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Testimony of
Fred W. Weingarten
Director, Office for Information Technology Policy
American Library Association
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Before the Copyright Office
On the need for exemptions from the anticircumvention provisions of the
Digital Millennium Copyright Act

Good morning. My name is Fred Weingarten, and I direct the Office for Information Technology Policy (OITP) of the American Library Association (ALA). OITP is a small office that supports the policy goals of ALA through policy research and education programs. Copyright and technological change is one of our key issues and we expect it to continue to be so in the foreseeable future.

For the last year, OITP has been working as a policy research and analysis resource for five national library associations on this important issue of technological measures and Section 1201 (a)(1) of the Digital Millennium Copyright Act. I am pleased to be here representing all five associations, including the Association of Research Libraries, the American Association of Law Libraries, the Medical Library Association, and the Special Libraries Association.

I come before you not as a lawyer, nor even as a librarian—although I speak for them—but as a policy analyst who has worked off and on for many years on intellectual property issues that are raised by digital information technology. Originally trained as a computer scientist, I have principally worked in Washington on technology and

information policy for thirty years. I was a computing research program manager for the National Science Foundation (where, by the way, I managed the networking program and made a few of the early grants that led eventually to the Internet, which we know today as the root of many policy dilemmas.) For the last twenty years, I have been a policy analyst, working for ten years with the late, lamented Congressional Office of Technology Assessment (OTA). For the last decade, I have worked with not-profit scientific and cultural associations, joining ALA five years ago.

In the mid-eighties, my program at OTA published a seminal report, *Intellectual Property in an Age of Electronic Information*, which explored the impact of new digital technologies in intellectual property law. One of our key findings was that policy conflicts over these issues would continue to worsen and be increasingly difficult to resolve—not a message my congressional sponsors were happy to hear. But, the validity of that finding is evidenced by this very rulemaking, held fifteen years later. Faced with a new and rapidly changing technical environment, you are trying to identify some sensible, legal path that steers a fair balance between creator's rights and the public's interest in preserving the exceptions and limitations that have always been inherent, explicitly or implicitly, in the copyright law.

The basic question before this panel is whether technological measures intended to control access to digital works also prevent users from exercising their rights under copyright law to use the material in non-authorized, non-infringing ways. It seems patently obvious to us that they must do so.

- “Circumvention” is defined in the law as bypassing a technological measure without authorization.
- Fair use and other limitations are unauthorized, but non-infringing use.
- Thus, unless the technological measure, itself, is programmed to “step aside” when confronted with an access request for an intended use that would be non-infringing, it either must be circumvented or it must block that access and use.

There is no other possible interpretation. It is this fundamental paradox in section 1201 that Professor Cohen suggested in her testimony requires the Librarian to issue a broad exemption in order to maintain fundamental balances in copyright law. This leaves four questions of fact for the Librarian to consider.

1. **Does a technological measure that controls use also control access?** If so, any circumvention, even if for the purposes of fair use after lawfully acquiring a work, falls under the Section 1201 (a)(1) proscription against circumventing in order to access a work. We think that the record for this rulemaking has clearly shown that the answer is “yes,” particularly in the case of what we call “persistent” controls, controls that continue to control access repeatedly after a work has been lawfully obtained initially.
2. **Are there now, or are there likely to be in the next three years, technological measures that persistently control access/use after a user has lawfully acquired a work?** Again, we think the record unambiguously establishes that the answer is “yes.” Such measures already exist, some have been deployed, and many more are on the drawing boards. Such persistent controls are central to the business models envisioned by the content community.
3. **What works are or will be protected by such measures?** The answer is “nearly everything.” To see that this is the case, just look at the range of content providers who have asked to testify at these hearings. Clearly, if they had no intention of implementing technological measures, they wouldn’t care about these hearings. The libraries’ request for a broad exemption stems both from the broad responsibilities we have to serve diverse public needs and from the inescapable conclusion that, whatever the work envisioned (or even not yet envisioned), someone has instituted or is planning to institute a technological measure to control access to it.
4. **So what’s the harm?** We believe that the record has established the existence of harm in four ways.

- First, we argue that, since fair use is basic public policy, a balance required by the Constitution, any diminution of it through a strict interpretation of Section 1201 is, de facto, serious public harm. Some legal scholars have suggested that this threat to the balance imbedded in copyright law may even be such as to render this section, if interpreted strictly, unconstitutional.

- Second, current experience with licensed products in which license terms are protected by technological measures shows that harm is already being experienced in areas such as archival rights and first sale. Libraries, the Copyright Office, and the Librarian have every legitimate reason to presume that these limitations are just the leading edge of a rapid technological trend, and that such harm will undoubtedly increase over the next three years.

- Third, although the operative section of the law has not yet come into force, it is reasonable to presume that, when it does, the threat of criminal penalties on users, coupled with the vague and broad nature of the anticircumvention provisions, will result in a severe chilling effect. This effect will not be to make “honest people honest” as some commentators have patronizingly suggested as the purpose of technological measures, but to make felons out of people who merely seek to exercise their legal rights to make non-infringing use of copyrighted works.

- Fourth, it is also clear that these controls are not only for the purpose of preventing piracy, but they are to implement and enforce a new, pay-per-use, model on all information users. If copyright law does not retain a balance between proprietor rights and user rights, the implications for the digital divide will be enormous. Let me quote from just one publicity announcement from a vendor we came across in the course of our research.

“[The firm] has developed a way for publishers to receive revenue each time a student accesses even a single page of a title. This has never been possible before.

Thus, older titles and out of print books that have been read and studied thousands of times over the years in libraries (yet have not generated new income) will now produce new revenues and become more valuable assets to publishers.”

What a vision for the future of American education and libraries! This is not the only “pay-per-use,” pay-per-slice,” or “pay-per-look” proposal we have come across. Is it any surprise that the library community is here in front of you expressing serious concerns about the impacts of technological measures and Section 1201?

I would like to continue my testimony by addressing a few points that were raised during these hearings that I would like to amplify on and hopefully clarify.

I want to address four topics that I see causing some confusion in the current deliberations. I will discuss the relationship and non-existent line between “access” and “use.” (Notice I don’t say “disappearing line!” Speaking as a technologist, the line was never there.) Secondly, I want to discuss the nature of controls and problems of circumvention. Third, I want to give some specific examples of persistent controls. Finally, I want to briefly discuss the distinction and relationship between licensing and technological measures at they relate to this rulemaking.

The Problem of Access and Use

For the purposes of Section 1201, there is simply no useful distinction between “access” and “use.” Some have argued in this proceeding that there is no fair use problem because, if access is legitimately granted, Section 1201 does not prohibit circumvention for use. From a technological perspective, no such distinction can be made. Access is the very concomitant of use. A person accesses information each and every time she plays music on a CD, watches a movie on a DVD, calls up information from a remote data base on the World Wide Web, reads an e-book, or runs a program on her computer. This is the

meaning of the term “access” that has been used for many years by computer technologists, but it is also the plain language meaning we would all employ.

It is reasonable to presume that the courts, themselves are likely to view the terms in the same way. It is interesting to note that, in one of the first cases involving Section 1201, Judge Lewis Kaplan, in the Reimerdes case, used the term “access” as a synonym for playing a DVD movie in rejecting the defendants’ claim that the sole purpose of DeCSS, the decrypting, playback program for DVDs, was to view the movie on a Linux machine. Kaplan said:

“...even if DeCSS were intended and usable solely to permit the playing, and not the copying, of DVD’s on Linux machines, the playing without a licensed CSS ‘player key’ would ‘circumvent a technological measure’ that effectively controls access...”

While we are admittedly early in the development of case law, this is certainly a clue about how courts will read and interpret the language of Section 1201. In protecting access regardless of the intended use, 1201 threatens a wide range of legitimate non-infringing uses including fair use, first sale, archiving, and criticism.

Thus, we are concerned in this proceeding about technological measures that, although controlling access in the strictest sense, do so in a case-by-case basis and decide whether to grant access in each case according to the intended usage. To all intents and purposes these measures control use, and when they do, they are likely to prevent unauthorized non-infringing use. This is not speculation. It occurs every day, and the incidence will only increase.

The problem of persistent controls

We have called these measures that continue to control access after the work is initially acquired, “persistent” controls. They can be as simple as a data-base system that

requires repeated use of a password each time one logs on to use it. Or they can be far more complex as technology evolves. (And, as I will point out below, all levels of persistent controls, from simple to complex, present unintended difficulties to legitimate users under Section 1201.)

Furthermore, these persistent controls are not just for the purpose of protecting against piracy, but to develop and enforce new business models, many of which seek to charge for uses that in the past have been free once a work has been lawfully obtained.

Let me quote from a report prepared by an industry marketing and consulting firm that serves the publishing industry.

“For the past several years, digital rights management (DRM) has focused primarily on protecting digital content from illegal or unwanted uses ... Lately, though, the scope and emphasis has been evolving to include more than just copyright protection. ... the pressures and opportunities in digital markets are forcing both publishers and their vendors to take a broader view of what a digital rights management platform entails.”

The report lists some of the characteristics of a modern DRM:

“* Operations on content: whether it’s viewed, printed, copied, stored, or passed along to someone else;

“* Transactions on the content: setting conditions for granting access and accepting payment for content, and;

“* Extents to those transactions: How many times can it be viewed, or printed, or for how long, etc.”

The report goes on to discuss a wide range of possible business models that could be enforced by DRM systems, including “superdistribution” which we described in our initial comments. This model effectively undermines the first sale doctrine by retaining

publisher control over all subsequent distribution of a work that has been acquired by a user.

Clearly, these mechanisms exist, are on the verge of deployment, and are not a figment of libraries imagination. I would just point you to the testimony of the RIAA and the oral description of future marketing models its representative gave in answer to a question from this panel. Note also the indifference shown to the question whether and when a library compatible format would be available. “Not for some time,” to paraphrase the reply.

Let me give an example of my points about access and persistence. The industry is currently developing standards for imbedding “rights-management” information in information products. For example, a page intended to be downloaded and viewed on a web browser may contain, in addition to the usual formatting codes, information about the terms and conditions under which it can be used. (This is called “rights management information” or, in the DMCA, “copyright management information.) See, for instance, <http://www.xrml.com> or <http://contentguard.com>).

Now imagine a user viewing such a page on the web. Two basic steps must occur. A set of programs “access” the page that is residing as a file of digital “bits” on some remote computer’s memory and transmit it to the user’s computer, where a temporary copy of that file is created the local memory. Next, a web browser or other application program such as an Adobe Acrobat viewer, “accesses” that local file and turns it into a readable display on the CRT. Just viewing a web page—a use—involves not just one, but a whole sequence of accesses.

Now, let’s assume that the applications program has been programmed to read and enforce the rights management information in the file (as is already happening). The program will then exercise continuing control over the use of the file. It can block or limit cutting and pasting, block printing, or enforce a time limit on viewing the page. Any form of control over usage is possible, and the program enforces that control by gating access

to the file—time and again. For instance, it can prevent a user from printing by blocking access to the file by the printer drivers. As long as the web browser is in control, it can manage all uses of the information displayed on the web page simply by blocking or granting “access” to the information in the user’s RAM. It certainly is “persistent.”

One might say, “That problem is easily solved. Simply use a web browser that doesn’t do such things.” That may not work. In the first place, one might be using the work on a device, say an SDMI compliant CD audio player, in which the applications program is essentially hardwired. Or, on a computer, the work might be in a unique format that to be used with a particular application program downloaded from the content provider. For instance, the host site could check to see which version of application program is being used, or the content industry might negotiate with the application providers to see that such capability is built into their programs.

However, suppose one could use another program to open and use a file with rights management information on it. Might it not be “circumvention” to use a program that did not recognize and enforce rights management information? I can imagine the provider in court arguing that such is the case.

This question brings us to my third point.

The problem of circumvention

Many times in this set of hearings, the panel has asked presenters whether they have encountered technological measures and have circumvented them. I have waited in vain for someone to respond with the question, “what is a ‘technological measure’ and what does it mean to ‘circumvent’ it?” Since they didn’t, I’ll raise the point.

The definition of “technological measure that effectively controls access” is so broad and all encompassing that it can cover everything from passwords and library cards at one end of the extreme to, at the other end, “c-chips,” public key encryption systems, and

continuous communication links between playback devices and a centralized control system. Clearly, with such a range of possibilities, it is hard, if not impossible for users to even know where they stand under 1201. Hacking into a system and distributing a valuable digital work to five million of one's nearest and dearest is pretty cause for serious concern and criminal action.

On the other hand, suppose someone loans a library card and password to a visiting relative so she can visit the library and use a database for a school project. If that use were not authorized under the license terms and if the library card and password were deemed to be a technological measure, the patron and the relative might well, under 1201, be found guilty of a federal crime.

In other words, depending on the sophistication of the measures employed, circumvention could be almost an unnoticeable, even innocent act with a legitimate fair use defense.. The combined effect of the broad definition of technological measures in Section 1201 is not, as some commentators have suggested, to help honest people be honest." It is to make potential criminals out of us all by criminalizing what has been legitimate, legal use of information up to this point.

It is these ambiguities and wide range of possible legal interpretation that will flow from them that create a chilling effect on libraries and their users.

Relationship between licensing and controls

Several times in these hearings, issues regarding licensing have arisen, mainly when examples have been offered of restrictions on usage of information products. The question has been as follows: are these problems of controls or problems of licensing? If the restrictions are in the license, what do you expect the Copyright Office, in this rulemaking to do about it? The answer is, they are problems of both. Restrictions in the license are enforced by technological measures.

Let me suggest some considerations.

1. **Baseline principles:** Of course, there is no direct relationship between the technological issue and licensing. A license is a private contract; while Section 1201 is copyright law. Furthermore, we have no objection to knowledgeable parties consenting to any licensing terms that make best sense to them—libraries do that every day. We do not expect that the Copyright Office could or should, with an exemption, “fix” any problems we have with such contracts.

But the fact that users give up certain rights in negotiated licenses has nothing to do with how bedrock federal copyright law should be written or enforced. This is no more so than the fact that employees regularly in employment contracts accept limits on speech should be an argument for dropping the First Amendment from the Constitution.

Furthermore, as James Neal testified at these hearings, copyright law sets a boundary, a statement of general public policy principle that helps set the tone and boundaries for negotiation.

2. **Restricted negotiation:** Technological measures can restrict negotiation. They become part of the work itself and, thus, limit the range of options under negotiation. Libraries are then confronted with a “take it or leave it” option. To “take it” means accepting a work with unnecessary restrictions that impede the basic mission of libraries to provide the public with access to information. To “leave it” means denying their users any access to the work no matter how limited. It’s a Hobson’s choice, both sides of which cause harm to library users by denying them the ability to fully use the work.
3. **Unbalanced enforcement:** Differences over licenses and contract law are usually resolved in civil proceedings (breach of contract suits), and there is no evidence that

such processes don't work in the information marketplace. But under 1201(a), terms restricting a user are enforced by threat both of civil and of federal criminal proceedings, while terms on the provider are still only enforced by civil proceeding. This creates a wildly unbalanced playing field which can only chill usage, particularly when it is in license gray areas where libraries and providers may disagree.

4. **Non-negotiated licenses:** As the push for passing the Uniform Computer Information Transactions Act (UCITA) illustrates, the use of non-negotiated "shrink-" and "click-wrap" contracts is expected to grow. The information industry is pushing hard to make those contracts fully enforceable, to include the terms that restrict uses that would otherwise be available under copyright law. There is no reason to expect that provider-drafted contracts of adhesion will be written with great sensitivity to fair use and other constitutional balances, nor that the consumer will have the legal sophistication to understand what make informed choices. Technological measures will enforce those terms, and Section 1201 bring the force of Federal criminal law to bear on one side only, the consumers.

The key point here is that, although licensing and technological measures are different basic issues, the two interact in subtle but powerful ways that the Copyright Office needs to understand. We believe that decisions made on a 1201 exemption could have positive effects on the terms and conditions in both negotiated and non-negotiated licenses.

Conclusion

Much of our testimony has sounded alarming and negative. In fact most libraries have embraced technological change. We believe that in the information society of this new century, libraries will be even more important—serving the public, supporting health research and care providers and the legal community, underpinning the vital research and educational missions of our schools, colleges and universities.

We also believe that content providers should be exploring new ways to serve their public and expand markets for their work, and copyright is an important tool to help them

to do so. After all, what they produce is much of what we purchase and make available to our patrons. And, of course, libraries are also exploring new forms of service models, using new digital technology to enhance public access to information. There is no reason why both interests can't be served. One goal need not be achieved at the expense of the other. The public service provided by libraries and educational institutions does not threaten, but if anything enhances the business opportunities seen by the content industry.

Copyright law extends rights to creators; but, in the name of the public interest it also assigns responsibilities to them in the form of limitations and exceptions. These are not new ideas, but date back to the earliest days of copyright law. Nor are they trivial; they have served our society well for two hundred years. We see neither technological reasons nor economic reasons to sweep them under the table now in the guise of controlling access. A broad, use-based exemption would be a strong statement that the public interest continues to be served in the digital age.