



MOTION PICTURE ASSOCIATION

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Re: Rulemaking on Exemptions from Prohibition
on Circumvention of Technological
Measures that Control Access to Copyrighted
Works
Docket No. RM 99-7

Dear Mr. Carson:

The Motion Picture Association of America ("MPAA") appreciates the further opportunity to participate in the Copyright Office's rulemaking proceeding concerning 17 U.S.C. § 1201(a)(1) by submitting this reply to the initial comments received to date. Upon review of the numerous comments received on the subject, it appears that the chief concern with respect to protecting encrypted DVD movies under section 1201(a)(1) is the alleged need to allow such audiovisual works to be played utilizing devices designed to run under new and emerging computer operating systems. We also note that a considerable number of the comments received appear to arise from a misunderstanding of the issues presented in a recent federal lawsuit (to which MPAA member companies are parties plaintiffs), *Universal City Studios v. Reimerdes, et al.*, No. 00 Civ. 277 (S.D.N.Y.), which is still pending in the United States District Court for the Southern District of

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New York. It is important to emphasize from the outset that the *Reimerdes* case was brought pursuant to section 1201(a)(2) of the Copyright Act — the prohibition against “trafficking” in circumvention devices by third parties — and that this rulemaking proceeding is confined to assessing the potential impact of the conduct prohibitions in section 1201(a)(1)(A) as to certain categories of copyrighted works. Thus, this proceeding does not impact, in any way, the results in the *Reimerdes* case to date, nor can it impact the ultimate outcome of that case.

Although we are confident that the Copyright Office’s rulemaking proceedings were — and, rightfully, should have been — informed by policy considerations other than, in effect, to appeal the outcome of a federal lawsuit, a brief clarification of the issues raised in the *Reimerdes* case is necessary. Thus, this reply is limited to the comments related to the *Reimerdes* case, and the concerns regarding use of encrypted DVDs on multiple computer operating system. The MPAA will respond to other issues raised in the comments in a separate reply to be submitted by the International Intellectual Property Alliance.

In *Reimerdes*, the defendants were trafficking in a device that was proven to have one purpose — to circumvent the proprietary Contents Scrambling System (“CSS”) that protects the MPAA members’ motion pictures delivered on DVDs. Although the *Reimerdes* defendants argued that the device at issue — referred to as “DeCSS” — was intended for use in playing DVDs under the Linux operating system, the plaintiffs established that the *Reimerdes* defendants’ proliferation of DeCSS was not part of any development effort for a Linux-based DVD player, nor was the functioning of DeCSS limited to mere playback of DVD movie content. To the contrary, DeCSS also was used — and touted as such by at least one of the *Reimerdes* defendants — as a means to copy plaintiffs’ movies delivered on DVDs. In addition, the *Reimerdes* court expressly found that, even if DeCSS was intended solely to permit playback of DVDs on Linux machines, the mere playing without a licensed CSS “player key” would, nonetheless, constitute an unauthorized circumvention in violation of the DMCA. Further, in granting the plaintiffs’ request for a preliminary injunction against further dissemination of DeCSS, the court found no evidence that the defendants were engaged in permissible acts of reverse engineering or encryption research (both of which are already subjects of specific exemptions to the DMCA anti-circumvention provisions).

It has been erroneously suggested in some of the comments that the CSS licensing scheme may foster monopolistic or anti-competitive practices; presumably, to the detriment of developers of software for operating systems such as Linux. To the contrary, CSS is licensed on a royalty-free, non-discriminatory basis, subject to a one-time administration fee; and licenses are made available to any person wishing to develop a DVD player who agrees to abide by the terms of such license. CSS licenses are available on identical terms for developers of DVD players to run under any computer operating system or on any hardware platform.

Importantly, much of the argument concerning the lack of availability of a Linux-based DVD player has been mooted by the fact that a CSS-licensed developer of DVD playback devices recently announced that it will support the Linux operating system. In fact, the developer demonstrated its Linux DVD playback capability at the LinuxWorld Conference & Expo held in February 2000 in New York City. Thus, the assertions that users of the Linux operating system

who wish to lawfully view DVD movies will be substantially adversely affected by the prohibitions contemplated in section 1201(a)(1) are simply untenable, given this widespread dissemination of the news that a licensed Linux-based DVD player soon will be commercially available. To the extent that there are other users of nascent operating systems who could claim adverse impact, the foregoing example of the software industry's response to the growing demand for Linux-compatible systems and devices — as the user base for that operating system has expanded — provides ample evidence that the market will keep pace with demand, without making it necessary to endanger the rights of copyright owners who choose to deliver their works on digital media.

Further, the vast majority of the comments reacting to the *Reimerdes* case suggest that the primary justification for exempting motion pictures delivered on DVDs from 17 U.S.C. § 1201(a)(1)'s prohibition is to allow the owner of a DVD movie to play it on any hardware platform of his or her choosing. However, the suggestion that the entire universe of copyrighted motion pictures delivered in encrypted form on DVDs should be exempted from section 1201(a)(1) is entirely inconsistent with the Copyright Office's directive in these proceedings to identify narrow, limited categories of certain works for which non-infringing uses could be substantially adversely affected. Viewed in their most simple terms, the objections to granting protection to encrypted DVD movies is not directed to a "particular class of works" as Congress intended; rather, it is directed to *all* works of any "class" delivered on a particular digital delivery medium. Indeed, exempting the entire body of motion picture works from protection based on the medium through which they are delivered would be contrary to the whole purpose of circumvention protection, and to the congressional mandate that such protection is necessary to bring United States copyright law into the digital age.

It is important to keep in mind that the existence of legal protection prohibiting circumvention of access controls, in fact, has enhanced the availability of copyrighted works. Ensuring federal legal protection for technological measures that effectively protect copyrighted works was crucial to many MPAA member companies before they released their motion pictures — from film classics to recent blockbusters — on DVDs. Indeed, the legal protection offered by CSS was a critical factor in the highly successful launch of DVDs and, therefore, made it possible for consumers to enjoy an ever-expanding catalog of copyrighted motion pictures in high-quality digital format.

Moreover, MPAA member companies currently still are releasing their content for the home video market on conventional VHS analog tape, without encryption or scrambling. There has been no showing in connection with any of the comments received by the Copyright Office to date that the availability of copyrighted movie content on alternate formats — without technological protection to control access — will be diminished in the near future. Congress made clear in directing this study that the Copyright Office should consider mitigating factors, such as whether a work for which the copyright owner has instituted a technological control measure is also available in formats that are not subject to such protections. Indeed, Congress noted that "the availability without restriction in the latter format may alleviate any adverse effect that would otherwise result from the technological controls utilized in the electronic format." House Manager's Report, at 7. The fact that movies are still released in formats not subject to

technological protections to control access should end the inquiry into whether movies delivered on DVDs, with necessary access control technology for that medium, should be exempted from protection under the DMCA.

In conducting this rulemaking proceeding, the Copyright Office also correctly emphasized Congress's directive that "mere inconveniences, or individual cases . . . do not rise to the level of a substantial adverse impact." (House Manager's Report, at 6.) In this regard, it bears noting that use of the Microsoft Windows and Macintosh operating systems — the two primary operating systems for which software-based DVD players are designed — is ubiquitous. By definition then, any "adverse impact" arising from the unavailability of DVD players running under lesser used operating systems is not substantial. Moreover, any purported inconvenience associated with a consumer's choice to use the Linux operating system has been effectively ameliorated, as explained above, by the fact that players for Linux have been licensed. Although there may be residual occurrences of isolated, individual preferences to use more obscure computer operating systems, any such inconveniences cannot rise to the level of substantiality contemplated by the Copyright Office.

Just as recent developments in the Linux arena demonstrate, there is no question that market forces always will ensure that the development of consumer technology and devices keeps pace with content delivery formats. This innovation is beneficial and desirable, and provides an appropriate complement to Congress's determination that United States copyright law must be brought into the digital age by providing strong legal protections for the tools that copyright owners utilize to prevent unauthorized access to their copyrighted works in digital formats. Such protection serves to ensure that copyright owners will be encouraged to make their works available to the public on digital media without the substantial risk of exposing the entire body of motion pictures released on DVDs to unfettered access, let alone copying, in the digital domain.

For the foregoing reasons, the MPAA is of the view that there has been no showing that non-infringing uses of certain classes of works — in particular, the entire universe of motion pictures delivered by the MPAA's members on DVDs — are, or are likely to be, substantially adversely affected by the prohibition in 17 U.S.C. § 1201(a) against circumventing "access control" measures put in place by copyright owners. Thus, there is no justification for delaying the October 28, 2000 effective date for the prohibition as to movies delivered on DVDs.

Again, the MPAA appreciates this opportunity to provide its perspective on this important issue. We stand ready to assist the Copyright Office further, in any way it desires, as it prepares its recommendations.

Respectfully submitted,
THE MOTION PICTURE ASSOCIATION OF
AMERICA, INC.

BY: _____

