyrighted content. In such a case, the plaintiff's software might be held to "control access to a work protected under [Title 17]," even though no copyrighted content is, in fact, accessed. That issue, however, is not before the Court. Here, Chamberlain admits that its rolling code software controls access only to uncopyrightable processes (*e.g.*, the internal electrical signals in its GDOs), and does not control access to *any* copyrightable material (*e.g.*, the software's written code or other expression adopted by the programmer).

¹⁶ The absurdity of Chamberlain's proposed construction of the DMCA emerged from applying the DMCA, as Chamberlain has construed it, to Chamberlain's own Clicker transmitters. Clicker transmitters can operate fixed code GDOs manufactured by third parties, without the permission of those third parties. Pl.'s 56.1, ¶ 28; Df.'s 56.1, ¶ 88. To the extent it wishes to avoid liability, Chamberlain must distinguish, for purposes of DMCA liability, universal transmitters for fixed code GDOs from universal transmitters for rolling code GDOs.

But the statute supports no such distinction. Fixed code GDOs usually contain multiple settings (*e.g.*, through the use of "dip switches"), which allow a user to change the security code that will operate the GDO. Df.'s 56.1, ¶ 89. In such GDOs, the receiver usually must be configured to recognize the code that the universal transmitter software has been programmed to send, or the GDO will not operate; alternatively, the universal transmitter must be configured to send the code that the receiver software has been programmed to recognize, or the GDO will not operate. Df.'s 56.1, ¶ 90. When a valid transmitter code is received by the receiver, the software controlling the motors of the GDO is activated, and the garage door is opened. Df.'s 56.1, ¶ 91. Universal transmitters for fixed code receivers can open a fixed code GDO once the receiver software and transmitter software have been synchronized. Df.'s 56.1, ¶ 92.

Under Chamberlain's (incorrect) construction of the DMCA, Clicker transmitters violate each prong of § 1201(a)(2). First, under Chamberlain's construction, fixed code software "controls access" to the receiver software because the fixed code software "requires the application of information [*e.g.* the correct fixed code]" to operate the receiver software. Opening Brief at 7-8. Second, under Chamberlain's construction, Clicker transmitters circumvent this access control measure because they "avoid, bypass, deactivate or otherwise impair" the pre-programmed security code by reconfiguring it. Opening Brief

D. The Lexmark Analysis Ignores The Statutory Language.

Until very recently, every published DMCA case has required, in accordance with Section 102(b), that the plaintiff's protection measure control access to copyrighted subject matter. *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 437-38 (2d Cir. 2001) (affirming injunction where encryption software limits ability to display, copy and manipulate DVD content); *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 2d 211, 217 (S.D.N.Y. 2000) (same analysis, issuing preliminary injunction); *Sony Computer Entertainment America, Inc. v. Gamemasters*, 87 F. Supp. 2d 976, 981-82, 987 (N.D. Cal. 1999) (protection measure controls user's ability to view and control characters in an audiovisual work contained on CD-ROM); see also *Pearl Investments, LLC v. Standard I/O Inc.*, 2003 WL 1741211 at *8, 14-15 (D. Me. April 2, 2003) (summary judgment for DMCA defendant inappropriate because encrypted password system may limit viewing of copyrighted data and software); *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); *CSC Holding, Inc. v. Greenleaf Electronics, Inc.*, 2000 WL 715610 at *6 (N.D. Ill. 2000) (magistrate judge's report and recommendation) (finding likelihood of success under DMCA against purveyor of "black boxes" for decoding cable television transmissions).

However, one recent, unpublished DMCA decision from the Eastern District of Kentucky fails to even consider the foundational Section 102(b) and Section 1201(a)(2) issues discussed above. See *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 2003 WL 912614 (E.D. Ky. Feb. 27, 2003). In *Lexmark*, the court addressed the plaintiff's motion for preliminary injunction arising from its claims for copyright infringement and violation of the DMCA. In conducting its

at 8. Third, Chamberlain's Clicker products are "designed and produced" to operate third party, fixed code GDOs, are marketed for such use, and, when set to operate such GDOs, have no significant purpose other than to operate the GDOs. Opening Brief at 8; see also Pl.'s 56.1, ¶ 28; Df.'s 56.1, ¶ 93. Thus, if Chamberlain were correct that access to only unprotectable processes satisfies the DMCA, then Chamberlain's own products would violate the DMCA. One can only imagine what other seemingly innocuous and beneficial products might be held to violate the DMCA were this Court to adopt Chamberlain's erroneous construction.

infringement analysis, the court explicitly recognized its obligation to consider *only copyrightable elements* of the plaintiff's software. *Id.* at *19-21. The court determined that the plaintiff had established a likelihood of success on the merits of its infringement claim because the defendant had "slavishly copied" the plaintiff's registered software – including protectable elements of the software. *Id.* at *10-11.

However, in addressing the plaintiff's DMCA claim, the *Lexmark* court failed to consider whether the plaintiff's protective measure controlled access to copyrighted content. Instead, the court determined that the plaintiff's authentication sequence controlled "access," as that term is used under the DMCA, to the plaintiff's software simply because a user could not "make use of" the software absent authentication. *Id.* at *23.

It is unclear from the opinion whether the *Lexmark* plaintiff's protection measure controlled access to any copyrightable subject matter. Moreover, *Lexmark* addressed a very different factual situation than that implicated in the current motion.¹⁷ Nevertheless, the decision is deficient from an analytical perspective in that the court apparently made no distinction between access to copyrightable content, on the one hand, and access to unprotectable processes, on the other. Rather, contrary to the DMCA and Section 102(b), the court apparently equated the *operation* of the plaintiff's "software" with the plaintiff's "work protected under [Title 17]." *Id.* at *23.

While the *Lexmark* court's failure to address this issue is perhaps attributable to the parties' failure to raise it, such an analytical approach to the DMCA – wherein access to unprotected portions of a computer program is not distinguished from access to copyrighted material – is contrary to: (i) Section 1201(a)(2), which requires that the plaintiff's technological measure control access to a protected work, not access to unprotected matter, (ii) Section 1201(c)(1), which reiterates that the DMCA does not expand traditional limitations on the

¹⁷ For instance, in *Lexmark*, the defendant committed "slavish" copying of the plaintiff's software. *Id.* at *10-11. Here, on the other hand, Chamberlain alleges no copyright infringement by Skylink. Similarly, unlike here, the defendant in *Lexmark* was not entitled to protection under the DMCA's "interoperability" safe harbor. *Id.* at *26.

subject matter of copyright, (iii) Section 102(b), which codifies the foundational rule precluding copyright protection for processes, and (iv) prior DMCA caselaw, all of which has required that a protective measure control access to copyrightable subject matter. To the extent that *Lexmark* suggests that a DMCA claim may be evaluated without considering whether a plaintiff's protective measure controls access to copyrightable subject matter, its incorrect framework for addressing the DMCA should not be followed.¹⁸

E. Summary: Chamberlain Admits Controlling Only Access To Processes.

Chamberlain's admissions demonstrate that, at most, Chamberlain's rolling code software controls access to an uncopyrightable process. As such, application of the DMCA does not accord with congressional intent, the statutory language or the caselaw. Summary judgment should be denied.

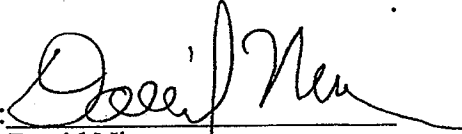
¹⁸ The *Lexmark* decision is currently on appeal. The district court purported to base its construction of the DMCA upon a prior California district court case, *Sony Computer Entertainment America, Inc. v. Gamemasters*, 87 F. Supp. 2d 976 (N.D. Cal. 1999). *Gamemasters*, like *Lexmark*, involved a preliminary injunction determination, not summary judgment. More importantly, *Gamemasters* involved crucially different facts. There, the plaintiff's authentication sequence controlled the user's ability to view and control characters in an audiovisual work contained on a CD-ROM; the access protection measure did not merely control access to internal processes. *Id.* at 981-82, 987. Moreover, *Gamemasters* relied upon an incorrect "quotation" of the DMCA. According to the *Gamemasters* court, Section 1201(a)(2) requires that a protection measure control access to a "system protected by a registered copyright." 87 F. Supp. 2d at 987 (emphasis added). This does not accord with the statutory language. 17 U.S.C. § 1201(a)(2) (protection measure must control access to "work protected under this title"). As the case settled shortly after issuance of the preliminary injunction, it is unclear to what extent the *Gamemasters* decision was based upon the court's incorrect understanding of the statutory language.

VIII. CONCLUSION

Chamberlain's DMCA claim is not amenable to summary judgment. Chamberlain has not met its burden to establish a *prima facie* case for summary judgment, and Skylink has submitted substantial evidence disputing Chamberlain's claims. Moreover, even ignoring the numerous facts in dispute, the DMCA does not apply where – as here – the plaintiff's "protection measure" controls access only to uncopyrightable processes. Skylink respectfully requests that Chamberlain's motion be denied.

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing SKYLINK TECHNOLOGIES, INC.'S OPPOSITION TO THE CHAMBERLAIN GROUP, INC.'S MOTION FOR SUMMARY JUDGMENT and SKYLINK TECHNOLOGIES, INC.'S RESPONSE TO THE CHAMBERLAIN GROUP, INC.'S STATEMENT OF MATERIAL FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, AND STATEMENT OF ADDITIONAL FACTS PRECLUDING SUMMARY JUDGMENT, PURSUANT TO LOCAL RULE 56.1 were served on attorneys for plaintiff on May 2, 2003, by hand-delivery, as follows:

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