

Reply Comments On Prohibiting Circumvention of Technological Measures that Limit Access to Copyrighted Works

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1 Introduction

I filed my initial comments in this proceeding on February 15, 2000 and they are available at <<http://lcweb.loc.gov/copyright/1201/comments/203.pdf>>. Here I shall respond in particular to the comments of Time Warner, Inc,¹, The Motion Picture Association of America,² and Sony Computer Entertainment America, Inc.³and in general to the multitude of comments relating to the DVD CSS technology and the substantial number of comments that suggested that all classes of works be exempted from the application of the anti-circumvention provisions of 17 U.S.C. § 102(a)(1).

First, however, I want to retract a statement that I made in my original comments.

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¹<<http://lcweb.loc.gov/copyright/1201/comments/043.pdf>>.

²<<http://lcweb.loc.gov/copyright/1201/comments/209.pdf>>

³<<http://lcweb.loc.gov/copyright/1201/comments/190.pdf>>

2 § 1201(a) Applies Only to the Original Acquisition of a Copy of a Work

In my initial comments I said:

It should be noted that while the Copyright Act itself regulates the *copying* of works protected by copyright, the technological measures that are not to be circumvented according to the provisions of 17 U.S.C. § 1201(a)(1)(A) regulate *access* to works that are protected by copyright. Now “access” clearly does not mean “copying,” but rather refers to “reading” copyrighted works. Thus, what that section really says is that no one shall circumvent a technological measure that effectively controls the ability to read a copyrighted work. And this in turn could lead to some rather strange situations.⁴

Although I am still convinced that “access” does not simply mean “copying,” I am now equally convinced that “access” cannot reasonably be construed as meaning “reading.” To read “access” as meaning “reading,” in the way that I did, will inevitably lead to the sort of confusion that I expressed, but did not even try to resolve, in Section 1.2 of my initial comments, and to even more preposterous conclusions: for example, under that reading, it would be a crime for you to disable the technological measures that would otherwise keep you from reading an electronic book that you had purchased and installed on your computer before you upgraded it by adding a more powerful chip.

The basic prohibition of 17 U.S.C. § 1201(a)(1) reads as follows;

⁴ P. Junger, “Comments On Circumvention of Technological Measures That Limit Access to Uncopyrighted Materials in Copyrighted Works” (hereinafter “*Junger Initial Comments*”) at page 3 [footnote omitted.].

The provisions of 17 U.S.C. § 1201(a) that give rise to this problem are as follows:

- (A) [T]o “circumvent a technological measure” means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner; and (B) a technological measure “effectively controls access to a work” if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.

17 U.S.C. 1201(a)(3).

No person shall circumvent a technological measure that effectively controls access to a work protected under this title.⁵

and many of those who submitted comments obviously fear—and the members of the Motion Picture Association of America (the “MPAA”) and some other “content suppliers” obviously hope—that the courts will read this, as I initially did, as forbidding the owner of a copy of a copyrighted work from reading it, or from viewing it, or from listening to it, if that requires the disabling of some technical measure without the authority of the copyright owner.⁶ There is a basic, though often overlooked distinction, in the Copyright Act between the intangible work⁷ that is protected by copyright and the tangible, material copies⁸ of the work. Keeping this distinction in mind, the anti-circumvention provisions of 17 U.S.C. § 1201(a) must be construed as applying only to getting access to the *work* itself in order to make a copy of it, not to gaining access to a copy that is already in one’s lawful possession.

Now at first glance this distinction may seem quite odd because, in the old days before the Internet, the only way that one could get a copy of a book was to buy one, or steal one, from the publisher or a book store. Today, however, if there is a copy of a digital version of that work sitting on a server on the Internet, one can simply make oneself a copy without either paying for the copy or stealing anything tangible like a book. Or, at least, one can

⁵See *supra* Note 4 for the statutory definitions of “to circumvent a technological measure” and “effectively controls access to a work.”

⁶Note that most, if not all, of the problem disappears if the initial sale of a copy of the work is construed as carrying with it the authority of the copyright owner to circumvent any technological measure that prevents one from reading or viewing or listening to the contents of the copy of the work.

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Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

17 U.S.C. § 102(a).

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“Copies” are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

17 U.S.C. § 101

download a copy of the work for oneself if it is not protected by a password, or encryption, or some similar technology.

17 U.S.C. § 1201(a)(1) forbids the circumvention of such a technological measure in order to get access to a work so as to download it, but it does not forbid one's circumventing a technological measure—even the same technological measure—to get access to the contents of a copy of the work that is already in one's lawful possession.

To read this provision the way I originally read it leads to the absurd result of holding that Congress intended to make it a crime for you to circumvent a technological measure that would prevent you from reading, or viewing, or listening to your own lawfully purchased copy of a literary work, or a motion picture, or a sound recording.

To read 17 U.S.C. § 1201(a)(1) as forbidding only the circumvention of technical measures that prevent the making of a copy by downloading the work from the Internet, or by some similar means, would also explain why there are no fair use or other exemptions to 17 U.S.C. 1201(a)(2),⁹ which forbids the manufacture of any technology that is primarily intended to circumvent a technical measure whose circumvention is forbidden by § 1201(a)(1), while there are extensive exemptions from the coverage of § 1201(b), which forbids the manufacture of technologies that are intended to circumvent other technological measures.¹⁰

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No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that -

- (A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;
- (B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or
- (C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.

¹⁰It is not clear what § 1201(b) forbids, but fortunately that question need not be decided, or even discussed, here.

If this understanding of the coverage of 17 U.S.C. § 1201(a) is correct, then there is no need to grant an exemption for the circumvention of technological measures by a user who is merely attempting to access the contents of a copy of a work that he owns.

On the other hand, if the courts should, as they might, adopt my original reading, then an exemption would seem to be necessary for such cases to allow the owners of works protected by copyright to read, view, listen to, and make fair use of the copies that they own.

I would suggest therefore that an exemption be granted for the class of works that are subject to technical measures that both prevent access to the work and that prevent the owner of a copy of the work from reading, viewing, listening to, or making fair use of the contents of that copy. Such an exemption might allow some persons to legally circumvent a technical measure in order to gain access to a work when they could not otherwise do so, but, as the Comment of the Library Associations¹¹ makes clear, the most destructive technologies are not those that restrict access to a work, but rather those that restrict the use that is made of a lawfully acquired copy. To the extent that the two types of restriction cannot be separated, classes of works subject to dual restrictions should obviously be exempted from the anti-circumvention provisions.

2.1 Technology v. Technology

Modern computer technology and the development of the Internet and the World Wide Web have created new efficient means for producing and distributing copies of works of authorship. Unfortunately, many traditional content producers, although willing to receive the benefit of these new technologies for themselves, are extremely reluctant to pass on the benefits, including the cost savings, to the public,

While in the past, publishers and other content producers relied on the protection of the copyright laws to keep others from copying their works and accepted the fact that they could not control the use that purchasers made of copies of the work after the first sale nor restrain others from making “fair use” copying of the work, today the content providers often attempt to regulate by technological means the use that is made of copies after they have been sold to their end-users. In some cases these may even amount

¹¹ <<http://lcweb.loc.gov/copyright/1201/comments/162.pdf>>.

to illegal restraints on trade. If end-users develop technological countermeasures they should be applauded, not criminalized. Certainly the anti-circumvention provisions of 17 U.S.C. § 1201(a)(1) should not be construed as making it a crime to use such countermeasures, but rather should be limited to the protection of technical measures that prevent actual infringement of a copyright.

2.2 The Need for Exemptions

Even technological means of preventing infringement are likely also to prevent fair use of copyrighted works and prevent access to materials that are not protected by copyright. Thus, as the Comments of the Library Associations¹² amply demonstrate there are many classes of works, especially those where the copyright is “thin,” that should be exempted from the anti-circumvention provisions relating to the access to copyrighted works. Such exemptions do not give anyone the right to actually access the works; all they do is *not* make it a crime to try to access them despite the technological measures that restrict lawful access.

3 My Responses to Particular Comments

It is surprising how few comments there were opposing the granting of broad exemptions, or of any exemptions, to the anti-circumvention provisions of 17 U.S.C. § 1201(a)(1) and how little content those few comments contained, especially when compared with the extensive and fact-filled Comments of the Library Associations.

Perhaps this silence represents a recognition that exemptions should be granted, or at least that there are no strong arguments to be made against their granting. More likely it is simply a consequence of arrogance.

3.1 The Time Warner Comments

Time Warner, one of the largest publishing conglomerates in the world, which has now merged with AOL, the largest Internet service provider, makes the remarkable argument that “digitization . . . poses grave dangers to copyright and to all of the businesses and individuals whose livelihood depends on

¹²*supra* Note 11.

copyright . . . because digitization makes it possible to reproduce copyrighted works in unlimited quantities with no degradation of quality and to transmit copyrighted works all over the world—all very quickly and at trivial expense.” It would seem to me, however, that a reduction in costs and an improvement in quality should only threaten the most inefficient firms.

It appears to be Time Warner’s position that 17 U.S.C. § 1201(a)(1) is intended to prevent “unauthorized uses” of copyrighted works, with the implication that you should not be allowed to read your book or listen to your phonograph record or CD without the express authorization of the holder of the copyright of the works fixed in those copies. This is a radical change from traditional copyright law under which once one has purchased a copy one can use it any way one wants that does not amount to an infringement of the copyright on the underlying work. Certainly 17 U.S.C. § 1201(a)(1) was not intended to make any such drastic change in the law of copyright.

The author of this comment claims flatly—and in contradiction to the extensive factual presentation in the Comment of the Library Associations—that the technical measures restricting the uses that are made of copyrighted works, and the legal restrictions on circumventing those technological measures, will not adversely affect users “at present or for the foreseeable future.”

I had thought initially that the multitude of comments about the restrictions that the CSS scrambling system places on the use of DVD drives in computers was not relevant to the issues we are discussing, since the CSS system does not restrict either access to or the use that one can make of DVD recordings, but only prevents one from using certain operating systems or DVD players. The author of the Times Warner comment, however, cites CSS for DVD as one of the two “technological measures existing today that effectively control access to copyrighted works.”¹³

The complaints of all the Linux users who want to be able to use their DVD drives shows how untruthful the claim is that the technological measures that Time Warner favors do not adversely affect users.

The only substantial claim that Time Warner makes is, despite the charge from Congress, that “defining classes of works is neither feasible nor appropriate.”

If Time Warner is right and it is in fact impossible to separate those classes of works that should be exempted from other classes of works, then the solution is simple: exempt them all.

¹³The other is the scrambling of cable systems.

3.2 The MPAA Comments

The Motion Picture Association of America represents all the major motion picture producers, including Time Warner, and can not unfairly be described as a cartel. It is the MPAA that is responsible for all the comments about DVD's and the CSS scrambling system and the DeCSS program that circumvents that system's denial of access, not to a work subject to a copyright without the authority of the owner of the copyright, but to a disk drive without the authority of the vendor of that drive.¹⁴ It is the MPAA that has brought two suits, supposedly under the authority 17 U.S.C. 1201(a)(1)(a), seeking to enjoin the distribution of the DeCSS program.

There is, however, not a single comment about CSS (or DVD's for that matter) anywhere in its comments. Nor is there any factual information in the comment, as opposed to vague generalities about various types of access systems. They do not mention, for example, that the CSS access control system allows them, in a tying arrangement with the manufacturers of DVD drives, to divide the world market for DVD's into separate regions in what, considering their monopoly over the production and distribution of motion pictures, would seem to be a blatant violation of the antitrust laws. Certainly it is a restriction on use which an owner of a DVD should be allowed to circumvent without being subjected to criminal penalties.

Yet all they really say is that the MPAA does not believe that an exemption is justified for any class of works..

3.3 Sony's Comments

The comments of Sony Computer Entertainment America are equally unrevealing. Sony is one of the manufacturers of DVD players and drives and is a member of the patent pool that controls that technology.

In its comments, however, Sony only speaks of its PlayStation game machines. As is to be expected it favors access controls as a means of controlling the use that is made of its game machines and its games in matters that have no relation to copyright. Thus it makes clear that its major concern with access controls is to keep works made by "infringers." by which it clearly means competitors, from being played on the machines it has manufactured. Sony is not concerned with access to the works that are played on the machines that it manufactures, but rather with access to the machines themselves.

¹⁴Or, more precisely, the vendor of the driver that controls the disk drive.

But Sony has no right under copyright law in general, or under 17 U.S.C. § 1201(a)(1) in particular, to control what works are played on the machines that it has sold.

The next thing we know Gillette Razor Co. will be claiming that it is a criminal circumvention of technological access controls under § 1201(a) for a competitor to make razor blades that will fit into a Gillette razor.