

Dear Librarian of Congress,

I strongly recommend that enforcement of 1201(a)(1) be denied to any works where such enforcement would make actionable (whether by criminal or civil punishment) usage of the work which would fall under the fair use exemptions or any other uses allowed by copyright law.

Congress did not intend to negate fair use, nor to allow someone to negate a consumer's fair use rights simply by implementing an access control system. As an example, if I produce and distribute a text file and someone makes personal copies or distributed limited excerpts with proper citations they are protected by the fair use exemptions in copyright law, but they would be guilty of a 1201(a)(1) offense and liable for damages due me if all I did was implement any access control system, no matter how trivial. In other words, content producers can take advantage of a loophole in the DMCA where the mere existence of an access control device can make fair use illegal. The DMCA says itself that nothing in it is to be construed as limiting or eliminating fair use - yet that is what can, and is happening (e.g. the DVD/DeCSS DMCA lawsuit).

Congress' intent, especially given the clause indicating lack of legislative intent to abridge fair use, must be looked at more in the light of prohibiting cable descrambler boxes which are designed to allow one to access content they do not pay for and hence have no right to, rather than looked at as intending to prohibit otherwise lawful activity. Laws predating DMCA already prohibit theft of service and copyright infringement. Circumventing access control systems to accomplish those two ends can be prohibited without prohibiting all circumvention. If all circumvention is prohibited, the copyright holder basically has unlimited power to stop any fair use. This could have devastating impact of the freeness and openness of our popular culture. Allowing copyright holders complete power would allow them to implement widespread pay per use systems, effectively allowing content to be cut off from lower income members of society. Educational systems would be subject to whatever restrictions content providers wished to impose. Computer companies could have the access control system prevent the usage of a product on a system also housing competitor's products.

Section 1201(a)(1) is currently subject to extremely overbroad interpretation. For example, in the current DVD DMCA case, the plaintiffs are charging that circumvention of DVD access control without authority of the copyright holder (i.e. 1201(a)(1) violation) is occurring (when using an independently produced computer DVD playback system), even though one's possession of a DVD constitutes

implied license to view it, and hence any circumvention would be with the authority of the copyright holder due to implied license and hence not a 1201(a)(1) violation. Section 1201(a)(1) demands a narrow interpretation to protect fair use. The class of works exempt from 1201(a)(1) should therefore be defined to be those works whose access control system prevents any legal fair use of those materials, including without limitation those works for which one has an implied or explicit license to access.

Frank T. Lofaro Jr.