



UNITED STATES DEPARTMENT OF COMMERCE
The Assistant Secretary for Communications
and Information
Washington, D.C. 20230

SEP 29 2000

Ms. Marybeth Peters
Register of Copyrights
Library of Congress
James Madison Memorial Building
Washington, D.C. 20540-3120

Dear Ms. Peters:

As you know, the National Telecommunications and Information Administration ("NTIA"), an agency of the United States Department of Commerce, "serves as the President's principal adviser on telecommunications policies pertaining to the Nation's economic and technological advancement."¹ As a matter of policy established by Congress, NTIA shall seek to promote "the benefits of technological development in the United States for all users of telecommunications and information facilities."² As the Department's *Falling Through the Net* reports have documented, a significant divide separates American information "haves" and "have-nots." In its continuing mission to bridge this digital divide, NTIA endeavors to promote policies to ensure that all Americans have the tools necessary to participate successfully in today's digital economy.

This letter continues the consultative process we have undertaken with you pursuant to 17 U.S.C. § 1201(a)(1)(C) (2000). In this proceeding, NTIA's principle concern is to ensure that the course ultimately adopted by the Librarian of Congress preserves fair use principles in this information age, and encourages a renaissance of research, academic, and educational freedom in this new and exciting digital era. Thus, presented below are two issues for you to consider as you make your recommendation to the Librarian of Congress.

¹ National Telecommunications and Information Administration Organization Act, 47 U.S.C. § 902 (b)(2)(D), I (2000).

² 47 U.S.C. § 901(c)(1).

FAIR USE DOCTRINE³

Congress enacted the Digital Millennium Copyright Act (the “DMCA” or the “Act”)⁴ as part of an effort “to begin updating national laws for the digital era.”⁵ Among its objectives, the Act seeks to protect intellectual property rights in today’s digital environment, affording copyright owners a prohibition against the act of circumventing technological measures that effectively control access to a copyrighted work.⁶ During Congressional consideration of the DMCA, however, some legislators were concerned that this new “anticircumvention prohibition” might engender unintended adverse consequences. Of particular interest to the Committee on Commerce of the House of Representatives (“Commerce Committee”) were the “fair use” concerns of librarians and educators.⁷ This Committee soon recognized that the new statutory prohibition set forth in Section 1201(a)(1)(A), bolstered by strong civil remedies and criminal penalties, had the real potential to diminish existing fair use applications.⁸ Mindful that Section

³ A significant limitation on the exclusive rights in copyrighted works is the doctrine of fair use. Its aim is to create a safe harbor for certain uses of copyrighted works that would serve as an affirmative defense to an action for copyright infringement. The fair use exemption, codified in Section 107 of the Copyright Act, provides for the unauthorized reproduction of copyrighted works where such copies are created for purposes of “criticism, comment, news reporting, teaching, . . . scholarship or research.” Further, Section 107 sets forth a nonexclusive list of factors to be considered in determining whether a use is “fair”: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of copying; and (4) the effect of the use on the potential market for the copyright work. 17 U.S.C. § 107 (2000).

⁴ Pub. L. No. 105-304, 112 Stat. 2860 (October 28, 1998), codified at 17 U.S.C. §§ 1201-1205 (2000).

⁵ H.R. Rep. No. 105-551, pt. 2, at 21 (1998).

⁶ 17 U.S.C. § 1201(a)(1)(A) (2000).

⁷ H.R. Rep. No. 105-551, pt. 2, at 25 (1998).

⁸ The Commerce Committee was concerned that many private and public interests considered H.R. 2281, as reported by the Committee on the Judiciary, as undermining Congress’ long-standing commitment to the concept of fair use. These concerns were so important that the Commerce Committee included in its report the following excerpt from a letter it had received from a representative of the fair use community:

These newly created rights will dramatically diminish public access to information, reducing the ability of researchers, authors, critics, scholars, teachers, students, and consumers to find, to quote for publication and otherwise make fair use of them. It would be ironic if the great popularization of access to information, which is the

107 of the Copyright Act did not afford a defense to the cause of action created by the prohibition, the Commerce Committee amended the legislation it had received from the Committee on the Judiciary of the House of Representatives, and reported out a bill that authorized the Librarian of Congress to craft exemptions to the anticircumvention prohibition that are analogous to fair use and that rest on similar considerations.⁹

The Commerce Committee understood and NTIA agrees that the “right” against anticircumvention must be qualified in order to maintain a balance between the interests of content creators and information users.¹⁰ To this end, NTIA believes that implementation of far-reaching access control technologies¹¹ without carefully drawn exemptions would not only invert 200 years of judicial interpretation regarding the scope of protections given to copyright holders, but also eviscerate individual scholarship and the notion of free inquiry. NTIA’s greatest immediate concern is the very one envisioned by the Commerce Committee when it warned of the development of a legal framework that would “inexorably create a pay-per-use society.”¹²

NTIA strongly urges the Register of Copyrights to follow the thoughtful guidance of the House Commerce Committee, preserve the principle of fair use in all of its applications, and allow it to inform her determination in this proceeding. To do otherwise would, in effect, reinforce and extend a licensing basis and transactional model for the electronic information market -- the very outcome that the Commerce Committee labored to avoid and Congress ultimately rejected by authorizing the Librarian to exempt certain classes of works from the anticircumvention prohibition.

promise of the electronic age, will be short-changed by legislation that purports to promote this promise, but in reality puts a monopoly stranglehold on information.

H.R. Rep. No. 105-551, pt. 2, at 26 (1998).

⁹ Section 1201(a)(1)(C) enumerates a number of “fair use” factors to be considered by the Librarian of Congress in the context of crafting exceptions to the anticircumvention prohibition. Moreover, the text of Section 1201(c) indicates congressional intent to preserve fair use and the other statutory limitations on the exclusive rights of copyright owners.

¹⁰ See H.R. Rep. No. 105-551, pt. 2, at 26 (1998).

¹¹ We agree with a number of commenters who suggested that “access control measures” should be defined as those designed to ensure that the acquisition, use, or benefit of the initial copy of a work occurs only by means of a designated process or commercial transaction authorized by the copyright holder. “Far-reaching access control measures” include those measures that seek to limit any lawful use, including the otherwise lawful uses that occur after first sale.

¹² H.R. Rep. No. 105-551, pt. 2, at 26 (1998).

Information crucial to supporting scholarship, research, comment, criticism, news reporting, life-long learning, and other related lawful uses of copyrighted information should never become available only to those with the ability to pay or the expertise to negotiate licensing arrangements to their advantage. By crafting exemptions grounded in the principle of fair use, you will offer the public the ability to realize fully their access to information resources for lawful purposes, to maximize personal learning potential, and to reap the benefits of this electronic age. In short, adoption of such a policy will promote digital inclusion.

CLASS OF WORKS

The statute and its legislative history provide little guidance on the meaning of the term “class of work.” In the absence of such guidance, the term has been the subject of intense debate among the commenters in this proceeding. Given that the principle of “fair use” is grounded in a factual examination of the “use” to which copyrighted materials are put, NTIA believes that it would be reasonable to include a similar examination in fashioning a class of excepted works pursuant to Section 1201(a)(1)(C). Under this formulation, we would support, as a starting point, the exception proposed by the library and academic communities. This exception is crafted as follows: Works embodied in copies that have been lawfully acquired by users or their institutions who subsequently seek to make noninfringing uses thereof.

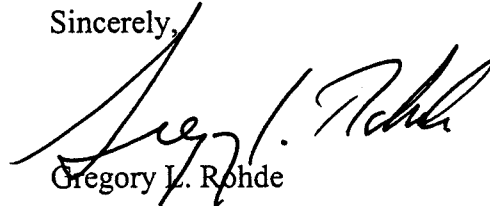
Moreover, we believe that this construction is appropriate because the definition of classes of works is not bounded by limitations imposed by Section 102(a) of the Copyright Act, but incorporates an examination of the “noninfringing uses” of the copyrighted materials. We agree with those commenters in this proceeding who noted that “classes of works” should not be “coextensive” with categories of original works of authorship, as that term is used in Section 102(a) of the Copyright Act.

NTIA is a strong supporter of protecting U.S. companies from threat of theft of intellectual property. The DMCA represents the faithful implementation of the United States’ obligations under the World Intellectual Property Organization copyright treaties to afford such protection. However, the Act is also a carefully crafted compromise that preserves the traditional balance of fair use principles enshrined in domestic copyright law with these new intellectual property rights protections.¹³

¹³ “The Committee considers it particularly important to ensure that the concept of fair use remains firmly established in the law. Consistent with the United States’ commitment to implement the two WIPO treaties, H.R. 2281, as reported by the Committee on Commerce, fully respects and extends into the digital environment the bedrock principle of ‘balance’ in American intellectual property law for the benefit of both copyright owners and users.” H.R. Rep. No. 105-551, pt. 2, at 26 (1998).

I commend you for your efforts to address this extraordinarily important issue, and thank you for taking these views into consideration as you prepare your recommendations. In reporting NTIA's views to the Librarian of Congress, please forward this letter to him in its entirety. If I may be of further assistance, please do not hesitate to contact me or Jeffrey E.M. Joyner, Esq. of my staff at (202) 482-1841.

Sincerely,

A handwritten signature in black ink, appearing to read "Gregory L. Rohde". The signature is fluid and cursive, with a large initial "G" and "R".

Gregory L. Rohde

cc: David O. Carson, Esq.