

Peter Watkins
Washington, DC
30 March 2000

David O. Carson
General Counsel
Copyright GC/I&R
Library of Congress

Dear Mr Carson,

I appreciate the opportunity to reply to comments on the rulemaking process that the Copyright Office is engaged in regarding 17 U.S.C. 1201.

In reading the code and first-round comments, I am struck by the importance of new terminology, especially the meaning of the word **Access@**. Where a reasonable person might expect legislation to prevent unauthorized duplication of copyrighted materials, section 1201 instead speaks of **Access@**. The value of **Access@** is an important consideration for the Copyright Office in light of 1201(a)(1)(C) and comments submitted earlier on this rulemaking process. One of my colleagues reasons that this language was likely chosen to better accommodate the needs of broadcasters. And in the case of live broadcasts, **Access@** does seem very important. Consider sporting events: cable television providers are likely much more concerned about individuals gaining unauthorized access to a live boxing match broadcast than individuals making unauthorized video recordings of the match that could not be distributed until after the last bell. Broadcasters want protection for their properties, and this means protecting real-time **Access@**. In the case of live, metered broadcasts, unauthorized **Access@** can mean lost revenue.

Recently the Motion Picture Association of America has initiated legal proceedings against individuals accused of violating 17 U.S.C. 1201 as regards circumvention of technological **Access@** control mechanisms. I am writing of course about the MPAA's legal battles against programmers who wrote computer software (known as **ADeCSS@**) so that they might view DVD movies on their computer systems, which had the (undeniably legal) physical hardware to make such viewing possible. These individuals were not attempting to access time-sensitive, paid subscription broadcasts. They stand accused of trying to access copyrighted materials that they have legally obtained copies of. Yet both in the courts and in comments submitted to your office, the MPAA takes the very aggressive stance that such activity should be prohibited.

In his comments on this rulemaking phase, Mr Attaway of the MPAA preferred to compare DVD video recordings to software products (rather than more traditional media like books or even VHS video recordings). Let us consider that comparison. It is certainly true that many software products feature access control mechanisms. For instance, the software I am now using to write this letter requires a license key in order for me to use the product. This key prevents someone from simply copying the CD-ROM on which the program was distributed, and also makes it easier for the software vendor to track piracy, as each CD-ROM has its own license key. These access controls serve a useful, legitimate purpose: they help prevent unauthorized use and piracy, while allowing any authorized user to enjoy the copyrighted work without additional, arbitrary constraints. The access controls that are built into the MPAA's DVD video recording system are completely incapable of preventing unauthorized use and piracy. What kind of control mechanism is that? The defendants in the MPAA legal proceedings are not accused of stealing or copying DVD's; they are simply accused of circumventing access controls on DVD's they paid for. I encourage the Copyright Office to carefully weigh the meaning of the word effectively in 17 U.S.C. 1201(a)(1)(A). In order for access controls to be given the support of law, they should be effective at protecting the copyright holder's rights, and should not hamper noninfringing use of the protected media.

Surely our Congress did not intend for section 1201 to forbid the use of legally purchased DVD video recordings! The purpose of our copyright law, after all, is the protection of copyright holders against violations of their rights. Section 1201 should not be construed as allowing copyright holders to devise arbitrary access controls that amount to de facto privilege to create their own legally binding definitions of copyright and infringement. No sensible interpretation of Title 17 would allow a copyright holder to arbitrarily deny access to a paying customer. But that is exactly what the MPAA, Time Warner, and others are arguing: I may buy a DVD or borrow one from a library, but if I attempted to watch the DVD on my computer, then my use would be unauthorized in their eyes. Why? Because I am not able to use officially sanctioned software. The test that the MPAA and Time Warner apply in this case has nothing to do with any money or other consideration they may have received from me or the library, nor what I will access. Both parties would surely deem my use authorized if they believed I intended to use an officially sanctioned computer program or hardware device. This is as absurd as a book publisher declaring that an individual is only allowed to read the book if using the proper brand of light bulb, and illustrates the danger of an overly broad interpretation of 1201(a)(1)(A).

In its comments, Time Warner suggests that to access a copyrighted work, I should in fact be able to borrow a copy from a library. Accordingly, I encourage the Copyright Office to carefully consider 1201(a)(1)(B). Clearly the MPAA and the consumer

electronics industry want to make the DVD medium the preferred format for video recordings, supplanting the aging VHS video cassette standard. It is marketed as the video recording industry's Compact Disc. DVD has already achieved remarkable market acceptance, and its success is expected to continue. This means we will likely see DVD racks in our libraries, offering video recordings in what is a more space-efficient, high-quality, durable medium than the VHS video cassettes that libraries currently offer. 1201(a)(1)(B) clearly, and rightfully, gives the Copyright Office the authority to ensure that such widely accepted, de facto standards should not be subject to the circumvention rules suggested by the MPAA's reading of 1201(a)(1)(A). In the case of the DVD medium, if we are to accept the MPAA's arguments, I could purchase an \$80 hardware device for my computer and borrow a shelf full of DVD's from a library: I would not be allowed to play a single DVD unless I am allowed to circumvent the arbitrary access control mechanism used on the DVD. Furthermore, Time Warner's assertion that the CSS encryption used in DVD's serves to prevent unauthorized digital copying and redistribution is blatantly false; artificially inflated media prices prevent those abuses. Their callous misrepresentation of the facts only serves to illustrate why publishers should not be able to implement arbitrary access controls that enjoy the full support of federal law.

Please consider 1201(a)(1)(C)(iv) (the effect of circumvention of technological measures on the market for or value of copyrighted works). The DeCSS DVD playback software is an excellent example of technology that circumvents an arbitrary access control mechanism but in no way diminishes the value of the DVD recordings themselves. 1201(a)(1)(C) suggests that economic damage to the copyright holder may be taken into consideration. In that light, a device that allows a unauthorized user to view a live boxing match without paying seems a good example of the sort of technology that 1201(a)(1)(A) seeks to ban (though I do have some worries about even that scenario vis-a-vis 1201(a)(1)(C)(iii), as the National Association Independent Schools also observed in its comments), but reverse-engineered playback devices and software for persistent media like DVD's are not an example of what Congress had in mind.

I commend Congress for granting the Copyright Office the authority to ensure that sensible rules are developed that balance the rights of the copyright holders with the rights of the public, to ensure that the best intentions of section 1201 are justly enforced -- especially 1201(a)(1)(B) and the effectiveness test in 1201(a)(1)(A). I thank you for giving me the opportunity to comment on this important rulemaking process.

Sincerely,

Peter Watkins