

June 19, 2003

David O. Carson
General Counsel
United States Copyright Office
Library of Congress
101 Independence Ave. SE
Washington, D.C.

Re: Docket No. RM 2002-4
Exemption to Prohibition on Circumvention of Copyright Protection
Systems for Access Control Technologies

Dear Mr. Carson:

Thank again to you and the panel for inviting DiMA to testify at the April 11, 2003, hearing in the above-referenced anticircumvention rulemaking proceeding. We respond to your questions below.

Question:

Are the concerns expressed by webcasters in their proposal (Comment No. 41) addressed sufficiently by 17 U.S.C. §112(e)(8)? Why or why not?

Response:

Webcasters' concerns are not fully addressed by the provisions of 17 U.S.C. §112(e)(8). Webcasters compete with all other forms of real-time diffusion of sound recordings, including radio transmissions, webcast retransmissions of broadcast radio, and webcasts by other webcast entities and even recording labels. Competition in the field of webcasting is influenced by several factors that are relevant to your question, including:

1. Timing. Most webcast channels rely on a steady influx of new music. Any delay in getting recordings onto the service renders the webcaster less "fresh" and therefore, less competitive with other services.

2. Quality. Webcasters strive to produce the highest quality sound in their transmissions. Webcasts that sound "better" are likely to be more attractive to the consumer. Therefore, sound quality is an important competitive point for many webcasters. Sound files must undergo significant transformations between codecs, and to optimize transmission at several bandwidth speeds. Each transformation, by its nature, diminishes the quality of the audio feed. To deliver the best possible sound to the consumer, webcasters – like broadcasters and all professional users -- must begin with source material in the highest possible sonic quality.

3. Formats. As noted, sound recordings must be encoded for webcasting in particular formats, such as Real, Windows Media, QuickTime or MP3. The decision to offer one or more formats, and to offer particular formats, has implications for competitiveness and cost.

4. Cost. Inasmuch as profitability remains elusive for many webcasters, the cost of obtaining recordings remains an important factor. In that regard, few webcasters obtain sound recordings free of charge. Most purchase at retail all or substantial numbers of the recordings they perform. Of course, inasmuch as webcasters operating under the section 114 license currently pay royalty fees for the right to make multiple ephemeral recordings, such fees would be wasted expense if the webcasters were paying for a right they could not use.

Section 112(e)(8) does not fully address the concerns of webcasters in several respects. First, the statute imposes several conditions that make reliance on the statute highly impractical. The statute appears to contemplate that requests for circumvention tools must be made on a sound recording by sound recording basis, thus imposing exceptional administrative burden and delay upon the webcaster. At present, there is no definition of what constitutes technological feasibility and economic reasonableness with respect to the copyright owner's obligations. Similarly, the statute does not define what would be considered to be a response in a timely manner, or what would constitute a transmitting organization's reasonable business requirements – particularly where, from the webcaster's perspective, *any* delay in obtaining access to the latest music may be commercially unreasonable.

Second, there appears to be no requirement that the circumvention tool be provided if the webcaster has access to the sound recording in any quality or format. For example, it is unclear whether Section 112(e)(8) provides relief if the webcaster can obtain a protected disc where a “second session” is accessible by computer. Such “second sessions” are not acceptable for webcasting. These files contain compressed audio data at lower quality than full CD or DVD audio quality. Moreover, they may be encoded in a particular media format that cannot be used by the webcaster without further format conversions, which conversions further erode sound quality. Consequently, the statute may not guarantee the webcaster a usable copy of the sound recording.

Finally, delivery of sound recordings in formats other than the highest quality imposes additional costs upon webcasters. The processes described above are time consuming, and require human intervention and monitoring and, so, cannot be done automatically. Similarly, the answer suggested by Mr. Englund, that any webcaster could convert the output of a CD or DVD audio player to a computer file, is unacceptable. Ripping directly to computer can occur at several times the speed of real time playback. Ripping from an audio player could only occur in real time. The process of transmission from one machine to another, with possible multiple format conversions, also may create significant degradation over the quality of a direct rip to computer server.

Therefore, DiMA submits that significant practical, administrative, timing, quality and cost issues render the Section 112(e)(8) exemption inadequate. DiMA respectfully requests that its petition for exemption be granted.

Question:

Is there a basis in 17 U.S.C. §1201(a)(1)(B)-(D) or in the legislative history to conclude that an exemption could be limited to a particular group of users or to a particular type of use? Wouldn't the class proposed in DiMA's comment allow any noninfringing user to circumvent the access measures on all Red Book CDs? Please explain.

Response:

DiMA respectfully submits that the statutory text on its face supports the ability of the Copyright Office to apply an exemption to particular users and for particular uses of a class of works. Specifically:

1. Subsection (B) provides that the prohibition in subparagraph (A) shall not apply “to persons who are users of a copyrighted work which is in a particular class of works, if such persons are, or are likely to be in the succeeding 3-year period, adversely affected by virtue of such prohibition in their ability to make noninfringing uses of that particular class of works under this title, as determined under subparagraph (C).” (Emphasis added.) The direct references to “persons who are users” of that particular class of works, if “such” persons are likely to be adversely affected in “their” ability to make noninfringing uses, appears to contemplate that specific users who are likely to be adversely affected may be given an exemption with respect to such noninfringing uses. Had Congress intended that the exemption apply only to a class of work, with respect to all users, the statute could have stated, for example, that the prohibition shall not apply “with respect to a particular class of works, if noninfringing uses of that particular class of works has been adversely affected by the operation of such prohibition.” That locution would be more consistent with the intent to limit exemptions only by class, whereas the ability to grant exemptions for particular uses by specified users would be the more harmonious reading of the actual statutory language.

2. Similarly, subsection (C) provides that the determination made under subparagraph (B) finds whether “persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition under subparagraph (A) in their ability to make noninfringing uses under this title of a particular class of copyrighted works.”

3. Moreover, the specific subparagraphs of subsection (C) support its applicability to particular classes of users. The statute directs the Librarian to examine, *inter alia*, “(ii) the availability for use of works for nonprofit archival, preservation, and educational purposes” and, “(iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research;... .” Each of

these factors relates to types of uses that are likely to be made only by particular groups of users; *e.g.*, librarians, conservators, museums, teachers, students, critics, journalists, academics and researchers. These factors would grant the Copyright Office the flexibility to adopt exemptions for particular uses by specified categories of users.

Finally, subsection (D) does not by its terms apply to all users and all uses. Rather, the subsection grants the Copyright Office the ability to identify groups of users whose noninfringing uses of the class of works are likely to be adversely affected by the prohibition. In particular, the provision concludes: “the prohibition contained in subparagraph (A) shall not apply to such users with respect to such class of works for the ensuing 3-year period.” If Congress had intended the exemption to be only by class, for all noninfringing uses or by all users, there would have been no need for Congress to limit the prohibition “to such users.” Instead, Congress simply could have provided that the prohibition “shall not apply to such class of works... .” Instead, by stating that the exemption should apply “to such users,” Congress clearly gave the Copyright Office the ability to a particular group of users that be likely to make the noninfringing uses presented to the Copyright Office.

Moreover, this intention to exempt only particular groups of users is borne out by other sections of Section 1201. For example, Section 1201(d) applies exemptions to particular classes of works for particular users, for specific purposes. Section 1201(e) exempts only law enforcement activities conducted by specified groups of users, *i.e.*, “an officer, agent, or employee of the United States, a State, or a political subdivision of a State, or a person acting pursuant to a contract with the United States, a State, or a political subdivision of a State.” Similarly, subsections (f)-(j) apply to certain activities most commonly carried out by groups of persons who are employed in particular professions or who are qualified by virtue of their specialized knowledge and expertise in certain limited fields and endeavors. These additional particularized exemptions further would support the intention of Congress to grant narrow exemptions based on the identity of the user and the nature of the use, and not just based on the class of work alone.

Under any other reading of the statute, the Copyright Office might be presented with a Hobson’s Choice of finding either that the risk of a generalized exemption outweighs the otherwise meritorious interests of the particular group of users and uses; or that the interests of a particular narrow group are so compelling that the class of works should be exposed to the risks posed by circumvention by all users. Neither reading comports with the intentions of Congress to both protect certain copyrighted works against circumvention and, yet, not impede otherwise socially beneficial uses of such works.

Should you have any further questions, please feel free to contact me at your convenience.

Respectfully submitted,

Seth D. Greenstein

cc: Jonathan Potter