

March 28, 2000

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

Re: Section 1201(a)(1) of The Digital Millennium Copyright Act (Docket #7M99-7)

Dear Mr. Carson:

The comments favoring exemptions submitted in response to the Notice of Inquiry ignore or misapprehend two fundamental and important propositions that must underpin any discussion of the question raised by the Notice of Inquiry.

The first is that the enactment of the anticircumvention provisions of The Digital Millennium Copyright Act (DMCA) is responsive to an understanding by Congress and the Executive that digitization presents enormous risks to copyright. It is, of course, common ground that digitization offers great economic and social benefits but those benefits can be wiped out by the looming dangers of easy, cheap and perfect quality reproduction, easy, cheap and perfect quality distribution and the ability to make changes in the digitized work be it text, audio or video.

Problems of unauthorized reproduction and distribution, and to a slight extent, modification existed and still exist with respect to works in the analog format. The economic losses caused by the first two of those activities were and are very significant. Digitization, however, leads to much more than just a quantitative increase in such consequences. The ability to make perfect copies (and copies of copies) and to transmit them on a worldwide basis has such a great potential for destroying copyright protection as to require qualitatively different approaches to stem the possibility that copyright owners would lose their rights as a result of illegal activities all over the world.

The need for a new and stronger approach to copyright protection was appreciated by the international community. Under the aegis of the World Intellectual Property Organization, two treaties were agreed at the end of 1996 by

approximately 160 countries. Each of those treaties provides that the “Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technical measures that are used...” by authors in connection with the exercise of their rights. The United States, in implementation of that requirement in the treaties, enacted Section 1201 of the DMCA.

The second fundamental proposition to which the comments pay little or no heed is that the subject of this Inquiry has to do with *access* to copyrighted works and *not* with the exclusive rights given to copyright owners by the Copyright Law. This distinction flows from the important differences between the provisions of Section 1201(a)(1)(A) and Section 1201(b). The former deals with circumvention of technological measures that control *access* to works protected under the Copyright Law; the latter deals with circumvention of technological measures that protect the rights of copyright owners under the Copyright Law.

With respect to both provisions, trafficking in circumventing devices is, in certain circumstances, prohibited. It is only with respect to the former provisions (dealing with *access*), however, that the *act* of circumvention is prohibited.

The Copyright Office, in its summary of the DMCA, explains the reason for that distinction:

“This distinction was employed to assure that the public will have the continued ability to make fair use of copyrighted works. Since copying of a work may be a fair use under appropriate circumstances, section 1201 does not prohibit the act of circumventing a technological measure that prevents copying. By contrast, since the fair use doctrine is not a defense to the act of gaining unauthorized access to a work, the act of circumventing a technological measure in order to gain access is prohibited.”

Furthermore, many of the comments consist of attacks of varying degrees of vituperation on the Digital Millennium Copyright Act or, at least, the “anticircumvention” provisions thereof. That position is, of course, beyond the scope of this inquiry. The DMCA has been enacted into law including the provision for this Inquiry and that provision is not asking about the wisdom of such enactment.

Many of the commentators assert that the legal proceeding brought by a number of motion picture producers and distributors complaining that DeCSS (the program hacking CSS) and the injunction entered by the United States District Court in that

action are not justified. The purported basis is that CSS prevents lawful purchasers of DVDs from playing them on Linux and probably other operating systems. This is offered in support of the argument that DVDs should be a “class of works” for which circumvention should be permitted.

There is no basis for that argument. A license to implement the copy control system (CSS) is available on a non-discriminatory basis to all hardware and software manufacturers.¹ In fact, at least one CSS licensee, Sigma Designs, produces a DVD player that permits DVDs to be played on the Linux operating system.

Some of the commentators assert that technological protections prevent a user from making any sort of non-infringing use except for what may be allowed by the producer of the content. This assertion is not true. Using, once again, DVDs as an example and assuming that showing a movie on DVD in a classroom is fair use, the technological measures used to protect DVDs would not prevent such a showing. Also, the technological measures would not prevent a student from recording a portion of a movie soundtrack or using a camcorder to copy a segment of the movie as it plays on the screen of a DVD player.

Many of the baseless assertions in the comments flow from the false premise that the purchase of a DVD or other copy of a copyrighted work entitles the purchaser to exercise many, if not all, of the rights granted to the copyright owner by Section 106 of the Copyright Law. It should be common ground that the only right relinquished by the copyright owner to a purchaser (as set forth in section 109) is “...to sell or otherwise dispose of the possession of that copy...”.

Some of the commentators and, to a large degree, the Library Associations complain of what is no more than inconvenience attributed to the use of technological protections. For example, the Library Associations complain (page 20): “Many databases are available on only one computer in a library. As a result, only one user can dial in at any one time” and (on page 21): “Because of restriction of the number of users that can use a resource at any time, our students and faculty are forced to do their research late at night during off-peak hours for some of our resources”. Similar “inconveniences” would, of course, afflict library users in a purely analog context in those situations where a library or school purchases only one or very few copies of a book or other “resources”.

¹ Contrary to assertions by some commentators, neither the Motion Picture Association of America nor any of its member companies controls the licensing process or receives revenues from the CSS license.

More fundamentally, the kind of inconvenience about which the Library Associations complain is not at all the “substantial adverse effect on non-infringing use” that would provide a rationale for exempting a “class of works” from the prohibition against circumvention. The NOI itself makes the point and quotes the House Manager’s Report that “mere inconveniences, or individual cases...do not rise to the level of a substantial adverse impact”.

At bottom, the comments that favor the establishment of exemptions stand, either explicitly or implicitly, on the proposition that exemptions will not adversely affect the availability of works in digital format. This proposition not only has no support but is contrary to the limited (fortunately) experience engendered by the hacking of the CSS protection for DVD. This resulted in certain motion pictures being withdrawn from availability in DVD format. What those commentators should appreciate is that exemptions will almost certainly lead to unlawful uses. This inevitable opening of the door to unlawful uses will, just as inevitably, lead to publishers refusing to make their works available in digital format.

At this time when (i) many technical protections are still in their infancy, (ii) technical protections have been subject to hacking, and (iii) piracy of copyrighted works on the Internet is rampant, content owners would understandably be reluctant to release their works in digital format if exemptions were granted.

The more rational premise is that effective technological measures will stimulate rather than inhibit a wider distribution of content in digital format. The logic is simple. Content owners will be willing to make their works available if they need not fear the kind of piracy that digitization makes possible. One can use as an example the Library Associations’ favorable references (page 24) to the *Lexis-Nexis Academic Universe* which the libraries describe as “...a protected electronic work that contains court cases, press releases, newspaper articles, among many works. One would have to engage in an enormous amount of research to find all of the collected material in any one place”. It does not take much imagination to realize that the value thus provided by *Lexis-Nexis* would not exist if *Lexis-Nexis* could not rely on technological protections in selling subscriptions to its service.

Not only are such controls vital to the continued availability of digitally formatted works, such controls (that protect against unauthorized copying and distribution even after a work has been lawfully acquired) have been with us for some time without, so far as is known, any adverse impact on fair use and lawful uses. Macrovision and SCMS are such technologies.

As to degrees of control over uses once access is obtained, most content owners and their customers are quite used to that kind of practice. First run pictures cost more to see than later runs. Hard cover books cost more than paperbacks. Early

releases of phonograph records cost more than older ones. This, of course, is not inflexible and that is one of the good things about control by the content owner; the needs of a market operating free of piracy can be met so that, for example, a rare recording or book, however old, will cost more than a contemporary issue.

Many of the commentators charge content owners with greedily seeking to control all aspects of the use of their content. This is another irrational assumption. For one thing, content owners are able to exist only in markets which allow and encourage the distribution of their products. Secondly, as a matter of fact, content owners do not control the manufacturers of hardware (both consumer electronic and computer) on which the content owners' works are carried and used. Content owners must work with hardware manufacturers to implement technological protections. This relationship insures that the technologies permit reasonable access and use.

This very significant point is made in a recently published paper commissioned by the World Intellectual Property Organization and written jointly by representatives of content owners and consumer electronics manufacturers:

“... content owners reap value by having their works seen, heard and read by audiences. Creators generally want people to experience their works and investors and creators alike depend upon wide audiences of legitimate, paying consumers to support the creation and distribution of works. Creative works are not like gold; there is no value in locking them away in a sealed vault. Therefore, copy protection technology must be implemented so as not to interfere with the legitimate distribution and communication of works to the public. This imperative vastly increases the complexity of developing and using copy protection technology. It means that for all practical purposes copy protection measures cannot be unilateral. Sound recordings and audiovisual works can only be enjoyed by the use of receiving and playback devices, such as television sets, CD or record players, videocassette players, personal computers, etc. Content owners thus cannot apply technical measures to their works that will cause all receiving and playback devices to be unable to receive or play the works. Equally important, the goal of protecting works cannot be achieved if receiving, playback and recording devices do not recognize and respond to copy protection technologies, but simply ignore them. Therefore, to work properly copy protection technologies must be bilateral – the technologies applied by content owners need to function with consumer

electronics and computer devices used by consumers and these devices need to respect and respond to the technologies applied. This bilateral requirement means that solutions are not simply a matter of technological innovation. Rather, effective copy protection technology requires a high level of agreement and implementation by both content providers and manufacturers of consumer electronics and computer products. This can be achieved by legislation, whereby certain types of devices are required to respond to a particular copy protection technology, or by negotiated cross-industry agreements.”²

Some commentators, particularly the Library Associations, express concern that the anticircumvention provisions will inhibit the ability of libraries and schools (as well as other institutions) to archive works protected by copyright. There is very little basis to this concern. For one thing, there is no reason why such institutions should not acquire archival copies – other than unsupported conjecture by such commentators, there is every reason to believe that publishers would make such copies available. Secondly, as technology develops, it very likely will provide for various levels of access to works and various kinds of permitted uses. Thus, free and flexible markets can develop for the benefit of users, publishers and society at large. Third, whether in an analog context or a digital context, no publisher is required to create or supply succeeding volumes or updates. The fears expressed that there will be a significant reduction in publishers keeping archival materials current has no basis in fact and is clearly contrary to publishers’ self interest. Fourth, the anecdotal complaints in this area are almost all contingent; they are put in terms of, for example, “little or no real assurance”, “if the library discontinues...”, “one can simply not be sure...”. This does not begin to provide a basis for a “determination that the prohibition has a substantial adverse effect”.

Some of the commentators take the position that DVDs should be a “class of copyrighted works” exempt from the application of Section 1201(a)(1)(A). This proposal seems not to contend with the fact that DVDs are not a “class of works” or even “works” within the meaning of the Copyright Law. DVDs are storage and playback media, something like recording tape and CDs. This problem is but one aspect of the larger definitional problem referred to in Time Warner’s original comments. It is also but one aspect of the overriding problem of the impossibility of limiting uses to non-infringing uses once an exemption is granted to any work or “class of works”.

² Technical Protection Measures: The Interaction of Technology, Law and Commercial Licenses by Dean S. Marks and Bruce H. Turnbull, *Journal of the Copyright Society of the U.S.A.*, Vol. 45 No. 4, 563, 567.

Perhaps the most basic and all-pervading misconception that infects most of the comments is the implicit view that the “problems” assertedly created for users are as real as those that copyright owners face from digitization. The facts are to the contrary.

The concerns expressed about users’ ability to make non-infringing uses of copyrighted works are not only dealt with in the DMCA but, very importantly to the point made here, they are purely speculative. Indeed, Section 1201(a)(1)(A) has not yet become effective. The dangers to copyright, on the other hand, are real and have already manifested themselves as in the DeCSS situation described in Time Warner’s original comments and referred to by many commentators. Napster is another example of a newly developed technology directed to destroying copyright.

Even these destructive technologies may pale before a new development announced in the Wall Street Journal for March 27, 2000. According to an article therein (page B1), “a new technology [called Gnutella] sweeping through cyberspace promises to unleash an entirely new wave of anarchy onto the Web, making it impossible for anyone to protect intellectual property online or shut down a rogue Web service”.

These very real dangers require that the protective provisions of the DMCA be interpreted broadly and generously in support of protection else they will not be able to serve their office of protecting copyright.

The view expressed in Time Warner’s original comments still appears accurate: there has been no showing that the users of any “class of works” are likely to be adversely affected in their ability to make non-infringing uses of those works by the coming into force of Section 1201(a)(1)(A). There is certainly no basis at this time to attempt to define such a “class of works” and any effort to do so should be postponed at least to the end of the 3-year period referred to in Section 1201(a)(1)(B) so that the provision of Section 1201(a)(1)(A) will have an opportunity to operate.

Respectfully yours,

The preceding is a **Reply** that is being submitted by:

Bernard R. Sorkin, Esq.
Senior Counsel
Time Warner Inc.
75 Rockefeller Plaza, 24th Floor
New York, NY 10019
Tele: (212) 484-8915
Fax: (212) 258-3006
e-mail: Bernard.Sorkin@twi.com

BRS:sib