

Comments of Brent Fulgham in response to the Notice of Inquiry, 37 CFR Part 201.

I believe that the Copyright Office of the Library of Congress should exempt several classes of expression from the access control provisions of the Digital Millennium Copyright Act (DMCA) in order to protect the ability of students, teachers, and regular citizens to exercise their rights to Fair Use of such works. The existing terms of the DMCA provides over-broad prohibitions against the circumvention of access controls to motion pictures in the Digital Versatile Disk (DVD) format, information archived on encrypted CD-ROMs, and some music recently issued with encrypted Compact Disk (CD) media.

I am a software engineer who donates a portion of my free time to the development of the Linux operating system. Recently, some foreign software engineers were successful in developing software to bypass the encryption mechanism protecting DVD films. This work formed the foundation of a software DVD player for use with the Linux operating system. Previously, the DVD-CCA had declined requests for information needed to produce a Linux DVD player due to the nature of Linux software licensing. I assume that the DVD-CCA did not wish to allow source code to a software DVD player to be available to the public, as they might have felt that it would endanger their intellectual property rights. Their decision prompted the reverse engineering effort that resulted in the Linux DVD player (LiViD). See <http://www.openDVD.org> for hypertext links.

Shortly after the reporting in popular media of the availability of non-DVD-CCA playing software, a series of lawsuits was filed by the DVD-CCA and the MPAA. The lawsuits invoked the language at question in this Notice of Inquiry, and stated that the actions of reverse engineering the DVD-CCA's encryption to access the DVD movie violated the DMCA, and specifically its prohibition against circumvention of access controls. The ruling of the presiding judge over a preliminary injunction (UNIVERSAL CITY STUDIOS, INC, et al., vs. SHAWN C. REIMERDES, et al., see <http://www.nysd.uscourts.gov/courtweb/pdf/00-01149.PDF>) invoked the language of the DMCA citing its access control provisions, stating that

"the legislative history makes it abundantly clear that Section 1201(f) permits reverse engineering of copyrighted computer programs only and does not authorize circumvention of technological systems that control access to other copyrighted works, such as movies.²¹ In consequence, the reverse engineering exception does not apply.

This chilling conclusion calls into doubt the very rights of legal owners of DVD films to view them using anything other than the manufacturer-created viewing mechanism. In my mind, this is a clear and present danger presented by those who would like to control all aspects of a copyrighted work. Rather than attempt to change the constitution and other laws that clearly provide for Fair Use, they seek to defeat these laws in all practical ways by creating a new legal provision outlawing the circumvention of access control mechanisms. It is as if a publisher issued all books with a diary-style lock, to which they would rent you a key. You could own the book, but not the key, and any attempt to bypass the lock to the book you purchased would be viewed as a crime punishable by up to \$500,000 in fines for a first offense (see the fines schedule in the provisions of the DMCA).

Again, drawing from Judge Kaplan's statement of opinion:

Section 107 of the Act provides in critical part that certain uses of copyrighted works that otherwise would be wrongful are "not . . . infringement[s] of copyright."²⁸ Defendants, however, are not here sued for copyright infringement. They are sued for offering to the public and providing technology primarily designed to circumvent technological measures that control access to copyrighted works and otherwise violating Section 1201(a)(2) of the Act. If Congress had meant the fair use defense to apply to such actions, it would have said so.

In this paragraph, Judge Kaplan ruled that the defendants are not charged with copyright infringement, but rather "access control tampering", and were therefore not protected by Fair Use. I can think of no better

example of why the Library of Congress must rule immediately that the Fair Use rights of persons who legally purchase encrypted media may not be undone by clever manipulations of the DMCA.

I strongly support the rights of the MPAA and others to protect their copyrighted works from infringement. However, I am even more concerned with the rights of myself and others to exercise our Fair Use rights to view and enjoy digital media we have legally purchased. There should be no prohibitions against sharing information with others detailing how to circumvent access control to their own property. Nothing in the technology attacked in this lawsuit is designed to allow piracy of the films or transmission of unencrypted information. Rather, the software at question allows interested parties to play DVD films on a Linux (or FreeBSD, or Windows) operating system.

I beseech your office to put an end to these insidious machinations, and to state in clear and bold language that the rights of our citizenry to make full use of items they own may not be stolen through the wording of a few vague phrases in the Digital Millennium Copyright Act.

Nothing in my statement is meant to support those who seek to illegally profit from reproducing copyrighted material. But let us not seek to so guard ourselves from copyright violation, that we shackle ourselves into an Orwellian future in which the very right to view and enjoy our own property is controlled by a handful of media companies.

The case of UNIVERSAL CITY STUDIOS, INC, et al vs. SHAWN C. REIMERDES, et al. satisfies the Commerce Committee's requirement that the adverse impact to Fair Use be "distinct, verifiable, and measurable". This case is no example of a *de minimis* impact -- it is a clear example of what the future holds for law-abiding citizens if the DMCA is left in its present vague state.

I respectfully ask this office to modify the DMCA provisions to include language allowing the circumvention of access control devices for the purposes of using legally purchased products. As we move further into the twenty-first century, the availability of non-encrypted media will become ever-scarcer. The ability of private citizens, librarians, and researchers to access their legal property will become increasingly endangered as more and more products are released on access-controlled media. We must take steps now to protect our rights in the present, and for the future.

I sincerely thank you for your consideration,

Brent A. Fulgham