

Comments on 17 USC Section 1201(a)(1), Digital Millennium Copyright Act
Dear Copyright Office,

My comments on this section of the Digital Millennium Copyright Act are simple: I recommend that the Librarian of Congress find that enforcement of Section 1201(a)(1) will adversely affect non-infringing uses of copyrighted works for ALL CLASSES of copyrighted material, and thus the prohibition in subparagraph (A) should not apply to any user for any copyrighted work for the next three years.

RE: Question No. 1 & 2

These technologies will be used to restrict “unauthorized” access. Currently there is no technology that can identify “fair use,” a long standing precedent within copyrights that allow someone who has purchased a copy to utilize in any manner that does not violate the actual copyright. As such, the purchaser is restricted from utilizing their own purchase. The copyright system employed on Digital Versatile Discs (DVD’s), for example, does not permit users to make copies, grab still screenshots or audio snippets, or even to play the disc in an unauthorized piece of hardware, on an unauthorized operating system, or in an unauthorized country. This is the model for future digital distribution systems.

This is double-jeopardy that serves no purpose but to further restrict use of copyrighted materials without actually putting those restrictions into law. Users already pay for whatever unauthorized copying may occur. See 17 USC Sec. 1004, which describes the government-mandated royalty payments on digital audio recording devices and media, which go to producers of copyrighted content. Everyone who purchases any equipment relating to digital audio pays a tax directly into the pockets of the recording industry, whether they ever infringe any copyrights or not. These forced royalties were put into place specifically to compensate copyright holders for the alleged “casual copying” that users would perform.

RE: Question No. 3 & 4

What purpose is served by making the circumvention of technology defending a copyrighted work illegal? Copyright infringement is unlawful and punishable, even upon works without technological access controls. By definition, a corporation pursuing claims under the copyright infringement laws is enforcing its rights to the maximum extent of the law, any additional laws regarding copyright defense are superfluous. Thus, The only use of such a prohibition is to attack conduct that is NOT infringing, yet still involves some sort of access to a copyrighted work, since infringing conduct could be attacked under other parts of the copyright laws. The usual name for conduct that isn’t infringing but involves copying from a copyrighted work is “fair use”.

And yet conduct that isn’t infringing and does NOT involve copying is still limited. By placing technological access controls in place that cannot be legally circumvented, the exact method of viewing the work becomes controllable. Currently if you purchase a book, as long as you know the language it was written in you can read it. But now the very language the work is “written” in is controlled. If I purchase a DVD it can ONLY be played in a device sanctioned by the copyright holder. I am forbidden from learning the language or acquiring an interpreter. Essentially this creates a tax upon the purchaser of the work levied by the copyright holder that further limits access of the work.

This is demonstrated by the perceived need for the DeCSS software. Consumers using unsupported computer operating systems found that they could not view their legally purchased DVD’s because there was commercial software that would allow access on their DVD-enabled computers. These consumers attempted to create their own software to access the works and have been charged with a variety of crimes as a result. Despite having hardware capable of utilizing the media involved, the access controls have provided an additional barrier to those who own a copy of a work.

RE: Question No. 6 & 7

Currently, digital media is typically superior to non-digital formats. There are qualities and features available only on digital media. The inclusion of enhanced audio (e.g. Dolby™ AC-3 encoding), additional video information/quality on DVD’s, or even the inclusion of search tools within digital text that prevent other medias from performing at the same level of quality preventing non-digital substitutions. Certain DVD’s include footage shot on alternate cameras that is not available except on DVD.

RE: Question No. 8 & 9

There is no doubt that the ability to archive digital media is extensively restricted. The phrase as written is “effectively controls access to a work” which reaches far beyond a copyright holder’s rights under our current laws. Had it even stated “effectively controls copying of a work”, it would still eliminate fair use copying.

Currently DVD’s come equipped with CSS copy prevention software. Any copies made are degraded and all digital-only features are lost. Given the finite life of a DVD (approximately one decade) this places the information in question in great jeopardy. There is no viable way for a library to maintain an archive of DVD’s for more than a few decades before some works become too costly to replace or are completely unavailable. Software, too, is equipped similar features. In many cases it is impossible to make an archive of either the working program or the installation package. When the media the software was delivered upon fails, it must be repurchased.

RE: Question No. 10

As stated above, technological access controls act to limit the ability of the owner of a work to access that work. It MUST be done on an authorized device. This creates an additional, and artificial, cost barrier which is a distinctive limiting feature for many nonprofit educational ventures.

Furthermore, not all access devices will be able to read a digital work even if there is no technical restriction. DVD’s are often shipped in a variety of viewing format like NTSC and PAL. Many DVD players are technically capable of reading both types of formats, however region codes utilized in the access control technology prevent the owner of a work from accessing that work from a DVD player that is not equipped with the correct region code even if that player has the capability of displaying the data it contains. International sharing between libraries becomes impossible as the libraries must have either a multitude of DVD players or a custom device to read the work.

Copyright is the right to prevent copying. The right to prevent or regulate access to a specific work is one that has never been enforced by copyright - when one book vendor tried to do so, the Supreme Court ruled against them, in *BOBB’S-MERRILL CO. v. STRAUS*, 210 U.S. 339 (1908). Once a book is sold the copyright holder loses all powers over it - the purchaser can sell it again, loan it out, or read it in the country of his choice. Under section 1201(a)(1), a digital book author could restrict any or all of these abilities, and violating the restrictions would be grounds for civil and criminal penalties, including up to five years in prison. Once more: reading a digital book in a location or manner not authorized by the copyright holder could land you five years in prison.

I’m not sure I can emphasize this enough. The only purposes which 1201(a)(1) can be used for is to restrict consumers from non-infringing copying and from accessing the copyrighted content in the time, place and manner of their choosing, which has never been a legitimate subject of copyright rights. That is, if a lawsuit is brought against someone, only two situations can exist: either that person was actually infringing copyright, in which cases claims could be brought under both the copyright infringement statutes and this circumvention provision; or the person was not actually infringing, in which case the claim under this provision would necessarily affect non-infringing conduct. In the first case this provision is simply tacking on more liability to the copyright infringement codes (which Congress should do independently if it wishes); in the second case it is making tort-feasors or criminals out of persons who have not infringed copyright in any fashion.

So we’ve established that the only conduct which section 1201(a)(1) affects is conduct which is non-infringing copying, or unauthorized access. Nothing in the law requires copyright holders to set “fair” standards for access to works - for instance, a digital book, perhaps a work by Stephen King or Danielle Steele, could cost \$5 for individuals to buy, but \$500 for libraries to buy. The mass market books could be issued with the “access restriction” that the purchaser may not lend the book to anyone else, ever, and thus the library would have no recourse but to purchase the \$500 lending-permitted version. Access could be further restricted by only allowing the purchasing library to lend the book out; inter-library loans would be a thing of the past. Or maybe digital books would expire after a set time period; trying to gain access to them afterwards would be a violation. Naturally, copyright holders will seek to maximize their profits by setting the most restrictive access terms that the market will accept. Conduct like this is allowed by the law, hugely profitable to copyright holders, and under section 1201(a)(1), taking any action to circumvent it is illegal.

The Federal Register notice asks for specific examples of abuse. As an example, the standard for Digital Versatile Discs forces DVD players disable the user's ability to fast-forward when instructed by the disc. This allows copyright holders to include advertisements in the content which the user has no choice but to watch. If I want to be able to make certain non-infringing uses of a DVD I've purchased - such as watching only the 90% of the content which is not advertisements while skipping past the rest - the access controls in the work prohibit me from doing so, and the DMCA prohibits me from circumventing those access controls. There are hundreds or thousands of examples of abuses related to the software field. Many software programs limit their use to a single machine CPU, prevent users from making back-up copies of the original software, inform on users via the Internet to the company which produced the software, and otherwise limit the user's ability to copy or access the software in the manner of his choosing.

Access controls will also adversely affect the ability of libraries to archive copyrighted works. Digital Versatile Discs may last as little as 5-10 years (that is how long CD's last) and the access controls built into all DVD players and recorders mean that is impossible for a library to transfer a copyrighted work to a new medium for archival purposes. While a library's rare book collection can be digitized so that even when preservation efforts fail, an authentic copy remains available, no such preservation measures are allowed by the DMCA.

I hope I have made my point adequately. Honestly, the Librarian's action on this matter is likely to have little practical effect. Section 1201(a)(2) of the law, already in effect, outlaws the production, importation or distribution of any devices (including software code) which would circumvent access control measures. This part of the DMCA is already being used against individuals who wanted to play DVD's on an "unauthorized" computer operating system, Linux, and constructed a device to allow them to play lawfully-purchased DVD's on computers running Linux. The outcome of that lawsuit is not yet determined, but it is clear that making lawful, non-infringing uses of lawfully purchased DVD's (the defendants have not been accused of any copyright infringement whatsoever) is being hampered by the DMCA.

Thus, even if the Librarian accepts my recommendation and negates the effect of 1201(a)(1) for the next three years, a library may still find itself in the position of being permitted to circumvent an access control measure but not being allowed to construct or otherwise obtain a "device" which would allow them to perform it, unless the library desired to be sued by a copyright holder. However, if the Librarian were to reject 1201(a)(1) for all copyrighted works, this would send a strong message to Congress that the current attitude toward protecting copyrighted works, which involves no consideration of the fair use rights of the public, is unacceptable to the library community.

-James McPherson