

30 March 2000

I would like to thank you for this opportunity to comment on the provisions of §1201 of the Digital Millennium Copyright Act (DMCA). I write as a scholar and teacher who works in issues of computer ethics and policy. This note will address two points: first, issues surrounding the context in which the DMCA is to be interpreted, and second, a series of specific suggestions which I believe are warranted in its discussion.

1. It is my belief that the specific issues surrounding the DMCA's decryption regulations need to be understood in the broader context of developments in intellectual property law occasioned by the development of computers. I realize that it is customary in statutory interpretation to examine the "plain meaning" of statutory language, and secondarily, the legislative history behind that plain meaning. In the case of the DMCA, the legislative history makes it clear (a) that the bill will affect virtually all Americans – as Senator Ashcroft put it, "This measure will have as broad an impact on the American public as virtually any measure we will address" (S4887); (b) that the bill is intended to balance a number of divergent interests; and that (c) it is a constitutive part of the legislative intent of the Act that it may require revision (see, for example, Senator Ashcroft's comments at S4891). In its enactment of both a blanket ban on decryption and certain specified exceptions, the statutory language reflects these efforts at balancing. It is therefore necessary to see the extent to which the statutory language succeeds in fulfilling this legislative purpose.

Initial evidence that it does not comes from the case surrounding the DeCSS software for reading DVD's. In granting a preliminary injunction to the plaintiffs, the judge rejected completely the possibility that the program's "sole purpose" could be interoperability, simply because the program could also be used a Windows machine, for which DVD software was already available. Of course, *any* program written in a high-level language *can* be used on another machine for which that language is also available. Such a reading guts the interoperability exception, since the whole point of interoperability is that a program is already available on a different operating system; given the market share of *Windows*, that will likely be a *Windows* system. In other words, if the reasoning behind the injunction becomes the norm, then interoperability will be meaningless as a defense. It would be an ironic result indeed if the legislative branch were to reach this result at the same time that the Justice Department was pursuing an antitrust case against Microsoft. At any rate, this sort of result does not seem to reflect the legislative intent behind the statute – in particular, since Senator Ashcroft approvingly quoted his own, pro-consumer work in the *Sony* case about interoperability. He adds:

I want to make it clear that I did not come to Washington to vote for a bill that could be used to ban the next generation of recording equipment. I want to reassure consumers that nothing in the bill should be read to make it unlawful to produce and use the next generation of computers or VCRs or whatever future device will render one or the other of these familiar devices obsolete (S4896).

In view of the apparently growing discrepancy between statements of intent such as the one above, and the results of judicial readings of the statute, it seems necessary to review the entire context of these provisions, and to review them in light of general developments in copyright as it would apply to computers. These developments include:

A. Courts have generally established that making a copy of a copyrighted work in a computer's random access memory (RAM) is sufficiently "fixed" to invoke copyright protection. The implication seems to be that virtually any electronic access to copyrighted material constitutes making a copy of such material, even if that access is limited to downloading the contents of a webpage onto one's browser. Indeed, court decisions lend support to this interpretation. The situation is in this respect radically dissimilar to that previously faced users: reading a book does not necessarily entail making a copy.

B. Because of the broad expansion of the activities which would come under the purview of copyright law, an increasing burden of the “delicate balancing” (the term is a commonplace; see, for example, *Stewart v. Abend*, 495 US 207 at 228-230) of the rights of copyright owners and the public must be borne by “fair use” exemptions. “Fair use” is, of course, only determinable by *ad hoc* judicial determinations of fact. That the burden of protecting the rights of the public is to be shouldered by *ad hoc* determinations and not a legal principle should be disturbing to those who wish to see such rights protected - those rights cannot even be identified in advance!

C. The effect of the preceding developments is to subtly shift the “delicate balance” in favor of copyright owners by creating the presumption that accessing, viewing or reading copyrighted material is impermissible unless that access is either accompanied by a purchase or subsequently demonstrated to be exempted as fair. Regardless of the number of cases litigated under these developments, or the outcome of such litigation, this presumption can only create a chilling effect in the market of ideas, and create a climate in which members of the public are afraid to share information.

D. Even this shift in the “delicate balance” in favor of copyright owners is not enough for the copyright industry, as demonstrated by the end-run around the fair use provisions being attempted by efforts to legitimate the enforceability of shrink-wrap licenses under contract law. The net effect of the success of these efforts would be to undermine the “first sale” provisions of copyright law: surprised customers will discover that they did not “purchase,” but only “license” a copy of a computer program or recorded material, which means that they do not even own rights to that copy. Copyright owners will then be able to contractually control what few consumer protections remain under fair use doctrine, creating a situation where the “limited” monopoly contemplated by the copyright clause of the constitution becomes effectually unlimited at the explicit expense of the advancement of the *public* interested contemplated by the constitution.

2. Against this background, the review of the decryption provisions of the DMCA takes on a new light. Those provisions have to be seen as part of the DMCA’s delineation of statutorily defined fair uses: decryption is presumptively unfair. This presumption thus writes into explicit statute law a further expansion of the already expansive set of owners’ rights. While this particular expansion might seem innocuous if viewed in a vacuum, when viewed against the backdrop of the copyright industry’s overall efforts in intellectual property law, it seems both to further unbalance an already precariously unbalanced situation and to undermine the credibility of the pious assurances by the motion picture industry and others of the economic necessity of these provisions. The copyright industry cites its size as evidence of the need for its protection. This tactic is disingenuous, as such evidence of industry success could equally indicate the *lack* of need for protection: the copyright industry seems perfectly capable of success without it. Not only that, that the industry is pursuing its profit margin without regard for public interest makes it necessary to regard its assurances with deep suspicion.

Furthermore, neither the constitution nor copyright law recognizes the presumptive right of a given industry to its profit margin. If that profit margin sufficiently undermines the public interest, the industry must accept curtailment in deference to the public. Our society recognizes a spectrum of such curtailments, ranging from product liability law to prohibitions on child and prison labor. In the case of copyright, questions of unconscionability are unnecessary: the Constitution expressly recognizes the existence of copyright in order to promote the progress of the arts (Art. I, §8, cl. 8).

3. In view of the above, I have a number of specific suggestions:

A. Statutory language or guidelines for its interpretation need to *explicitly* affirm the applicability of fair use doctrine. As written and interpreted now, the statute disables judicial balancing of fair use issues. The language needs to be reviewed in order to restore some measure of the intent behind fair use. Endorsement of

fair use would also have the added benefit of allowing interpretation of copyright to change with technological developments, rather than writing into statutory law provisions which may soon be obsolete.

B. Provisions concerning the “sole” purpose of software being interoperability, etc. should be reviewed with extreme suspicion. If the existence of another program which does a similar thing, or of another way of achieving a similar result is sufficient to demonstrate that the “sole” purpose of the software is not interoperability (or other statutorily granted exemption), then, as the developing DeCSS case suggests, the exemption will mean very little. Statutory language should reflect some sort of understanding of reasonability or balancing, rather than exclusivity.

C. Banning decryption would fairly straightforwardly overturn a substantial portion of the well-established “first sale” doctrine. Apparently, according to the reading of the statute pushed by the MPAA and RIAA, buying the DVD is not enough to own a copy of it. One also has to buy a certain brand of computer, player, software, etc. Something as simple as changing geographic regions entails either decryption or a further hardware purpose. By analogy, if I purchase a book, I do not have to then purchase something else to read it in a different country. Why should digital media be different? In any event, if the effect of the decryption ban is to undermine “first sale” doctrine in this way, the ban should at the very least be viewed with deep suspicion, given the extent to which first sale doctrine is a settled part of copyright law.

D. The DMCA decryption provisions seem easily to come into conflict with issues of free expression. In this context, First Amendment issues should perhaps be seen as expressive of the public interest in the progress of the arts and sciences. For example, software which was written to decrypt a list of sites blocked by net site filters was removed from circulation on the grounds that it violated the decryption provisions of the DMCA. Insofar as (apparently) over 100,000 sites were blocked, and lists of blocked sites often include those with political (e.g., about abortion rights) or religious content, banning software which makes available a list of which sites are banned seems dangerously close to statutory restrictions on the most protected forms of free speech. Even if these restrictions do not rise to the level of unconstitutional restrictions on free expression, that the argument can even be made suggests the extent to which they attempt to override the public interest in the name of corporate profits.

In short, it seems that the decryption restrictions in the DMCA as written fail both to realize the statute’s legislative intent and to maintain the “delicate balancing” of copyright law. Rather, they serve to further expand an already unprecedented expansion of the rights of copyright owners at the expense of the American public. Again, I thank you for the opportunity to make these comments.

Sincerely,

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