

To:

David O. Carson, General Counsel,
Copyright GC/I&R

Dear Sir,

This letter concerns the recent call for input regarding section 1201 in particular with regards to Digital Versatile Disks (DVD's) and the Content Scrambling System (CSS). After wearisome reading of copyright law I have come to the conclusion that section 1201(a)(1) "No person shall circumvent a technological measure that effectively controls access to a work protected under this title...." Weighs too heavily in the favor of the copyright holder.

In *Sony v. UNIVERSAL CITY STUDIOS, INC*, the US Supreme Court held the following opinion applicable on new mediums of copyrightable work.

"The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be [464 U.S. 417, 432] encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an `author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. `The sole interest of the United States and the primary object in conferring the monopoly,' this Court has said, `lie in the general benefits derived by the public from the labors of authors.' *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127. See *Kendall v. Winsor*, 21 How. 322, 327-328; *Grant v. Raymond*, 6 Pet. 218, 241-242. When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (footnotes omitted).

Copyright protection "subsists . . . in original works of authorship fixed in any tangible medium of expression." 17 U.S.C. 102(a) (1982 ed.). This protection has never accorded the copyright owner complete control over all possible uses of his work. Rather, the Copyright Act grants the

[464 U.S. 417, 433] copyright holder "exclusive" rights to use and to authorize the use of his work in five qualified ways, including reproduction of the copyrighted work in copies. 106.14 All reproductions of the work, however, are not within the exclusive domain of the copyright owner; some are in the public domain. Any individual may reproduce a copyrighted work for a "fair use"; the copyright owner does not possess the exclusive right to such a use. Compare 106 with 107.

--SONY CORP. v. UNIVERSAL CITY STUDIOS, INC., 464 U.S. 417 (1984)
Section II paragraphs 9 and 10.

The DVDCAA and MPAA brought forth a lawsuit versus the various posters of DeCSS source code in the light of a slighted copyright holder, but their actions belie their true intentions. The use of CSS in combination with Region Coding of DVD ROM Drives (discussed below) makes plain that the DVDCAA aim to completely control not only the availability Movies on DVD's, but also DVD players and the use of DVD's so that they are most benefited monetarily, and they are trying to do so using copyright law which as stated above does not afford them that right.

CSS and RCP-I,II

Nowadays, the content of DVD's containing movies is encrypted (though weakly) by the a scheme CSS but in addition DVD's also contain a description of what region that DVD was manufactured in. Drives of region X will not play DVD's of region Y. Moreover, decoders of region X will not play DVD's of region Y. It has been seen that the DVDCAA will not grant licenses to a player system or manufacturer of DVD players/ROMS if that player does not enforce a check of the Region of the DVD and compare it to the Region of the drive. Prior to January 1, 2000, DVD ROM drives available for use with PC's was manufactured during Region Coding Phase-I or (RCP-I) drives during this time well allowed to have no region. Standalone DVD players have always been region coded. As of January 1, RCP-II began. All manufacturers of DVD ROMS for PC use must make drives that set their region to the first DVD played in them (if it is not already set) and will not play a DVD of another region. Actually the drive's region can be changed up to 5 times, but thereafter the region becomes locked. For example, a DVD purchased in Europe cannot be played in a DVD player purchased in the US for no other reason than this mechanism put in place by DVDCAA. There can be no other use of

Region coding than to improve sales. But since CSS merely exists, there can be no player that will play DVD's from 2 regions let alone from all 6 (perhaps 8) unless DVDCAA decides to license one, which they won't, because 1201(a)(1) is too broad and vague in its wording.

Examples of Fair Use denied.

I believe that the following are examples of fair use of a DVD that will not be allowed due to 1201(a)(1)

- 1) Watching a purchased DVD on a player not licensed by DVDCAA.
- 2) Making a personal archival copy of a DVD.
- 3) Making a copy of a DVD for a library/public archive.
- 4) Extracting excerpts of a DVD for educational purposes
[PRINCETON UNIVERSITY PRESS v. MICHIGAN DOCUMENT SERVICES, INC.]
- 5) Recording a broadcast program on a DVD for time-shifting purposes. [SONY CORP. v. UNIVERSAL CITY STUDIOS, INC.]

and also

- 6) Copying or otherwise making any use of noncopyrightable material that happens to be encoded using CSS.

1201(a)(1) does not make illegal circumventing a technological measure if the content is not a copyrightable work, but what of all the other instances what are copyrighted? It has been established that public need to view a particular video can outweigh the rights of a potential copyright holder 1 Nimmer @ 1.10[C][2], at 1 - 81. and additionally a video tape is not by virtue of its medium a copyrighted work Harper House, Inc. v. Thomas Nelson, Inc., 889 F.2d 197, 201 (9th Cir. 1989) [see discussion in

In the future, it is likely that DVD's will replace videotapes entirely and this argument may be applied to them. Most will be copyrightable, some won't and thus it is likely that CSS or a derivation thereof will exist and all video will be encrypted using it and citizens will be denied their fair access to a non copyrightable work because there will be no free (non-licensed) DVD reader/decoder. And if DVDCAA has its way certainly no copier.

Recommendation.

Apparently, 1201(a)(1) can be used to confer powers to a copyright

holder not intended by copyright law. It seems that so long as one copyrighted work employs a technological means, the effect is that all other works copyrighted or not can not be accessed for any reason though it be for a necessary and useful purpose. Thus, I recommend to modify 1201(a)(1) so that it allows for circumvention a technological measure as long as that circumvention is primarily for fair use. Alternately, I would argue that application of 1201(a)(1) should only be applied to individual copyrighted works rather than a broad classification that share the same technological measure.

Sincerely,

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