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Reply comment

Concerning the Copyright Office's Rulemaking on Exemptions from Prohibition on Circumvention of Technological Measures that Control Access to Copyrighted Works.

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Computer Professionals for Social Responsibility is pleased to have the opportunity to submit this reply comment concerning the Copyright Office's Rulemaking on Exemptions from Prohibition on Circumvention of Technological Measures that Control Access to Copyrighted Works.

Four suggestions for clarifying Section 1201

We support and affirm the comments of the Electronic Frontier Foundation, the American Library Association and related organizations, the Association for Computing Machinery, the Media Laboratory at Massachusetts Institute of Technology, the National Association of Independent Schools, and the Computer & Communications Industry Association. We will respond to several other comments in this reply. In addition, we offer three additional suggestions for Copyright Office rulings, which could be positioned as clarifications of the law:

1. Section 1201's ban on the circumvention of technological measures should not be used to suppress the production of a competing or alternative compatible device.
2. The Section should not prevent users who have lawfully purchased or licensed the product from choosing a device or medium to view a work other than ones approved by the copyrighted work's vendor.
3. The Section should not prevent users who have lawfully purchased or licensed the product from accessing that product in new ways for their own innovative purposes.
4. The Section should not be used to suppress the use of material for criticism, comment, news reporting, teaching, scholarship, or research.

CPSR is a public-interest, non-profit, grassroots organization that was founded in 1983 and currently has over 1300 members among the computing and other professions in the United States. Our mission is to educate the public and policy-makers concerning the appropriate use and scope of computers and related technologies.

Our comments are relevant to question 12 of your inquiry concerning the impact of technological measures “on the ability of interested persons to engage in criticism, comment, news reporting, teaching, scholarship, or research,” and question 13 concerning the impact of technological measures “on the ability of interested persons to engage in noninfringing uses” of copyright works. The comments are also relevant in a more general sense to the questions in section D of your request, Impact on Criticism, Comment, News Reporting, Teaching, Scholarship, or Research, and particularly question 17 that asks how works “are being used in ways that do not constitute copyright infringement.”

Section 1201 cited by filmmakers and recording device manufacturers to suppress competition

In December 1999, programmers reverse-engineered the DVD (Digital Video Disk or Digital Versatile Disk) format and posted to the Internet some code called DeCSS that would allow developers to build devices that could retrieve DVD content. Since this case was discussed in detail by many comments submitted on the first round (notably the M.I.T. Media Lab and the Computer & Communications Industry Association), we will not repeat its whole history but only point out certain aspects that illustrate the dangers of misusing Section 1201.

We will argue that the suppression of reverse-engineered code is more likely to harm competition and innovation than the rights of copyright holders. We note especially that this invocation of Section 1201 is unfair not only to competitors, but to lawful users, whose right of fair use should allow them to play the DVD on any device. In place of a special exemption for playing DVDs on Linux, as requested by the Computer & Communications Industry Association, we offer more generally the first and second suggestions at the beginning of this comment.

Devices for making unauthorized videos from DVDs existed long before DeCSS, undermining the argument that its “primary purpose” was to facilitate unauthorized copying. Rather, the people who showed interest in the software were those developing new software to play DVDs on the Linux operating system, which is currently unsupported by any licensed DVD manufacturer.

Thus, reverse engineering, a classic technique of software development which is generally protected by law, was used in this case for exactly the purpose that is protected under Section 1201(f) of the DMCA: “to achieve interoperability of an independently developed computer program.” The courts unfortunately did not honor this exemption when upholding the claim in the DVD Copy Control Association’s complaint that the program “enables users to illegally pirate DVD videos.” The DVDCCA and other organizations representing filmmakers and recording device manufacturers have carried on a broad campaign since then to expunge the software from Internet sites worldwide.

Because the decryption program was implemented purely in software, it raises a basic conceptual problem with Section 1201. The “primary purpose” language has some meaning in relation to physical devices, because their application is usually fairly fixed. Software, however, is far more malleable; a technique defined for one application may prove equally useful in a completely different application. If manufacturers start to apply the “primary purpose” argument to software, the clause’s scope becomes arbitrarily large and a huge range of useful technologies can be prosecuted under it. While we have no particular language to recommend to the Copyright Office, given that the “primary purpose” clause is in the law, we hope both the Copyright Office and the courts seek solutions to this problem. We will take up the problem again in the next section of our comment.

Without public debate, manufacturers of new media and devices have decided to undermine the rights of first sale and fair use. For instance, Sony Computer Entertainment America’s comments

claim that “Access to copyrighted Playstation® games is permitted only through use of the access control coding in the PlayStation® console and the CD-ROM that embodies the videogame.” Along the same lines, the Motion Picture Association of America’s comments state, “Access controls embodied in the work itself also commonly function in tandem with the hardware used to access the work, so that a work may be made accessible on a specific machine, or a specified category of machines.” Aside from some unsubstantial claims that technological control measures serve customers (such as by preventing the sale of games in a country where the language used in the games is not widely spoken) Sony claims to need these measures to prevent games from being copied. In other words, they wish to avoid the burden of finding and bringing violators to court as regular publishers in traditional media must do.

We believe that the convenience of the Sony Corporation and motion picture studios—who have ample resources for tracking down and prosecuting copyright infringers the traditional way—should not be allowed to outweigh the damage caused by the effective abrogation of customers’ traditional rights, including the effects of such abrogation on innovative uses of artistic and information materials and on the availability of competing or compatible products.

Time Warner’s comments compare the circumvention of technological measures to stealing a book from a store. Leaving aside the difference between making a copy of a book and stealing a book, overcoming technological measures in the cases presented in this comment is more like choosing to underline passages in a book with a pencil. The law should not back up the insertion of digital techniques whose effect is equivalent to making it impossible for the customer to use a pencil on a work, or techniques whose effect is equivalent to forcing a customer to buy a particular stylus for the task, perhaps one that uses only a special ink that vanishes after a few hours. Historically, while strict licenses have been upheld for multiple site licenses purchased by large organizations, courts in cases involving mass-market software have ruled that users still maintain traditional rights such as first sale and fair use.

Emerging dangers that may involve Section 1201

Some recent legal cases, while they do not directly involve Section 1201, raise dangers that the Copyright Office may find it timely to address. It is all too likely that Section 1201 will be involved in such cases in the future, with the effects of suppressing comment and criticism of consumer products, or of punishing customers for exercising the traditional rights of fair use and first sale.

Several incidents involving legal threats (not all of which were actually pursued in court) involve a fairly frequent practice among advocates of free speech wishing to document arbitrariness and incompetence in software filters that claim to block computers from accessing Web sites inappropriate for children. Though software filters have been installed by numerous institutions such as public libraries and public schools, in addition to individual consumers, the actual sites being blocked are rarely known to any customers. The activities of the free speech advocates remedy that situation by publishing lists of blocked sites. A perusal of these lists demonstrate the value of the critics’ activity, due to the high incidence of incorrect and biased decisions found in software filtering products.

Sometimes the critics obtain the lists of blocked sites through reverse engineering. The endeavor of the free speech advocates is squarely in the public interest and falls cleanly into categories of news reporting, product reviews, and criticism.

(We will not comment any further on the clause concerning reverse engineering in Section 1201, because in this section of the comment we are not discussing the development of compatible

works. Similarly, we will not comment on the part of Section 1201 dealing with encryption, because that section was drawn up to protect computer science research in the field of encryption rather than the use of encryption for other ends.)

Rather than deal with questions by customers and external critics, some companies making software filters resort to various legal actions, often invoking copyright, to punish whistleblowers and suppress further distribution of the uncovered materials. We are concerned that copyright is being invoked on material that is not distributed for public view, but exists only as an internal database, and we are worried that Section 1201 may be used in the future as a weapon for suppressing information and debate on issues affecting consumers and the general public. In relation to the Copyright Office request's question 23 ("what criteria should be used in determining what is a 'class' of copyright works") we offer the brief reminder that publishing selected facts from a database, without copying the form or expression, is not subject to copyright.

Imagine that a company loses a lawsuit for a faulty product that caused deaths or severe damage, but manages to have the court records sealed as part of the settlement. Imagine further that they have to report some details about the case in an annual report. When the report is distributed through standard channels, an enraged shareholder can legally pass it to a reporter and the reporter can quote it. But in the future, a company may choose to email the report, lightly encrypted, and claim a violation of its "technological self-help protection measures" when the truth hits the newsstands. The Copyright Office can do a great deal to restore copyright law to its intent—that of protecting copyrights—by making the third and fourth rulings we asked for at the beginning of this comment.

The widely-publicized lawsuit by the Recording Industry Association of America against Napster does not involve Section 1201. But since the case involves technology used for infringement rather than the act of infringement, its implications are worth considering in relation to Section 1201.

Napster is simply a combination of a directory service (a kind of software distributed by such major corporations as Microsoft, Netscape, and Novell) and a file transfer protocol (a kind of software that was the first application ever invented on the Internet; even the World Wide Web is based on a HTTP, a file transfer protocol of moderate sophistication). A challenge to Napster, based simply on the proclivity of its users to breach copyright, is a challenge to the basic technologies on which the Internet is based. Almost any Internet protocol and product, new or old, could be used for copyright violations; here again the "primary purpose" language of Section 1201 presents dangers to innovation.

We do not challenge the doctrine that copyright should apply to online works, just as it has applied to works in traditional media. Nor do we deny that widespread copying takes place, online as elsewhere. But we object to the misuse of copyright law to remove traditional consumer and research rights. If not reined in by the Copyright Office and other branches of government, the cases discussed in this comment could lead to a safe haven for exploitative hoarders of information and culture.