

June 23, 2000

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Library of Congress
101 Independence Ave., S.E.
Washington, DC 20059-6000

RE: Rulemaking on Exemptions from Prohibition on Circumvention of
Technological Measures That Control Access to Copyrighted Works
Docket No. RM 99-7

Dear Mr. Carson:

The copyright organizations listed below appreciate this opportunity to provide post-hearing comments in this proceeding. These post-hearing comments supplement our Joint Reply Comments, filed March 31, as well as the Written Testimony submitted by Steven J. Metalitz on our behalf at the public hearing held in Stanford, California on May 19.¹

I. The Focus of this Proceeding

The record compiled in this proceeding is massive: hundreds of written submissions and five days of oral testimony. A key challenge facing the Copyright Office at this juncture is to maintain in focus the objectives and ground rules for this proceeding, as set by Congress in the Digital Millennium Copyright Act (DMCA).²

This rulemaking exists to answer a single question. That query, while not simple, is narrowly focused. Should the effective date of the law making it illegal to circumvent an access control mechanism used by copyright owners be delayed past October 28, 2000, with respect to any “particular class of works”?

¹ These post-hearing comments do not address all the issues raised in this proceeding, and should be read in conjunction with the separate post-hearing submissions of several of the undersigned organizations. For example, the submission of the MPAA is directed to many of the issues concerning use of the Content Scrambling System as an access control measure for products in DVD format.

² Pub. L. No. 105-304, 112 Stat. 2860 (1998).

The default answer to that question – the answer that Congress considered “most likely” to be the right one, based on its expectation of how the digital information marketplace would develop – is “no.” See House Comm. on the Judiciary, 105th Cong., 2d Sess., Section-by-Section Analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4, 1998 8 (Comm. Print 1998), *reprinted in* 46 J. Copyright Soc’y U.S.A. 631, 641 (1999) (“HMR”), at 8.³ Proponents of a contrary answer bear the burden of persuading the Librarian – and, at this phase of the proceeding, the Copyright Office – regarding two fundamental issues.

First, they must adduce “highly specific, strong and persuasive evidence” that the prohibition on circumvention of access controls is likely to cause a specific harm: in the phrasing of the statute, to cause adverse effects, on balance and over the next three years, on the ability of users to make non-infringing uses of copyrighted materials to which such controls have been applied. 17 U.S.C. 1201(a)(1)(B); HMR, at 6. Second, they must define with specificity the “scope or boundaries” of the “particular class of copyrighted works” as to which such a likelihood of harm has been demonstrated. HMR, at 7.

While the record in this proceeding is voluminous, the proof directed to either of these issues is sparse. Clearly, the burden that the law assigns to the proponents of a delayed effective date for 17 USC 1201(a)(1)(A) has not been met. Those proponents have been unable either to define a “particular class of works” or to demonstrate any likelihood of an adverse effect on non-infringing uses of works within that class.

Accordingly, if the Copyright Office is to remain faithful to its statutory mandate, the only answer which it can recommend to the Librarian in response to the question posed by Congress must be “no.” This is also the only action that could pass muster if judicial review of the Librarian’s decision is sought. The requisite showing of harm has not been made as to any

³ “Of course, the Secretary [now, the Librarian] is not required to make a determination under the statute with respect to any class of copyrighted works. In any particular 3-year period, it may be determined that the conditions for the exemption do not exist. Such an outcome would reflect that the digital information marketplace is developing in the manner which is most likely to occur, with the availability of copyrighted materials for lawful uses being enhanced, not diminished, by the implementation of technological measures and the establishment of carefully targeted legal prohibitions against acts of circumvention.” HMR, at 8.

“particular class of works,” and therefore section 1201(a)(1)(A) should take effect as scheduled for all works on October 28.

Indeed, based on the record before it, the Office could produce a contrary recommendation only if it accepts one of the numerous invitations it has received to ignore the law and stray from the path Congress has marked out for this proceeding. Many submitters have called for the Office to ignore its statutory mandate because they disagree with the balances struck by Congress in enacting the DMCA. But others, who do not frontally challenge the DMCA itself, urge the Office to recommend that the effective date of section 1201(a)(1)(A) be delayed for at least some works in order to “send the right message” to copyright owners, to “influence attitudes,” or to bolster the bargaining position of one group of parties in the digital marketplace.⁴

All these appeals are a diversion from the task the law sets for this proceeding. To the extent that the Office pays heed to them, it risks running afoul of Congress’s clear instruction for the conduct and work product of these proceedings.

Of course, it is impossible to conclusively disprove the predictions of some participants that, to use their words, we are “trembling on the brink” of dire consequences for our “existing cultural practice,” or that “the worst is yet to come.”⁵ But disproof of these dark visions is not required. It is enough to resolve this proceeding that they have entirely failed to demonstrate that “adverse effects” within the meaning of the statute are “likely to occur” over the next three years. Anticipating the unpredictability of developments in the digital marketplace, the statute provides for the questions involved in this proceeding to be revisited three years hence. If, at that point, there is evidence that the coming into force of section 1201(a)(1)(A) is having, or even beginning to have, the disastrous impacts that some submitters now foresee, there will be another

⁴ See, e.g., Oral Testimony of Fred Weingarten, 5/19/2000 (“a exemption done ahead of time serves as a message to the marketplace.... It’s that kind of attitude that we need to – that we don’t trust the marketplace independent of an exemption to address”); Oral Testimony of Mr. Lutzker, 5/4/2000 (“ I think you can exercise an impact on those negotiations by what you do now...”); Oral Testimony of Mr. Neal (“[W]hat is contained in law is very influential in terms of the ability of libraries and universities and users to negotiate effectively with copyright owners. What is respected and understood in law gives us a leg up in terms of advancing the interests of our users”). (Because some transcripts as downloaded lacked pagination, page references will be supplied later.)

opportunity to persuade the Librarian to make that prohibition inapplicable to the “class of works” affected. After the prohibition on circumvention has been in force for three years, proponents of an exception will be in a position to marshal their evidence that “a substantial diminution of ... availability is actually occurring in the market for particular classes of copyrighted works,” rather than having to rely, as today they must, on assertions that “an adverse impact is likely to occur” over the next three years. HMR at 6, emphasis in original.⁶

II. “Particular Class of Works”

The vast majority of the submissions made in the initial comment round did not even propose any “particular class of works” as to which the anti-circumvention cause of action should remain unavailable after October 28. Our Joint Reply Comments responded to those few submissions from which such a proposal could be gleaned. We do not believe that anything in the reply comments or in the written or oral testimony generated by the public hearings undermines the conclusion we presented in the Joint Reply Comments: the Copyright Office cannot, consistent with its statutory mandate, recommend that it remain legal to hack through encryption, steal passwords, disable IP address controls, or otherwise circumvent access control technologies to the extent that they are used in connection with, for example, “thin copyright works,” “fair use works,” or “all electronic works marketed and sold to libraries, archives and educational institutions.” These labels do not even meaningfully designate any “particular class

⁵ See Oral Testimony of Peter Jaszi (5/2/2000).

⁶ In this regard, the conclusions of the Joint Study of Section 1201(g) of The Digital Millennium Copyright Act, recently issued by NTIA, are relevant. This study concludes: “Of the 13 comments received in response to the Copyright Office’s and NTIA’s solicitation, not one identified a current, discernable impact on encryption research and the development of encryption technology; the adequacy and effectiveness of technological protection for copyrighted works; or protection of copyright owners against the unauthorized access to their encrypted copyrighted works, engendered by Section 1201(g). Every concern expressed, or measure of support articulated, was prospective in nature, primarily because the prohibition and its attendant exceptions will not become operative until October 28, 2000. Given the forward-looking nature of the comments and the anticipated effective date of the section at issue, any conclusion would be entirely speculative.” NTIA and U.S. Copyright Office, Joint Study of Section 1201(g) of The Digital Millennium Copyright Act, posted at <http://www.ntia.doc.gov/reports/dmca/> (visited 6/19/00). There are important differences between the mandate for the section 1201(g) study and the current rulemaking, notably the Congressional direction that in the latter, “in extraordinary circumstances,” HMR at 6, the Librarian could act based solely upon the likelihood of future adverse effects. However, because the Librarian’s action of recognizing any exception to section 1201(a)(1)(A) will be operative without any further consideration by Congress, the cautionary note sounded by the section 1201(g) report, which simply refrained from making any advisory recommendation to Congress, should sound even more forcefully in the proceeding at hand.

of works”⁷; and to the extent that the boundaries of such classes can be discerned, the proponents have failed to adduce more than a scintilla of evidence that the advent of section 1201(a)(1)(A) will cause any “adverse impact” on the availability of these works for noninfringing uses. Nor do the isolated suggestions that have been put forward regarding adverse impact take into account the huge positive impact that the use of access control technologies has had on the dissemination of works of authorship in new digital formats. The advent of section 1201(a)(1)(A) is likely to reinforce and expand this trend toward widespread availability of copyrighted materials to members of the public, since the statute will provide a legal back-up to the technological measures that copyright owners may choose to employ to manage access to these works.

A. The “initial lawful access proposal”

At the hearing in Washington on May 2, Professor Jaszi proposed, as his “personal views and not necessarily those of all DFC member organizations,” a new formulation for the “particular class of works” as to which section 1201(a)(1)(A) should not take effect: “works embodied in copies which have been lawfully acquired by users who subsequently seek to make non-infringing uses thereof.” This formulation later received varying degrees of support from several other witnesses. Ever since a variant of this formulation was considered – and ultimately rejected – by Congress as part of the design of this proceeding⁸, this approach has commonly been referred to as the “initial lawful access” exception to the cause of action for circumvention of access controls.

We have already stated, in our Written Testimony presented at the May 19 hearing, why we believe that the evidence in support of this proposed “particular class” falls far short of what is needed to meet the burden of persuasion in this proceeding. Fundamentally, the “initial lawful access” formulation derives from two interrelated false premises: first, that access controls should operate only in a binary fashion, and second, that so-called “persistent” or

⁷ Indeed, as noted during the hearings in Stanford, any work protected by copyright can be the subject of activity covered by the fair use defense, so the “fair use works” rubric, far from describing a “particular class of works,” potentially encompasses all copyrighted materials. See question of Mr. Carson, 5/18/00, at 104.

⁸ Compare proposed 17 U.S.C. 1201(a)(1)(B)(i) in H.R. 2281 as passed by the House of Representatives (prohibition does not “apply to persons with respect to a copyrighted work which is in a particular class of works and to which

“second level” controls fall outside the pale of access control technologies which Congress sought to protect in the DMCA.

In fact, as we explained both in our Joint Reply Comments and in the Written Testimony, many access controls are far more complex than an on-off switch. These technologies are used not only to manage who may or may not have access to copyrighted materials, but also to permit or deny access at certain times, to certain users, or on certain specified categories of machines. It is just such granular, calibrated access control technologies that Congress specifically intended to foster in enacting the DMCA. See, for instance, HMR at 7, in which the House Manager of the DMCA legislation describes as “use-facilitating technological protection measures” precisely the kind of access control mechanisms that users would remain free, under the “initial lawful access” formulation, to circumvent without legal consequences. Adopting this formulation would not carry out Congress’s intent in enacting the DMCA; to the contrary, it would (at least for the next three years) contravene that intent. The Librarian is empowered to take such a step only if presented with the needed quantum of “highly persuasive” evidence that it is necessary to do so in order to avoid an “adverse impact” that Congress failed to anticipate.

Indeed, as the Jaszi formulation was discussed and dissected over the course of five days of public hearings, its contours became less rather than more distinct, and the justification for its adoption appeared to weaken. Take, for instance, the by-now relatively commonplace scenario of a time-limited CD-ROM. Copyrighted material which is embodied in such a product may be available for access by subscribers during a subscription period defined by time. The access control mechanism through which such a limitation is enforced is an encryption system that decrypts material at the request of an authorized user up to a certain date, and that thereafter refuses to decrypt it, thereby rendering the material inaccessible. After October 28, 2000, circumventing this access control mechanism by, for instance, re-setting the date in the encryption system to a later date than authorized under the subscription would violate section 1201(a)(1)(A).

such persons have gained initial lawful access...” with 17 U.S.C. 1201(a)(1)(B) as enacted (no special treatment of those with “initial lawful access”).

Would adoption of the “initial lawful access” proposal change this result? The witnesses in Washington seemed to think so. After all, the work in question is embodied in a copy; the subscriber has “lawfully acquired “ that copy; and we may assume for present purposes that the use which the subscriber seeks to make of the work after the expiration date of his subscription does not infringe copyright in that work. Even Professor Cohen, while not embracing Professor Jaszi’s proposal, thought that it would cover this scenario, at least for some finite period of time after the subscription had expired.⁹

Two weeks later in California, however, witnesses for several DFC groups took a different view. Mr. Weingarten testified on behalf of the library organizations: “After the term of the agreement is over, and I no longer have legal access, I’m not under the contract... I don’t have lawful access, and it doesn’t fall under the exemption we’re seeking.”¹⁰ The same witness went on to say that while the Jaszi proposal should not apply to circumvention of time limitations, it should be relied upon, during the lifespan of the contract, to immunize the act of circumvention of other aspects of access control technologies. For instance, in Mr. Weingarten’s view, circumvention to defeat a control limiting the number of simultaneous users should be actionable only as a breach of contract, not as a violation of section 1201, assuming that the uses ultimately made did not infringe copyright.¹¹

When the advocates of this exemption from section 1201(a)(1)(A) cannot agree amongst themselves about the application of their proposed “particular class of works” formulation to one of the simplest relevant scenarios, extreme caution is counseled. Just a few steps further down this path lie a number of even murkier problems. For instance, when access is carried out online rather than via a CD-ROM, can it be said that the user has “lawfully acquired” a copy of the work? Which copy – the one mounted on the server which the user accesses, or the temporary copy made in the user’s computer? If the former, in what sense can it be said that a particular user has “acquired” a copy which is equally accessible to hundreds or thousands of other simultaneous authorized visitors to that server? If the latter, does the right to circumvent vanish

⁹ See Oral Testimony of Professor Jaszi, Professor Cohen , 5/4/2000.

¹⁰ See also Oral Testimony of Professor Gasaway, 5/18/2000, at 59-60 (“I think when you’re talking about a termed license period, it is only for that period.... If you paid for 12 months of access, that’s what you get.”).

¹¹ See Oral Testimony of Mr. Weingarten, 5/19/00.

along with the copy when the session ends or the computer is turned off? Similarly, does “acquisition” depend upon the legal rubric under which access to the work in question is granted? Does it make a difference, for purposes of whether a user may legally circumvent an access control mechanism, whether the user has purchased the copy, licensed it, or licensed access to it without taking delivery of a tangible embodiment of the copy? Finally, what if a single act of circumvention is accomplished for the purpose of carrying out a number of different uses, some of which infringe copyright, others of which do not? What if the purpose is solely to make non-infringing uses but infringement occurs anyway – is the circumvention immunized or not from liability under section 1201(a)(1)(A)? Would it not be necessary, in every case, to conduct a collateral trial on infringement in order to determine whether or not, based on the subsequent uses actually made, the work in question (embodied in the copy in question) fell within the “particular class of works” that the proponents of the Jaszi formulation urge the Office to recognize? If so, just how would this formulation cure the uncertainty and trepidation ---the so-called “chilling effect” -- that many of the witnesses aver to be plaguing the library and educational communities in the wake of enactment of the DMCA?

These are among the questions that the Office would need to grapple with were there any “highly persuasive, strong and specific evidence” that the availability for non-infringing uses of works falling within this “particular class” was likely, on balance, to be adversely affected when it becomes illegal to circumvent the access controls applied to such works. Fortunately for the Office’s limited resources, such an inquiry need not be launched, because such evidence has not been presented in this proceeding. Professor Jaszi’s recycling of the “initial lawful access” approach should be rejected.

B. Archiving and preservation

A couple of other new proposals for “particular classes” that should be recognized as exempt from section 1201(a)(1)(A) surfaced during the public hearings. For example, Professor Gasaway suggested that the “particular class” could be defined to include works that have already enjoyed a stated number of years of protection, or “works abandoned in the commercial market, which are fixed and obsolete technology.” Gasaway at 70, 72. Neither of these suggestions was explored in any detail, and they appear to be variations on the concerns

expressed by a number of other witnesses about the asserted need to circumvent access controls in order to make archival copies of works, to transfer copies from obsolete to more current media, or to preserve works threatened by deterioration or technological obsolescence.

In the preservation and archiving area, the record of this proceeding is replete with strongly expressed views but notably sparse in terms of concrete examples. Since, by all descriptions, this is not a new concern, one would expect to see evidence that circumvention of access controls for archival or preservation purposes is a sufficiently widespread practice today that to outlaw it on October 28 as to a specified subset of works would substantially inhibit the ability to carry out those functions. No such evidence has been forthcoming. Instead, to cite one of the more cogent submissions on this topic, the National Agricultural Library refers to “situations in which digital versions of works, for example, those published on CD-ROM, magnetic tapes, or diskettes, have become impossible to access ... because [a] software and/or equipment required to unblock the access mechanism may no longer be available, and/or [b] because the digital medium has deteriorated, become obsolete, or been damaged.” Reply Comments of NAL (#111) at 1 (bracketed subdivisions added). The “situations” referred to in [b] of the NAL comments are irrelevant to this proceeding; obsolescence, deterioration, or damage are not access control mechanisms protected by the DMCA, and if the copy in question cannot even be played or accessed due to these factors, circumvention of true access controls (e.g., decryption of an encrypted work) will be unavailing. The “situations” referred to in [a] are precisely those in which the prevalence of circumvention behavior today could provide a critical element in meeting the burden of defining a “particular class” for purposes of this proceeding. From all that appears in this record, circumvention is rarely, if ever, undertaken today in order to achieve preservation or archival ends. Presumably, such issues are addressed today (and will continue to be addressed after October 28) in ways that do not involve circumvention of access controls and that thus do not directly implicate section 1201(a)(1)(A).¹² While this presumption may be incorrect, there is nothing in the record to contradict it. This epitomizes the failure of proof which forecloses the Office from recommending any “particular class of works” based on

¹² Such means could include, for example, negotiations with the copyright owners (or their successors in interest) and/or reliance on the archival and preservation exceptions found in section 108 of the Copyright Act, as recently expanded by the DMCA.

archival or preservation concerns, if it is to remain faithful to its statutory mandate in these proceedings.

C. “Access” v. Use” and other abstract questions

The task of defining a “particular class of works” to which section 1201(a)(1)(A) should not apply is admittedly not easy. The problem is made harder by the paucity (indeed, the virtual non-existence) of specific examples of works as to which the advent of the statutory prohibition is likely to diminish availability for non-infringing purposes.

Astronauts have always found it difficult to function constructively in a vacuum, and the same applies to those seeking to map out the new frontiers of Title 17 after the DMCA. Rather than embark on a spacewalk through hypothetical examples, the Office should consider foregoing the issuance of abstract general statements about what would or would not constitute a “particular class” of works, as well as about how the recognition of an exception to section 1201(a)(1)(A) for such a “particular class” would be implemented.¹³ This would allow these issues to be revisited without prejudice three years hence. At that time there will have been some real-world experience with the impact of the cause of action for circumvention of access controls, and answering these questions may have become a practical necessity rather than a theoretical exercise.

Some witnesses in this proceeding ascribed much of the difficulty in crafting a definition of a “particular class of works” to confusion about the terms used in the statute. One witness described the problem as “the non-existent line between ‘access’ and ‘use’,” Weingarten Written

¹³ The question of whether an exception, if recognized, would apply to all users who circumvent access controls protecting works falling within the “particular class,” or whether it could be invoked only by those whose subsequent use of the work thus accessed was found to be non-infringing, falls squarely within the category of hypothetical questions that need not be addressed at this juncture. Witnesses at the hearings gave different answers to this question. Here it suffices to observe that, while Congress certainly did not wish to benefit circumventors who were also infringers of copyright, it created conceptually and factually distinct causes of action for circumvention of access controls and for copyright infringement. One may be liable for a violation of section 1201(a)(1)(A) while remaining innocent of liability for copyright infringement, and vice versa. It is not clear that the Librarian was accorded any authority to change this basic framework. If and when a the requisite level of harm is demonstrated as to a “particular class of works,” the Librarian will have to face the question of whether an exception can be fashioned that respects the statutory framework, and yet does not distinguish, in terms of relief from liability, between wrongdoers and those whose use of a work after circumvention is non-infringing.

Testimony at 5, and others used similar terms to describe their quandary.¹⁴ In part, these witnesses may be wandering in a fog of their own creation, not the statute's. The DMCA does not distinguish between "access controls" and "use controls." It draws the line, instead, between "a technological measure that effectively controls access to a work protected under [Title 17,]", see 17 USC 1201(a), and "a technological measure that effectively protects the right of a copyright owner under [Title 17] in a work or portion thereof," see 17 USC 1201(b). The word "use" is never employed in the statute to describe the activity that either category of technological measure manages or controls.

Whether a technological measure falls under section 1201(a) or section 1201(b) has important legal consequences. Beginning October 28, 2000, it will be a violation of the DMCA to circumvent a technological measure that effectively controls access to a copyrighted work (section 1201(a)(1)(A)); it will never violate the DMCA in its current form to carry out the act of circumventing a technological measure that effectively protects the reproduction right, the public performance right, or any of the other rights of copyright owners. While there may in theory be a considerable overlap between section 1201(a) measures and section 1201(b) measures, the practical problems seem much less intractable, at least so far. In the example presented in Professor Gasaway's testimony, for instance, the technological measure employed to ensure that "off-campus but enrolled students are not permitted access" is, not surprisingly, an access control. It controls these students' access to the material, not their ability to exercise any of the exclusive rights with respect to material to which they already enjoy access. Circumvention of this measure would violate section 1201(a)(1)(A), an answer that may be unwelcome to some but that is at least reasonably clear.

The overlap between sections 1201(a) and 1201(b) has not proven fatal to judicial enforcement of the DMCA. See, e.g., *RealNetworks, Inc. v. Streambox, Inc.*, No. 2:99CV02070, 2000 WL 127311 (W.D.Wash. Jan 18, 2000), in which the court carefully distinguished between the 1201(a) and 1201(b) aspects of the plaintiff's technology and held the defendant liable

¹⁴ See, e.g., Lutzker Written Testimony at 8-9 (a "crucial element of the definition" of a particular class is "whether the controls employed restrict uses in the guise of access"); Gasaway oral testimony at 41 ("We paid for access for these students, but they still cannot use the material.... Is this access or is this use? We don't know, and we can't tell when we are liable for such conduct should be circumvent.").

because its Streambox VCR product enabled both unauthorized access to RealMedia streaming content (in violation of section 1201(a)(2)) and unauthorized copying of those streaming files (in violation of section 1201(b)(1)). There is no guarantee that the courts will be similarly adept at applying section 1201(a)(1)(A) when it comes into force, but surely the experience with cases brought under the currently operative provisions of section 1201 lends little support to the concerns expressed by these witnesses.

The record of this rulemaking would not support a conclusion that the universe of access control mechanisms whose circumvention will become illegal on October 28, 2000 is so ill-defined that implementation of section 1201(a)(1)(A) is likely, on balance, to diminish the availability of any works to users who wish to make noninfringing uses of them. Even if there were some “highly specific, strong and persuasive” evidence of such a likelihood, no participant in these proceedings has suggested any formulation of the “particular class of works” as to which it should remain legal to circumvent access controls mechanisms in order to ameliorate the anticipated “adverse impact” of this assertedly vague definition.

Conclusion

In establishing this proceeding, Congress proceeded from the premise that technological measures to control access to copyrighted materials had enormous potential to benefit consumers and copyright owners alike. That is why they expected the prohibition against circumvention of these measures to go into effect absent highly persuasive evidence that they were causing harm to those seeking to make non-infringing uses of particular classes of works. The marketplace is confirming Congress's prediction; no evidence of adverse effect has been presented in this proceeding. Instead, proponents of exemption offer dark predictions about future problems, and complaints about situations unrelated to technological measures. As the law does not authorize the Librarian to delay the effective date of section 1201(a)(1)(A) based upon such a gossamer showing of possible future harm, he should carry out the statutory mandate by allowing the

prohibition to come into effect, with respect to all copyrighted works, on the date set by Congress.

Respectfully submitted,

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On behalf of:

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American Society of Composers, Authors, and Publishers
American Society of Media Photographers
Association of American Publishers
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