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Re: Notice of Inquiry under Section 1201(a)(1) of the Copyright Act on Possible Exemptions to the Prohibition against Circumvention of Technological Measures that Control Access to Copyrighted Works (Docket RM 99-7, 64 Fed. Reg. 66139 (Nov. 24, 1999); Docket RM 99-7B, 65 Fed. Reg. 14505 (March 17, 2000))

-- Reply Comments

Dear Mr. Carson:

Sony Computer Entertainment America, Inc. ("SCEA") submits these reply comments in the current proceeding concerning circumvention of access control technologies employed by copyright owners. We have not sought to reply to all of the comments you have received in the initial round but only to some that we believe require specific response from us.

Burden of Persuasion

Several commentators would have the Librarian place the burden of persuasion on the opponents of any proposed further exemption to Section 1201(a)(1)(A). Those commentators have it exactly wrong. The legislative history makes plain that the proponents of an exemption must present evidence sufficient to show that, absent such an exemption, Section 1201(a)(1)(A) would substantially adversely affect their ability to make noninfringing uses of specific classes of copyrighted matter.[1]

Congress has *not* charged the Librarian to determine a negative, i.e., whether the ability to make noninfringing uses is *un*affected; rather, the clear Congressional mandate is to determine whether that ability is "adversely affected" by the protection provided under Section 1201(a)(1)(A).

The DVD/DeCSS Controversy

The degree to which the commentators' concern focuses on the issue of DVD encryption, and specifically the efforts of the Motion Picture Association of America to curb the distribution of the DeCSS DVD decryption utility, is striking. But the DeCSS controversy, based as it is on the application of Section 1201(a)(2)'s prohibition on unauthorized offering of *products* that circumvent technological access control measures, is outside the scope of this rulemaking, whose purpose is to explore the necessity of exceptions to the Section 1201(a)(1) prohibition on the *act* of circumventing such measures.

If the DeCSS dispute is relevant to this rulemaking, however, its relevance appears to us to lie in the fact that the overall effect of CSS, like that of the access-control technologies employed by SCEA, has been to enable producers of copyrighted works to make them available to consumers much more widely and rapidly than would have been possible

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[1] The Section 1201(a) prohibition "is *presumed* to apply to any and all kinds of works." H.R. Rep. No. 105-551, pt. 2 at 37 (1998) (emphasis added). The burden is clearly to be placed on the advocates of each proposed exemption: "If the rulemaking has produced insufficient evidence to determine whether there have been adverse impacts with respect to particular classes of copyrighted materials, the circumvention prohibition should go into effect with respect to those classes." *Id.* at 38.

The rulemaking proceeding, furthermore, "should focus on "distinct, verifiable, and measurable impacts [and] should not be based on *de minimis* impacts" on noninfringing uses. *Id.* at 37. While anticipated adverse impacts may also be considered, a determination should be based on such projections "only in extraordinary circumstances in which the evidence of likelihood of future adverse impact during that time period is highly specific, strong and persuasive." Staff of House Committee on the Judiciary, 105th Cong., Section-by-Section Analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4, 1998, at 6. We submit that none of the comments submitted demonstrate such distinct, verifiable, and measurable impacts, or such extraordinary circumstances.

otherwise. Application of this particular access-control technology to DVDs, far from adversely affecting the public's ability to make lawful use of works on DVDs, has been instrumental in making those works available in the first instance. As the United States District Court for the Southern District of New York stated recently, "CSS has facilitated enormous growth in the use of DVDs for the distribution of copyrighted movies to consumers." *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 2d 211 (S.D.N.Y. 2000).

Classes of Works

Several commentators proposed exemptions for "classes" of works that are enormously broad and egregiously ill-defined, characterized as lawful uses of materials commonly used by libraries and their patrons, or all fair uses, which are in fact not classes of works at all. The number and variety of works which would fall outside Section 1201(a)(1)(A) under such exceptions is potentially infinite, and bears no resemblance to the "narrow and focused subsets" of the Section 102 categories which Congress intended should be considered in this rulemaking.[2]

Even as to properly delimited classes of works, we share the concern, expressed aptly by Time Warner Inc. in its initial comments, that there is no workable way of defining them for purposes of exemption. It would almost certainly prove impossible to limit such permitted circumventions to non-infringing uses, let alone to those uses that, although infringing, might later be exculpated as fair uses.[3]

It would, furthermore, be problematic in the extreme to effectively restrict the scope of such a permitted circumvention to the required "narrow and focused subset." Rather, the likelihood is that such an exemption in practice would spill over to encompass the entire Section 102 "category of works of authorship" within which the "class of works" fell. This spillover effect underscores how crucial it is that the proponents of any exemption be held strictly to their proof of its necessity.

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[2] H.R. Rep. No. 105-551, pt. 2 at 38.

[3] In this connection, we call to your attention that the scope of both Section 1201(a)(1) of the statute and the Copyright Office Notice of Inquiry pursuant to that provision is limited to *noninfringing uses.* Although under Section 107 fair use can be a defense that exculpates an infringement, no fair use issue arises until there has been a determination that the defendant has made an *infringing use*.

Moreover, it hardly seems feasible (i.e., possible to administer without extensive litigation) to provide exemptions for all infringing uses that under a determination at some later point might possibly be exculpated under the complex calculus of fact-intensive factors under Section 107.

Fair Use and Research Exemptions

SCEA as a responsible member of the copyright community is vitally concerned with the vigor of the fair use doctrine. But we are given great concern by several of the initial comments, including those of the National Association of Independent Schools, the Association of American Universities et al., and the Library Associations, which urge a notion of some sort of necessity for a general exemption for fair use purposes.

As we've already noted, such a proposal is out of all proportion to the question on which Congress has directed the Office to make a recommendation to the Librarian of Congress, namely: whether users are (or are likely to be, in the period 2000-2003) adversely affected in their ability to make noninfringing uses of a particular class of works. The limitless character of such an exemption would effectively eviscerate the statute.

Similarly, we believe that the claimed apprehensions of several commentators as to the continued ability to perform legitimate reverse engineering and encryption research under the statute rests on a misunderstanding or on a lack of familiarity with the clear exemptions that Section 1201(f) and (g) already provide for such activities. Alternatively, perhaps some of the comments may be founded on a reflexive opposition to the rights of content owners under the Copyright Act and Article I, Section 8 of the Constitution, rather than on a considered assessment of any actual or foreseeable adverse effect of Section 1201(a)(1).

Archiving and Preservation

Some commentators, including the Association of American Universities et al. and the Library Associations, have urged that an exception be made for libraries and similar institutions for purposes of archiving and preservation. A letter from staff personnel within the Library of Congress has also expressed concern that such a measure could eventually prove necessary.[4]

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[4] We believe the views in the letter have been presented in good faith and are entitled to consideration as the individual opinions of distinguished specialists in the library profession. However, we have some concern as to the appropriateness of submissions in this proceeding from entities under the direct supervision of the Librarian of Congress, who is charged by law with the responsibility to make an independent examination of the issues and an independent determination in this statutory rulemaking proceeding.

Such a submission – which, again, we are confident was made in all good faith – is unfortunate, and no more appropriate than would be a submission *sua sponte* of views of the Copyright Office (also of course an entity within the Library) to the Librarian prejudging the issues in this proceeding prior to the Office's receipt of all comments and hearings testimony.

SCEA recognizes the concern of some commentators that the preservation of our cultural heritage, as embodied in digital media, could become problematic when such media begin to wear out, or the equipment needed to access them is no longer readily available. However, the necessity for such an exemption to Section 1201(a) would arise, if ever, only after the passage of some years. Since Section 1201(a)(1)(C) specifically mandates that the Librarian of Congress is to conduct additional rulemakings every three years after this initial rulemaking, we believe consideration of such an exemption is properly deferred until at least the next round.

Participation in Hearings

The initial round of comments evidences widespread confusion and misunderstanding among your respondents as to the technology, the marketplace, the Digital Millennium Copyright Act and fundamental copyright principles. SCEA believes it can contribute clarification in these matters, and therefore would very much appreciate the opportunity to testify at the hearings to be held by the Copyright Office on Friday, May 19, 2000 at Stanford University.

We will be submitting our formal request to testify, in compliance with the procedure you have announced in your most recent Notice in this matter, at 65 Fed. Reg. 14506.

Conclusions

Our review of the initial comments in this proceeding confirms concerns we expressed to you in our own initial submission of February 17, 2000:

1. An unimpaired Section 1201 is necessary if the United States is to fulfill its obligations under Article 11 of the WIPO Copyright Treaty and Article 18 of the WIPO Performances and Phonograms Treaty.

2. Adequate and effective access control measures are indispensable tools for SCEA and other copyright owners in combating counterfeiting and other piracy.

3. These measures are crucial to our compliance with the requirements of trademark law that we control the nature and quality of the goods and services we produce and market under our trademarks.

4. Diluting the adequacy and effectiveness of these measures would impair our ability to ensure that even legitimately produced videogames are distributed only in the areas for which they are properly licensed, rather than to permit distribution that produces only dissatisfied customers as, for example, where games in one language are diverted to markets where the consumers don't speak that language.

5. When the Register's recommendations and the Librarian's determinations are made in the current proceeding, the independent judgments of the Register and the Librarian should not be foreclosed by any recommendations to be made in the study of related issues under Section 1201(g)(5)(B) and (C), a study based on responses that will be more than a year old (but embracing fast-moving technologies).

6. The need of SCEA for protection against circumvention activities proscribed by Section 1201 will be even greater with the advent of our PlayStation® 2 line of products and services in the United States in the fall, a major marketing effort of SCEA in the three-year period running through 2003.

7. Many of the concerns expressed by those advocating wide-ranging exemptions in the initial round of comments are met by exemptions and other provisions already in the statute.

8. The burden of proving a necessity for further exemptions under Section 1201(a)(1) is on those who seek them. In our view, that burden has not been met.

In these reply comments we have sought not to repeat the comments made in our letter of February 17, 2000 in the initial round of this proceeding. Since the views we expressed in our earlier comments provide context for our present letter, however, we attach a copy of our February 17 letter for your convenience.

SCEA thanks you for your consideration of our views and the opportunity to present them. We will of course be pleased to respond to any further inquiries you may have in this most important matter.

Very truly yours,

Riley R. Russell
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Sony Computer Entertainment America, Inc.