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This comment is submitted to 1201@loc.gov as per its request:

"The purpose of this rulemaking proceeding is to determine whether there are classes of works as to which users are, or are likely to be, adversely affected in their ability to make noninfringing uses if they are prohibited from circumventing such technological measures [that control access to copyrighted works]."

In this comment on bill 1201 (the Digital Millennium Copyright Act) I address the notion of a "class of works" which may be exempt from the prohibition on circumvention of copyright protection; and the questions on "Technological Measures" (section A of the Questions section in the notice requesting comments). It appears to me that, in regard to the technological aspects of the bill, certain misconceptions exist in the language of the bill which could allow adverse effect on noninfringing uses of copyrighted works.

#### CLASS OF WORKS

It is impossible that any one class of works, in the sense of genre, can have any meaning to this rulemaking proceeding. To designate one genre as exempt and another as not exempt from 1201, without consideration of any other circumstances, will be arbitrary and make no sense to the issue at hand.

The only meaning "class of copyrighted works" can have to the issue at hand is in regard to **status of use and/or ownership** of the works. The bill is supposed to address economically harmful or perhaps other unauthorized uses of a copyrighted work. Therefore the only meaning a "class" can have in regard to this issue is in regard to the authorized or unauthorized use of a work. To this end a "class of copyrighted works" can be defined only in terms of **who owns the work, and/or who uses the work**. For example: if I purchase a DVD, I now own the DVD. While the maker(s) of the work written onto the DVD are in possession of the work's copyright, I am the owner of the disk and entitled to have free access to the contents of that disk by virtue of the fact that the copyright holder(s) offered the work/medium for sale and I purchased it. What right does the copyright owner have to determine what access I have to my purchased DVD, as long as I am not infringing their copyright (which I am not, no matter how I **access** the work on the disk – access is not copyright infringement).

Again, any attempt to exempt a copyrighted work based upon qualities inherent to the work (i.e. in terms of genre or related concepts) can only be arbitrary and meaningless to this rulemaking proceeding. The essential fact pertinent to what class of works may be exempt or not exempt from the protections of this bill is, if I may put it this way, the economic and/or use status of the work and/or of the medium on which it is written. Is the work published? Who has published it? Is it offered for sale? Who has offered it for sale? Has it been purchased? Who has purchased it? From whom has it been purchased? To what use will the work be put? These are the

questions which should be of the greatest importance when determining any class of works which may be exempt from 1201. We are not concerned with the copyrighted work qua work, but more essentially as an object of commerce.

If I may offer my own opinion, I believe that one class of works which should be exempt from 1201 should be that class of works purchased by individuals or organizations freely and legally from copyright owners who offered the work for sale freely and legally. I explain why I believe this in the following.

#### TECHNOLOGICAL MEASURES

Bill 1201 prohibits the circumventing of technological protections put in place by copyright holders to prevent unauthorized access to copyrighted works. It is my opinion that, first, the bill's language shows misunderstanding of what amounts to an effective technological measure of protection for a copyrighted work; and, second, inadequately addresses a most important circumstance of a technological protection of a copyrighted work.

Firstly, the bill uses language which implies, or takes for granted, that certain technological measures, such as encryption or scrambling, are "effective" measures of protection of a work.

The technological measures - such as encryption, scrambling, and electronic envelopes - that this bill protects can be deployed, not only to prevent piracy and other economically harmful unauthorized uses of copyrighted materials, but also to support new ways of disseminating copyrighted materials to users, and to safeguard the availability of legitimate uses of those materials by individuals.

House Manager's Report, at 6

However, it is not given that certain means of protection are actually effective means. For example, it is known that in the current case of the MPAA and its attempts to control DeCSS, the CSS encryption of DVDs is not only a weak protection scheme, it is entirely ineffectual when it comes to protection of the copyrighted works on the DVDs.

No one needs to decrypt DVDs in order to make infringing uses of the copyrighted materials contained on them. Encryption prevents being able to read the work, but it does not prevent copying of the work. If I can copy the contents of a DVD from the DVD to my hard drive, and thence to another blank DVD (perhaps with a tool as simple as my Windows cut and paste, which, if it did not work, would not be prevented from working by the encryption), I will successfully have infringed copyright. Any difficulties I may come upon while engaged in this endeavor will not arise from the CSS encryption. I refer the rulemaking body to the document at the following website: <http://cryptome.org/dvd-bogk.htm>, which gives a statement as to why CSS does not effectively protect DVDs from being copied.

Additionally, the bill's stated understanding of what is an "effective" technological measure against copyright infringement appears to be completely detached from what matters about any measure of protection, which is whether it can reasonably be said actually to prevent a given infringing act. The bill defines an effective protection thusly:

a technological measure 'effectively controls access to a work' if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work

This is to define an effective measure by how it operates, and not by how well it operates. This is a serious flaw. It is obvious that an effective measure of protection should be one which will actually prevent an act intended to infringe copyright. By the above definition of "effective", CSS is an effective measure of technological protection, if it can be shown that it "requires the application of information" such as a decryption key, authorized by the copyright owner. This sort of standard, in the computer security industry, would be the object of ridicule (except that this standard would prevent a computer security industry from existing, which would eliminate the ridicule most effectively).

It seems clear to me therefore that bill 1201 is insufficiently clear, even inadequate, as to what constitutes an effective technological protection. In itself, this may not be a problem, but it is a problem if there is no independent body put in position to determine whether a vendor's technological protection scheme is in fact an effective one. Unless vendors are made to submit their protection schemes to review by an independent body whose job it is to determine whether a specific protection scheme can be described as "effective", we will have, on a regular basis, cases like the MPAA and its attempts to attack DeCSS, where a vendor maintains that it has provided technological measures to protect a copyrighted work, when in fact it has failed to do so, or at the very least, failed to prove that it is so.

(Incidentally, a second class of works which should be exempt from the protections of 1201 should be those whose protection schemes have not been thoroughly evaluated and ascertained to be "effective" by an independent body. When I say independent, I mean completely unaffiliated with the vendor whose protection scheme is to be evaluated.)

Second, while bill 1201 asserts the uncircumventability of technological protections put in place to defend copyrighted works, it leaves completely unaddressed the issue of a protection scheme's status on copyrighted works gotten legally. Currently, persons who purchase a DVD must play them on an MPAA authorized player, able to decrypt CSS, and these players work only with Microsoft Windows. Let us say that a person wants to watch DVDs but this person's computer only has Linux on it. Or let us say that this person has Windows, but no longer wishes to use Windows, because it costs more money to maintain a Windows operating system than a Linux operating system. This person has purchased the DVD and this constitutes permission to have access to the contents of the DVD, which is copyrighted material. However, the makers of the DVD and CSS have not provided the owner of the DVD with any means to watch the movie on the DVD. Even if the CSS encryption provided an effective measure of technological protection from piracy, it is still the right of the owners of DVDs to watch their own legally purchased media unhindered by these protections. The following is from the section of the federal register requesting comments for the rulemaking on 1201:

Specifically, subsection (a)(1) of new section 1201 applies when a person **who is not authorized by the copyright owner to gain access to a work** seeks to do so by circumventing a technological measure put in place by the copyright owner to prevent access to the work.

37 CFR Part 201 [Docket No. RM 99-7]

Anyone who legally purchases a DVD is not a person "not authorized by the copyright owner to gain access to a work"; in fact, all purchasers of DVD are by virtue of their purchase granted right to access their legally purchased media, in any

way that does not infringe copyright. Even if a protection such as encryption were an effective measure of protection, it should not apply to those authorized by a copyright holder to gain access to a work, which includes all those who legally purchase works. However, in the case of the MPAA's CSS encryption, which is not an effective means of protection, the issue of watching a DVD on a Linux system instead of a Windows system is essentially a matter of watching the work in one format versus another, and as it is not infringement of copyright owners' rights for the legal purchaser of a work to enjoy that work in whatever format is convenient for them, or to make backup copies of a work in a format other than that in which the owner purchased it (for example, copying .wav files on a store-bought CD into .mp3 files), it should be the right of any owner of a DVD to obtain a key which will allow them to watch their legally purchased media on any system they like, or if no such key will be given them, to break the CSS encryption in order to exercise these rights.

(I add parenthetically that I have not yet been able to locate in 1201 itself the language directly corresponding to my quote from the Federal Register above. I assume, however, that Ms Peters and Mr Billington know whereof they speak.)

Again, it is not an infringing act to gain access to work one has legally purchased or legally obtained otherwise than purchasing. The only act that CSS can prevent is this non-infringing act. Therefore 1201 should not apply to an owner of DVDs who circumvents those DVDs CSS encryption.

It is my opinion that for 1201 to be effectual, it should include provision that consumers will not be restricted by technological measures which control access to works after those works have been legally purchased or legally obtained otherwise. To rule otherwise is to encroach upon the consumers' rights in favor of copyright owners, who, while having rights, do not have rights greater than those of consumers.

Again, unless there is set up an independent body which will regulate vendors' protection schemes, especially disallowing the continued presence of such schemes on legally obtained media or of allowing users of such media to be persecuted as copyright infringers when they have in fact legally obtained their media, and thus safeguard consumers' rights to the media they have purchased, we will have on a regular basis cases like the one before us today, where persons given access to a work by the copyright owner(s) will still be held restricted to protective measures which should no longer apply to them.