Eric Eldred
PO Box 21
E Derry, NH 03041-0021
+1-877-205-6139x8972
<EricEldred@usa.net>

David O. Carson
General Counsel, Copyright GC/I&R
P.O. Box 70400
Southwest Station
Washington, DC 20024

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

The Librarian of Congress should determine 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 (and so for each three subsequent years).

1. The DMCA (HR 2281) provides no mechanism to decrypt the scrambled digital work once copyright term expires. Thus a legitimate fair use of the product at that time would be impossible, given that the manufacturer is not required to unscramble the work, and libraries and other non-profit institutions are not allowed to unscramble the work except for the purposes of evaluating buying the work from the manufacturer. This lack of a positive provision for unscrambling effectively extends the copyright term without limit and violates Article 1, Section 8, of the Constitution. The Librarian should determine this point at this time, since manufacturers are permitted under the act to issue encrypted works, but may go out of business before the copyright term expires, and thus unscrambling now becomes necessary for any fair use then.

2. In a larger sense, the Librarian should determine that the Act is flawed in attempting to define what fair use is and what possible non-infringing fair use could be. These are matters for courts to decide in civil actions--the boundaries of intellectual property rights and of fair use

are both constantly enlarged as users attempt to make use of new technologies. Protection of the law for copyrighted works should extend only so far as copyright does--fair use should not be defined, but simply be the norm for any use of a digital product. To define fair use as any use that is permitted or licensed by the maker of the digital product extends copyright law itself and is contrary to the spirit of copyright, which ought to encourage works to be published and widely used, not restricted as trade secrets are.

3. The Librarian should conclude that any restrictions on use of the copyrighted works covered by the Act will have a chilling effect on citizens publishing on the Internet and their rights of free speech and free press under the First Amendment. I maintain that exempting Internet Service Providers (ISPs) from contributory infringement will shift copyright disputes from civil courts into federal criminal courts. Innocent infringers (for example publishing a work from which someone else has removed the copyright notice) will imply that a lawyer somewhere has the power to instantly require the other party's ISP to withdraw service (or else become a party to defend the accused subscriber). The accused party will then have to pay a lawyer and sue the ISP to determine who the complainaint is. The subsequent criminal trial will require the FBI to seize the computers of the accused and hold them in a warehouse for five years. If found guilty, and damages are above a certain "retail" amount, the accused could go to jail. So, instead of a civil trial in which a judge can weigh evidence of copyright claims against fair use, we will have a situation where any possible publishing on the Internet runs the risk of severe criminal penalties, even if the act is non-commercial. Free speech will be chilled by the threat of lawyers for some large corporation somewhere having the power to seize the printing press (computer) in a person's home and sending her to jail for innocent infringement. The Act requires all this because it is fatally flawed: it assumes that the printing press is in the hands of some large corporation that will suffer economically if copies are made (even with fair use). Instead, the Constitution provides for copyright so as to avoid any requirement to license publication and is intended to remove threat of criminal sanctions such as were applied to Peter Zenger. The Internet and World Wide Web make it possible and easy for individuals to publish for themselves. If we have any rights to free speech and free press, surely this law should not take them away from us--but it does, I

maintain.

4. The Act's exemptions for libraries and archives do not cover the accepted definitions of fair use at this time. In essence, the Act will prohibit any rental or lending by libraries and archives. Libraries and archives, instead of being able to preserve our common culture and promoting the fair uses of scholarship and learning, will become licensing arms of media giants who are allowed to lock up their works under DMCA. Unless libraries and archives are given perfect freedom to unscramble and distribute the works, they cannot make fair use of the products. Furthermore, libraries are now becoming computerized and distribute over the Internet, a procedure that is specifically outlawed by the Act. Since this point applies to all products covered by the Act, then all use of these products for the next three years, and all three-year periods subsequently, must be considered non-infringing.