Reply Comments to Rulemaking on Exemptions from Prohibition on Circumvention of Technological Measures that Control Access to Copyrighted Works

INTRODUCTION


We wish to respond to several comments that have been submitted to the Copyright Office as part of its initial call. A list of all specific comments replied to is listed in appendix A. Before doing so, it would be prudent to describe the organizations involved in creating this document.

Copyright's Commons is a non-profit coalition of students, professors, archivists and other members of the public who are concerned about the preservation of the public domain against the overextension of copyright.

We share the Library Associations' concerns (comment #162) that access controls may too easily become persistent use controls, in the hands of publishers. Because individuals, as much as libraries, are impacted by use restrictions in the guise of access controls, we agree with many of the earlier comments that all categories of works should be covered by this rulemaking, and propose that all non-infringing uses of lawfully obtained copies of works be expressly exempted from § 1201(a).

We offer specific proposals below to achieve this that are simple and easily motivated by the Legislative History of the DMCA, the combined wisdom of several hundred years of copyright jurisprudence, and a deep respect for the Constitution's underlying purpose to promote the public good in granting Congress the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors ... the exclusive Right to their respective Writings ...".

Copyright's Commons originally formed to challenge the lengthening of copyright terms under the Sony Bono Copyright Term Extension Act. What we see here, however, in the submissions of the Motion Picture Association of America ("MPAA"), Time Warner, and Sony, could be far worse than a term extension. We believe these three submissions stand apart from the rest of the comments submitted. Therefore, we reply to some specific assertions from these comments.
RULEMAKING SUGGESTIONS

Despite adding a new right of access control to the copyright holder's bundle, Congress never describes the content of that right. One of the important functions this rulemaking can serve is to define "access control" narrowly, consistent with existing rights and the limitations on those rights as required by § 1201(c). Comment 162, submitted on behalf of five major library associations, discusses the dangers of an overbroad definition of access. We agree with the recommendations and conclusions of that comment.

We also urge the Copyright Office and the Librarian of Congress to weigh this comment heavily. The Library Associations are perhaps the most qualified of any organization to interpret the impact of the DMCA without bias. Libraries are literally the keepers of the 'public good' generated by the Copyright Clause. This is perhaps why Congress appointed its own Library, the Library of Congress, to play such an important role under the DMCA.

Following the lead of the Library Associations we urge the rule making to begin with a careful definition of the scope of the "right to control access". We recognize and emphasize that many of the dangers to the public good can be avoided by a careful, limited definition of this term. On the other hand, a broad and expansive definition of access control could cause great upheaval in copyright law and set aside hundreds of years of wisdom regarding the scope of the protections given to copyright holders.

The quid-pro-quo between copyright holders and the public is a simple one. The public offers the copyright holder a chance to profit from their original expression to induce the owner to provide access to some members of the public initially and the public at large eventually. The time honored doctrines of 'first sale' and 'fair use' say that once the copyright owner has achieved the profit from an individual copy that much of the control over it has expired. The only control that remains is that needed to assure that the market remains intact for other copies to be traded, and even this only lasts for 'limited times'.

With this motivation, we urge the adoption of a definition of "access" that clarifies this and simplifies the law. We propose:

DEFINITION OF 'ACCESS' - the ability to acquire, use, or benefit from the initial copy of a work

With this definition, access lawfully occurs if and only if the copyright owner is given their just reward in the market. Thus access is provided at first sale.

An access control measure, then, is defined similarly:

DEFINITION OF ‘ACCESS CONTROL MEASURE’ - any measure designed to ensure that the acquisition, use, or benefit of the initial copy of a work occurs only via a designated process or commercial transaction.
This would not include, however, any measure that seeks to limit the otherwise lawful uses that occur after first sale. In this light, § 1201(a) regulates circumvention of technological measures that seek to assure that the required commerce leading up to delivery of a copy actually occurs. They do not, however, apply to any and all uses of technology such as encryption or scrambling. In some cases, copyright owners will seek to use such technology, not for 'access control', but for 'use control'. From the earliest Supreme Court cases to the recent precedents set in Feist and Sony, it should be clear that 'use control' is not necessary for the copyright holder to recieve their just rewards, hence it is not accorded the same level of statutory or Constitutional protection.

In such cases, Congress did not intend for § 1201(a) to apply, but rather for § 1201(b). In particular, there is no analog of § 1201(a)(1) in § 1201(b). This intent is supported in the legislative history by the comments of Rep. Howard Coble, chair of the Subcommittee on Courts and Intellectual Property:

First, the bill [as introduced] dealt separately with technological measures that prevent access and technological measures that prevent copying. As to the latter, the bill contained no prohibition on the act of circumvention itself, leaving users free to circumvent such measures in order to make fair use copies.

Many of the fears exhibited in other comments will be very simply avoided by adopting this very simple definition of 'access' and 'access control'. For example, in Comment # 175, Carl Fleischhauer, Technical Coordinator, National Digital Library Program and David A. Francis, Chief, Motion Picture, Broadcasting, and Recorded Sound Division, both of the Library of Congress suggest that without an exception it "may be necessary for the Library to circumvent technological controls on access to copyrighted works in order to preserve digital audio-visual works for the long term.". With the proposed definition of 'access', such archives would not circumvent the access control measure, even if it requires decryption of the material. In fact, archiving requires access before it occurs, but archiving itself is not access, it is use.

This definition will surely clarify and simplify the intent of Congress embodied in § 1201(c)(1), where it is written that "Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title." Note the use of the word 'affect'.

Indeed, with the proposed definition, there is no conflict between access control rights and fair use, since you cannot make fair use of material that is not lawfully aquired and once such access has been purchased, the full range of non-infringing uses are available.

IMPACTS TO PENDING CASELAW

As of 3/28/2000 there have been three suits filed under section § 1201(a)(2). It should be noted that the definition of 'access' that is adopted by the Librarian of Congress will, no doubt, also be applied to section § 1201(a)(2). Therefore, it would be useful to examine quickly how this definition would affect the cases. Two cases have granted preliminary injuctions, but have yet to reach their final conclusion.
The first case was RealNetworks, Inc. v. Streambox, Inc. No. C99-2070P (W.D. Wash. Jan. 18, 2000). In this case, RealNetworks alleges, among other things, that a product called the Streambox VCR violates § 1201(a)(2). Judge M. Pechman’s findings of fact included this item:

24. In order to gain access to RealMedia content located on a RealServer, the VCR mimics a RealPlayer and circumvents the authentication procedure, or Secret Handshake, that a RealServer requires before it will stream content. In other words, the Streambox VCR is able to convince the RealServer into thinking that the VCR is, in fact, a RealPlayer.

In such a case, it is clear that using the Streambox VCR violates the law under the proposed definition of 'access'. A user of Streambox VCR acquires copies of streaming content from the RealServer, where initially they had none. The Streambox VCR, then, clearly circumvents the designated process for access intended by the content distributor.

The second and third cases are the "DVD cases", brought by the MPAA against individuals who posted the "DeCSS" utility to their websites in New York and Connecticut. In these cases, DeCSS allows owners of a DVD to remove the Content Scrambling System, ("CSS"), which is used to assure that DVD's are viewable only on authorized players. The result is a rather large copy of the movie stored on the hardrive of the user. The resulting file can be viewed with any MPEG-2 video player, including those of alternative operating systems, such as Linux and FreeBSD.

Since DeCSS can only work on an original DVD, this is not an example of circumventing an access control measure. The access control measures for DVD are the laws and countermeasures against shoplifting and they are not circumvented when the DVD is purchased through ordinary retail outlets. When this happens, the copyright owner reaps the benefit of the copyright quid-pro-quo.

It may be a circumvention of a use control measure, but as such the claim should be brought under § 1201(b)(1), where 'fair use' would be a defense. We agree strongly with Comment #204, submitted by the Electronic Frontier Foundation, urging the Librarian of Congress to use it's rulemaking ability to exclude such systems from the protection of § 1201(a).

DeCSS is simply a format-shifting program. As such, it easily qualifies for 'fair use' following the Sony Betamax decision. Moreover, DeCSS is used to break the tying of DVD viewing to separately purchased players which curiously only work on Microsoft operating systems. Such tying smacks of anti-trust, and it is exactly the kind of abuse of copyright that the motion picture studios were guilty of in the landmark Supreme Court case US v. Paramount (1948). It is unthinkable that the intent of Congress in the DMCA was to promote and protect such anti-competitive behavior.

Failure to exclude such abuses of copyright is contrary to the spirit of the DMCA as illustrated in the Congressional Record, because it will lead inevitably to a 'pay-per-use' society in which every published work is encrypted, not to control access, but rather just to qualify for the extra
measure of control. The definition of 'access' that we offer, following the lead of the Library Association's comment, avoids this fiasco.

SPECIFIC RESPONSES TO CONTRARY COMMENTS

We strongly disagree with the notion advanced by the MPAA, Time Warner, and Sony in their comments, that the rulemaking by the Librarian of Congress should exempt virtually nothing. This suggestion would rebuff the intention Congress clearly had for this office to play a substantial role in protecting the public's "fair access" that must accompany the statute. Tipping the "delicate balance" (Stewart v. Abend) between rights of the author and use by the public, these corporate holders of copyright now seek to use the Digital Millennium Copyright Act's "paracopyright" to expand their monopoly on expression and restrict the public's use of their works.

In the expansive interpretation these three groups urge the anticircumvention provisions in section § 1201(a) effectively put legal force behind any restrictions chosen by a copyright holder. The views of these three groups are in sharp contrast to the strong consensus of the mainstream that the DMCA should do no such thing. Without broad exemptions for fair uses of the underlying work and access to non-copyrighted works incorporated under the access control layer, the provision would permit copyright holders to stake out claims far in excess of the exclusive rights granted under the Constitution by the Copyright Act.

"[M]ost 'lawful users' are licensed users, and most 'non-infringing uses' are uses that are carried out pursuant to a license agreement," the MPAA claims. This is a clear misrepresentation of the current situation, in which purchasers are free to borrow books and trade videotapes, but a telling sign of the MPAA's aspirations: With access control technologies, we can have all of our media shrinkwrapped. Only those uses approved by the copyright owner will be within the user's rights. The requirement that the user get advance approval from the copyright holder before making non-infringing uses of the work entails all the problems of a prior restraint of speech. The new power to control access cannot be interpreted to permit copyright holders to censor critical uses as "circumvention," while "authorizing" only favorable reviews. [quote that few copyright holders would authorize a parody]

While all these mechanisms serve to control access by allowing it to authorized users and denying it to unauthorized users, the effect of these measures is not always a simple binary matter. These techniques are also employed to allow access to part of a work while denying it to another part; to enable access by a specified category of users but not by another category; or to enable access by a specified number of simultaneous users but no more. Access controls embodied in the work itself also commonly function in tandem with the hardware used to access the work, so that a work may be made accessible on a specific machine, or a specified category of machines.

[Access control technologies] have also enabled greater granularity in the dissemination of copyrighted materials, so that users can gain access to the specific works or portions of works in which they are most interested, without incurring the added expense of access to unwanted material.
The MPAA describes a rationed, pay-per-use system of precisely the nature the drafters of the DMCA took pains to avoid.

Time Warner paints a similarly grim picture: "Time Warner is vitally interested in the healthy maintenance of the 'fair use doctrine,'" its comment proclaims, yet it proceeds to describe a regime of technological controls that would eviscerate fair use, or at least prevent anyone from coming close enough to a work to make fair use of it.

Time Warner alludes to the "problems" of digitization, in the ability to reproduce copyrighted works en masse, a question flatly inapplicable to this rulemaking. Reproduction without the authorization of the copyright owner is already prohibited -- no new provision was added because none was needed. Section § 1201(a) bars the circumvention of access control devices, not copy protection.

Time Warner proclaims that

[A]nyone wanting to make 'fair use' of a copyrighted work need only follow the same steps as he or she would in the absence of technological protections: buy or rent a copy, subscribe to a transmission thereof or borrow a copy from a library.

We are seeing, however, that buying an access controlled copy often will not enable access to fair uses of the work: Purchasing a movie on DVD does not give a user the ability to excerpt a short clip for use in a classroom presentation or a critical review, or even to play the work straight through on a machine running Unix or Linux. Purchasing a download of Stephen King's new short story does not give a reader the ability to photocopy or print a page, or lend the story to a friend.

Such measures may require users to pay for access to a work; the users, however, are not prevented from making non-infringing uses or uses as to which fair use would be a defense.

If this is indeed the case, we expect Time Warner should happily drop its suit against the posters of DeCSS code, as the decryption is only used on DVDs to which the user has lawful access -- as by purchasing a copy.

Time Warner admits that only "[s]ome technological measures impose no further controls on use once access is authorized." Others, such as CSS, continue to restrict use of the work even after the reader has demonstrated his authorization.

Time Warner claims that

[i]t would be exceedingly difficult - if not impossible - to limit the permitted circumvention to uses that are not infringing or defensible under the fair use doctrine as distinct from uses that are neither and are consumptive and even commercial.
Yet this is what the law has always had to do on questions of fair use. Despite the arguable convenience of such a move, it is improper to delegate the hard questions to technological implementations that do not admit for nuanced responses.

Time Warner attempts to minimize the restrictive effect of its access controls, but acknowledges that the content available only on controlled media can differ substantially from that published free of restrictions. The restricted DVD format is an improvement, it argues, because movies on DVD "provide[] much information that could not be included in VHS tapes," while "timing or release [and] quality of picture and sound ... often lead consumers to prefer one format over another for certain films." Indeed, a consumer who purchases the enhanced version of the work based on these preferences should be free to use the work. Time Warner may not limit use and deny fair use to a purchaser of the high-quality version of a work on the ground the consumer may purchase an inferior version instead, effectively conferring total monopoly on the enhancements.

Finally, Sony Computer Entertainment America submits that it has "found access controls to be an important means for SCEA to combat unauthorized access to our works." Its access controls are not so limited, however. The region coding and blocks on interoperability with non-Sony consoles or games similarly block "unapproved" but not unauthorized uses of its works by legitimate purchasers of copies or those who reverse engineer the consoles. Sony is trying to reclaim, through access controls, what it has been denied by copyright proper -- an exclusive right to produce both the games and the consoles on which they play. Shall the Ninth Circuit's recent validation of reverse engineering in Sony Computer Entertainment Inc. v. Connectix Corp., -- F.3d --, No. 99-15852 (9th Cir. Feb. 10, 2000), be overruled by a simple cipher?

"The essential non-infringing use made of videogames is the playing of the game by consumers in the home," Sony states. (emphasis added) Its restrictions would add, sub rosa, the requirement that they be Sony-approved games, played on a Sony console, provided the home is in that segment of the world for which the games were designated. Sony thus undertakes to determine that there are no fair uses of its works, and that legitimate purchasers may not choose to make other uses of their copies.

Moreover, Sony acknowledges that its videogames are available only in digital, access-controlled format. A would-be fair user whose use requires a different means of access to the work has no alternative, even in degraded format, to circumvention of the access controls.
Appendix A - Comments under Reply

Favorable  Our reply agrees with these favorable comments:
Comment #162, American Library Association et al.
Comment #175, Fleischhauer and Francis from the Library of Congress
Comment #204, Electronic Frontier Foundation

Unfavorable Our reply disagrees with these unfavorable comments:
Comment #209, Motion Picture Association of America
<<Sony>>
<<Time Warner>>

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Appendix B - Contributors

This document is submitted on behalf of The Copyright’s Commons

The main authors are Wendy Seltzer and Bryan Taylor

Contributions were submitted by

Dan Steinberg