



Association of American Universities

February 17, 2000

Mr. David O. Carson
Office of the General Counsel
Copyright Office, LM-403
James Madison Memorial Building
101 Independence Avenue, S.E.
Washington, DC

Dear Mr. Carson:

I write on behalf of the Association of American Universities, the American Council on Education, and the National Association of State Universities and Land-Grant Colleges to comment on the Copyright Office Notice of inquiry, "Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies," 64 Fed. Reg. 66,139-143 (Nov. 24, 1999).

We commend the Copyright Office for the thoughtful rulemaking proceeding it has proposed for determining whether to exempt certain classes of works from the prohibition against circumventing technological protection measures. By providing for opportunities to comment, reply to comments, and discuss these exceedingly important and complicated issues in open hearings, the Copyright Office has established a process that will promote a full and public discussion of the issues as a basis for the difficult decisions that must be reached by the Librarian of Congress.

In responding to specific questions, the Notice asks respondents to differentiate between the current state of affairs and the state of affairs that is likely in the ensuing three-year period. While the general thrust of the questions appears to be on the current state of affairs, the ultimate decision in this rulemaking proceeding properly focuses on the prospective impact of the anticircumvention prohibition over the period covered by the decision, October 2000 through October 2003.

We would like to offer the following observations at this early stage of the process. We urge the Copyright Office to incorporate these views into its decision-making process:

- Congress established this rulemaking procedure because it recognized the potentially profound effect of access control technology on lawful uses of copyrighted works. We are confident that the Copyright Office will give full weight to this concern in implementing Section 1201(a)(1)(C).

- Works such as scholarly journals, databases, maps, and newspapers are primarily valuable for the information they contain, information that is not protected by copyright under Section 102(b) of the Copyright Act (“Thin Copyright Works”). Access control technologies applied to such works will protect primarily material in the public domain, not copyrightable authorship.
- Certain works such as scholarly journals, scientific databases, textbooks, and legal casebooks are works most commonly used for educational purposes or scientific and scholarly research (“Fair Use Works”). Restrictions on access to these works, particularly where the user has lawful possession of a copy of the work, are highly likely to interfere with fair use and will be particularly damaging.
- The effective date of Section 1201(a) should be further deferred with respect to Fair Use Works and Thin Copyright Works absent a strong showing that circumvention will cause substantial loss to the affected copyright owners.

In the discussion that follows, we amplify on these basic points.

Congress’ Recognition of the Threat to Lawful Use Posed by Access Control

Technology Deserves To Be Given Full Weight. In deciding to establish this rulemaking, Congress made clear its intention that access control technology not be applied to interfere with lawful uses of copyrighted works. The rulemaking originated in the House Commerce Committee and was thereafter adopted with only procedural changes in Conference. According to the Commerce Committee:

“[T]he Committee was concerned that [the then current version of the bill] would undermine Congress’ long-standing commitment to the principle of fair use. Throughout our history, *the ability of individual members of the public to access and to use copyrighted materials has been a vital factor in the advancement of America’s economic dynamism, social development, and educational achievement*. In its consideration of [the bill], the Committee on Commerce paid particular attention to how changing technologies may affect users’ access in the future. Section 1201(a)(1) responds to this concern.

The growth and development of the Internet has already had a significant positive impact on the access of American students, researchers, consumers and the public at large to informational resources that help them in their efforts to learn, acquire new skills, broaden their perspectives, entertain themselves, and become more active and informed citizens. . . . *Still, the Committee is concerned that marketplace realities may someday dictate a different outcome, resulting in less access, rather than more, to copyrighted materials that are important to education, scholarship, and other socially vital endeavors.*

Committee on Commerce, House of Representatives, Digital Millennium Copyright Act of 1998, H.R. Rep. No. 105-551 at 35-36 (1998) (emphasis added).

The Committee further confirmed that “Fair use, thus, provides the basis for many of the most important day-to-day activities in libraries, as well as in scholarship and education.” *Id.* at 25-26. The Committee “felt compelled to address” the risks of access control technology, “including the risk that enactment of the bill could establish the legal framework that would inexorably create a ‘pay-per-use’ society.” *Id.* at 26.

In response to these concerns, the Committee “struck a balance that is now embodied in Section 1201(a)(1) of the bill. . . . *The Committee considers it particularly important to ensure that the concept of fair use remains firmly established in the law.*” *Id.* (emphasis added). The deferral provision in Section 1201(a)(1) was the a central element of this effort to “fully respect[] and extend[] into the digital environment the bedrock principle of ‘balance’ in American intellectual property law.”

In deciding whether there are classes of works for which Section 1201(a)(1) should be deferred, full weight should be given to Congress’ concern that access control technology not be used in a manner that interferes with lawful uses of copyrighted works.

Two core principles of copyright law bear on the decision whether to extend the deferral of 1201(a): the right to reproduce facts, information and ideas contained within copyrighted works; and the fair use of copyrighted works. These uses constitute the principal activities that come within the “ability to make non-infringing uses under this title of a particular class of copyrighted works” that 1201(a)(1)(C) endeavors to preserve.

The Application of Access Control Technology to Certain Classes of Works Will Necessarily Interfere with Access to Facts and Information that Must Remain in the Public Domain. Section 102(b) of the Copyright Act makes clear that copyright protects only expression, and not facts or ideas. Data and information are the cornerstones of academic, scientific, and indeed all intellectual activity. It has long been the fundamental premise of this nation’s information policy that no one may own facts or information, or may prevent the full, unfettered use of facts and information. As the Supreme Court said in *Feist*, “all facts—scientific, historical, biographical, and news of the day . . . are part of the public domain available to every person.” *Feist Pubs., Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 348 (1991), quoting *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1368 (5th Cir. 1981). “[T]he raw facts [in a compilation] may be copied at will. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.” 499 U.S. 340, 350 (1991).

This policy has served the country well. We can all be proud that the United States stands at the forefront of learning, science and technological achievement. Implementation of access control technology must not be allowed to threaten this fundamental principle. If there is any doubt about the proper scope of Section 1201(a), the Copyright Office should err on the side of continued access to information.

Many classes of works, including scholarly journals, databases, maps, and newspapers (“Thin Copyright Works”), are primarily valuable for the information they contain, not for the richness of their protected expression.¹ These types of works are entitled only to what has been called “thin” copyright protection. *Feist*, 499 U.S. at 349.

¹ Cf. Jane C. Ginsburg, NO “SWEAT”? COPYRIGHT AND OTHER PROTECTION AFTER *FEIST V. RURAL TELEPHONE*, 92 Col. L. Rev. 338, 340 (1992) (contrasting “low authorship works” such as “directories, maps, computer databases, and similar information compilations” with “high authorship works, such as novels, paintings, and musical compositions,” in which “an authorial personality permeates the work.”).

Section 1201 threatens to expand dramatically the scope of protection available for these thinly protected works and thereby undermine the critical balance struck by Section 102(b). The Copyright Office should eliminate the risk that a thin veneer of authorship would permit a copyright owner to lock up unprotected facts and information in access control technology, precluding the use of public domain facts and information. The classes of Thin Copyright Works should be listed as works not subject to Section 1201(a)(1) in order to ensure that section 1201(a)(1), as applied, does not turn into “The Fact and Information Copyright Extension Act of 1998.”

The Application of Access Control Technology to Certain Classes of Works Will Interfere with Fair Use, Particularly Where the User Has Lawful Possession of a Copy of the Work. Certain classes of works raise particularly sensitive fair use issues because they are used every day throughout the nation for fair use purposes. Scholarly journals, scientific and academic databases, textbooks and legal casebooks are examples of works that are central to education, science, and scholarly research. Imposition of access control technology to these ‘Fair Use Works’ seems certain to diminish the exercise of fair use. Accordingly, the Copyright Office should be particularly skeptical of the application of such technology to such works.

We do not intend, by these comments, to promote inappropriate efforts to obtain possession of copies of works when the user lacks lawful possession. In this context, access controls such as passwords typically do not pose a problem, since they protect against unlawful possession but generally do not preclude use subsequent to lawful possession. However, we have great concern with access controls such as enveloping or encryption technology that prevent use of a work even after copies have been distributed. Such controls can be, and increasingly will be, coupled with usage controls.² Such usage control technology is the subject of Section 1201(b), which (i) does not contain a prohibition against the *act* of circumvention analogous to Section 1201(a)(1), and (ii) expressly contemplates circumvention for fair use purposes.³

In other words, as technology advances, it will become increasingly difficult to distinguish access control technology from copy control technology. The former will become the standard for performing the very copy control functions that Congress contemplated would be the subject of Section 1201(b). This is precisely the fear voiced in the legislative history, that “enactment of the bill could establish the legal framework that would inexorably create a ‘pay-per-use’ society.”

² See, e.g., SDMI Portable Device Specification, § 3.20 (defining “Usage Rules” as rules that “govern the Content’s use in the SDMI Domain.”). These Usage Rules are attached to “Protected” Content, which, in turn, is defined as content to which “unauthorized access is restricted by technical means (e.g., encryption or scrambling).

³ Section 1201(b) only applies to circumvention of a technology that “effectively protects the right of a copyright owner.” These rights are bounded by and must be read together with the limitations imposed by Sections 107 through 121, including fair use. See, e.g., *Quality King Distrib., Inc. v. L’Anza Research Int’l, Inc.* 523 U.S. 135 (1998) (holding that the exclusive rights in Section 106 are inherently limited by Sections 107 to 121).

Section 1201(a)(1) should not be applied to such hybrid technologies. One way to accomplish this is to limit the applicability of section 1201(a) to circumstances in which copies of Fair Use Works are not lawfully in the possession of the user. *Cf.* 17 U.S.C. § 1201(g)(2)(A) (the “encryption research” exception to Section 1201, which is limited to circumstances in which “the person lawfully obtained the encrypted copy, phonorecord, performance or display of the published work.”)

The Effective Date of Section 1201(a)(1) Should Be Further Deferred with Respect to Fair Use Works and Thin Copyright Works Absent a Strong Showing that Circumvention Will Cause Substantial Losses. The clear Congressional intent behind establishing this rulemaking, coupled with the characteristics of Fair Use Works and Thin Copyright Works, provide guidance for the Copyright Office in its decision making. With respect to such works, the threat of access controls greatly outweighs the threat to the works from circumvention. Accordingly, absent a strong showing that circumvention of access control technology will reduce incentives to create these works, *per se* civil and criminal liability for circumvention (without regard to whether or not the underlying use of the work is infringing) should continue to be deferred.

In this regard, it is important to keep the scope and effect of this rulemaking in perspective.

- Nothing in this rulemaking will prevent or inhibit copyright owners of any works, including owners of Fair Use Works and Thin Copyright Works, from using access control technology.
- The manufacture, distribution, sale and performance of circumvention devices, components and services will continue to be fully subject to the prohibition of Section 1201(a)(2), making it very difficult for lawful users to gain access to protected works, even if Section 1201(a)(1) continues to be deferred as to certain classes of works. Similarly, Section 1201(b), proscribing dissemination of devices designed to circumvent technological measures protecting “a right of the copyright owner,” will continue to apply, and will make it difficult for users to make unauthorized post-access copies.
- Infringing uses after circumvention remain subject to the full sanctions of copyright law.

In short, if appropriate waivers are not granted, Section 1201(a)(1) will add only a *per se* imposition of liability for non-infringing uses. Unlawful uses remain subject to full liability under copyright law. Under these circumstances, the threat that overboard implementation of 1201(a) poses to the ability of non-profit educational institutions to make non-infringing uses of copyrighted works far outweighs any threat of underprotection that delayed implementation of 1201(1) poses to Thin Copyright Works and Fair Use Works in the academic environment.

We appreciate the opportunity to provide comments as part of the Copyright Office’s rulemaking proceeding. We look forward to working with the Copyright Office, and to contributing additional thoughts, throughout this process.

Very truly yours,

A handwritten signature in black ink, appearing to read "John C. Vaughn".

John C. Vaughn
Executive Vice President

JV/BJ/JG/sjd