

Copyright's Commons
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RE: Reply Comments, Exemption to Prohibition on Circumvention of Copyright
Protection Systems for Access Control Technologies.
Federal Register Notice - 64 FR 226 Docket No. RM 99-7

INTRODUCTION

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 appreciate the opportunity to submit these reply comments in response to the Copyright Office's Notice of Rulemaking dated November 24, 1999. The notice seeks public comment regarding exemptions to 17 U.S.C. § 1201(a), enacted in the Digital Millennium Copyright Act of 1998 ("DMCA").

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).

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 access control schemes depicted in the submissions of the Motion Picture Association of America ("MPAA"), Time Warner, and Sony, could be far worse than a term extension in its effect of impoverishing the public domain. Tipping the "delicate balance" (*Stewart v. Abend*) between rights of the author and use by the public, corporate copyright holders 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. We believe these three submissions stand apart from the rest of the comments submitted, and therefore reply specifically to some of their assertions.

We are also concerned that the "access control" provisions of the DMCA will be employed to control much more than the copyrighted subject matter in question. Specifically, we fear that the "anti-circumvention" rules will be wrongfully used for improper commercial purposes and to block speech. As principles, no rulemaking should a) directly enable unlawful or improper commercial practices, b) interfere with any purchaser's right to any analysis or examination of any part of any purchased informational entity. Nor should any rulemaking in effect compel use of any active informational process.

We offer specific proposals below based on the remarks of the legislators who passed the DMCA, the combined wisdom of more than a century of copyright jurisprudence, and the constitutional mandate that copyright serve the public interest: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors...the exclusive Right to their respective Writings." (U.S. Const., Art. I, § 8, cl. 8)

RULEMAKING SUGGESTIONS

Despite adding a new right of "access control" to the copyright holder's bundle, Congress never describes the content of that right. Notably, "access control" was not added to the copyright holder's exclusive rights; there are no sections corresponding to § 106 and § 107 to define the content and demarcate the boundaries of this novel 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. Following their lead, we suggest that the rulemaking begin with a careful definition of the scope of the right to control access. We recognize and emphasize that many of the harms to the public good can be averted by a careful, limited definition of this term. On the other hand, a broad definition of protected access controls would displace hundreds of years of wisdom regarding the scope of the protections given to copyright holders and greatly damage the public interest.

The quid pro quo between copyright holders and the public is simple but effective: The public offers the copyright holder a chance to profit from his or her original expression, while in return, the owner provides members of the public with access to the published work, and ultimately commits it to the public domain. The time-honored doctrines of first sale and fair use demand that once the copyright owner has received profit from sale of a copy, much of his or her control over that copy expires. The only control that remains is that needed to assure that the market remains intact for other copies to be traded, and even that only for “limited times.”

Access: We therefore urge the Copyright Office to adopt a definition of “access” that clarifies its limited meaning. We propose that “access” to a work be defined as “the ability to acquire, obtain, or make use of a copyrighted work.”

In this definition, access to a copyrighted work lawfully occurs once the copyright owner is given its market reward. Thus access is provided at first sale, when the work is acquired and the ability to use begins. There is no granularity within access. Access is atomic: Either one has the work, or he does not. Further, access is relevant and subject to control only for copyrighted and

copyrightable material, not to material in the public domain or to uncopyrightable elements of works. “Access” shall not describe any acquisition or use engaged in for the purposes of analysis, examination, or education, including as to means or methods of informational processing employed, determination of operability or interoperability, or determination of the informational state or condition of an informational entity.

Access Control: “Access control measures,” then, are limited to those measures 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 authorized by the copyright holder.

Access controls supported by the statute should not include measures that seek to limit any lawful use, including 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, and stops at that point. It does not, therefore, 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.” “Use control” is unnecessary for the copyright holder to receive his just rewards, hence it is not accorded statutory or Constitutional protection. Thus if a device controls both use and access, the permitted avoidance of its use controls should prevail over the supposed circumvention of access controls, and should not be considered a “circumvention” under 1201(a).

In the case of “use controls,” Congress did not intend for § 1201(a) to apply, but rather § 1201(b) and the pre-existing prohibitions on infringement. In particular, there is no analog of § 1201(a)(1) in § 1201(b). This intent is supported in the legislative history. Rep. Howard Coble, chair of the Subcommittee on Courts and Intellectual Property, states:

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.

These definitions of “access” and “access control” would go far to avert many of the fears exhibited in other comments. 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, feared 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.” Under the definition of access we propose, such archiving would not constitute circumvention, even if it required decryption of the material, but rather a legitimate use of previously acquired materials.

This limited definition furthers the intent of Congress embodied in § 1201(c)(1), that “Nothing in this section shall *affect* rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.” (emphasis added) To make sense of this language, as we presume Congress intended all its words to have effect, we must find that fair use prevails over access controls—access may be limited only to those elements over which the copyright holder already has an exclusive right.

Indeed, with the proposed definition, there is no conflict between access control and fair use: Fair use is permissible only in material that is lawfully acquired, and the gaining of access upon lawful acquisition enables the full range of non-infringing uses.

RESPONSES TO SPECIFIC COMMENTS

We strongly disagree with the suggestion 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 contradicts Congress’s clear intent that this Office play a substantial role in protecting the public’s “fair access” that must accompany the statute.

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, without respect for time limits, the amount of uncopyrightable material within their purview, or the doctrines of first sale and fair use. 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 explicitly granted them in the existing 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 state, 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 shrink-wrapped. 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. Yet already, licensors attempt to do just that. The Oracle database license thus states: “Customer shall not ... cause or permit reverse engineering, disassembly, or decompilation of programs [or] disclose results of any benchmark tests of any Program to any third party without Oracle’s prior written approval.” Given the backing of technological controls and § 1201(a), this restriction would become oppressive. And what copyright owner would license parody, a strongly protected fair use?

Instead, the caselaw flatly contradicts the notion that licensing provisions should limit fair use: “It is sometimes suggested that fair use is predicated on the implied or tacit consent of the author. This is manifestly a fiction since a restrictive legend on a work prohibiting copying in whole or in part gives no greater protection than the copyright notice standing alone.” Melville B. Nimmer & David Nimmer, 4 *Nimmer on Copyright*, § 13.05 at 13-151 (1999).

The MPAA’s description of access controls bears quoting at length:

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.

The movie industry proposes doing with “access” precisely what it has been prohibited from limiting in the name of “use”: limiting users to a prescribed course, restricting the sharing of works, and tying works to specific viewers, places, and times. This overzealous interpretation shows the clear need for a narrow definition of access and a broad class of exemptions.

The MPAA describes a rationed, pay-per-use system of precisely the nature the drafters of the DMCA took pains to avoid.¹ “[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.” This is not publication, but as some have called it, “privacation.”

Time Warner begins with reference 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.

The comment cannot overcome this confusion of access and use controls. “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 simply prevent anyone from coming close enough to a work to make fair use of it. It admits that only “[s]ome technological measures impose no further controls on use once access is authorized.” (emphasis added) Others, such as CSS, continue to restrict use of the work even after the reader has demonstrated his authorization.

¹ See 144 Cong. Rec. H2136 (daily ed. October 13, 1998) (statement of Rep. Bliley).

Time Warner presumes that “anyone 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.

Time Warner claims that the rule of anticircumvention must be absolute because “[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 careful distinction is what the law has always had to do on questions of fair use. As the Supreme Court stated recently, “[t]he task [of fair use analysis] is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994). If the Supreme Court finds the fair use analysis difficult, we clearly cannot delegate its hard questions to technological implementations that do not admit for nuanced responses.²

Finally, 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

² The Supreme Court has ruled on fair use several times in the last two decades alone, on decisions that were overturned at every level of review. (See 4 *Nimmer on Copyright* § 13.05 at 13-150, citing *Sony Corp. v. Universal City Studios*, 464 U.S. 417 (1984); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 59 (1985); and *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); and briefly, *Stewart v. Abend*, 495 U.S. 207 (1990)).

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 right to reverse engineer, affirmed as critical to technological innovation in *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1993) and the recent *Sony Computer Entertainment Inc. v. Connectix Corp.*, -- F.3d --, No. 99-15852 (9th Cir. Feb. 10, 2000), be overruled by a 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.

For the foregoing reasons, we respectfully recommend that the Librarian of Congress adopt narrow definitions of “access” and protected “access control devices,” and a broad exemption from the prohibition of § 1201(a) for the circumvention of any devices that control use.

On behalf of Copyright’s Commons.

Respectfully submitted,

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