United States Copyright Office

Rulemaking on Exemptions from Prohibition Against Circumvention of Technological Measures that Control Access to Copyrighted Works

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I offer this testimony on behalf of myself, as an academic who makes research use of copyrighted materials, as a teacher who makes educational use of copyrighted materials, and as a specialist in copyright law who has published a number of articles about the implications of copyright management technologies and anti-circumvention regulations. *See Copyright and the Jurisprudence of Self-Help*, 13 Berkeley Tech. L.J. 1089 (1998); *Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management"*, 97 Mich. L. Rev. 462 (1998); *Some Reflections on Copyright Management Systems and Laws Designed to Protect Them*, 12 Berkeley Tech. L.J. 161 (1997); *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 Conn. L. Rev. 981 (1996).

It is my personal opinion that the anti-circumvention provision in section 1201(a)(1), as well as the related provisions in section 1201(a)(2) and (b), are in their entirety unconstitutional. That question, though, plainly is not before the Librarian today. Instead, we are here to determine whether the Librarian should declare a specific exemption or exemptions to the anti-circumvention provision in section 1201(a)(1) pursuant to the statutory authorization. To do that, however, this proceeding first must determine exactly what sort of exemption section 1201(a)(1) authorizes.

In particular, if the statutory delegation to the Librarian is susceptible of different constructions, one constitutional and one not – that is to say, if the statute is ambiguous – it is equally plain that the Librarian must choose the construction that comports with constitutional limitations. *Chevron* teaches that an agency's reasonable construction of ambiguous statutory language is entitled to deference.[1] *See Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843-45 (1984). An unconstitutional interpretation is by definition an unreasonable one. That question is properly raised in this proceeding. There is a constitutional interpretation of section 1201(a)(1) and an unconstitutional one, and the Librarian is obligated to choose the former and not the latter.

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[1] There is some question as to whether the Library or the Copyright Office is properly considered an agency, but that question is not before this proceeding either.

Section 1201(a)(1) authorizes the Librarian to declare an exemption to the prohibition on circumvention of access control measures for "a particular class of copyrighted works," upon a showing that the ability to make noninfringing uses is likely to be "adversely affected." 17 U.S.C. § 1201(a)(1)(C). Constitutionality hinges upon the interpretation of these two phrases.

With regard to "particular class," the question is how a "class" should be defined – and, in particular, whether a "class" may by defined by reference to the type of use sought to be made. The copyright industries argue that defining permitted uses is not the issue in this proceeding. *See, e.g.*, American Film Association, et al., Joint Reply Comments, Docket No. RM 99-7 (Mar. 31, 2000), at 10 [hereinafter "Joint Reply Comments"]. Nothing could be farther from the truth. The statute and the legislative history suggest that "classes" of works are not coextensive with "categories" of original works of authorship, *see* 17 U.S.C. § 102(a), but beyond that they simply do not say what Congress intended "class" to mean. The dictionary defines "class" as "a group, set, or kind sharing common attributes." Webster's Ninth New Collegiate Dictionary (1990). The nature of the attributes that will define the scope of the exemption is precisely the question that this proceeding must address. Moreover, the language of the statute authorizes the Librarian to declare an exemption for *any* class of works that raises the concerns articulated by Congress and thus, necessarily, for *all* classes of works that do so.

Based on my experience as a researcher, writer, and educator, I believe that the question of what class or classes of works raise the problem that Congress identified cannot be answered ex ante except by reference to the use that is sought be made. The nature of the research and educational processes makes it impossible to say in advance which specific works must be consulted. Research is by its very nature a process of open-ended and wide-ranging inquiry. Good research and good writing require a significant degree of random, fortuitous access to source materials and the ability to pursue tenuous, but possibly fruitful, links and connections. Good creativity, that is to say, requires something less than perfect control for copyright owners – and promoting good creativity is what copyright is all about. It is for precisely this sort of reason that the section 107 fair use analysis is an open-ended balancing inquiry, and that the Supreme Court has cautioned against the application of rigid presumptions and bright-line rules. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). In contrast, the implementation of persistent access control technologies without exemption would require, in effect, ongoing preauthorization of research uses. This would chill the freedom of inquiry that is central to the academic process – and that is, moreover, privileged by the First Amendment. *See* Cohen, *A Right to Read Anonymously*, 28 Conn. L. Rev. at 1006-17.

Good education requires a similarly open-ended approach to questions of access to and use of copyrighted materials. The basic course in copyright law is illustrative. Students must read federal cases and statutes, of course, and since no copyright subsists in these materials, they should be entitled to circumvent access controls when no feasible alternative exists. However, a good copyright course also will expose students to scholarly theories and source materials, and further to examples of the various works that are or might be the subject of copyright disputes. Persistent access control technologies threaten this practice, and as I educator I consider this a

grave threat. Education is about free-ranging inquiry, full stop. We do not require that our students apply for permission to read, view and evaluate original source material lawfully acquired by the university any more than we require them to apply for permission to think. I do not consider it an exaggeration to say that loss of the ability to use lawfully acquired copies or phonorecords representing the full range of copyrightable subject matter in any of the ways permitted by sections 107 and 110 would cripple the educational process.

Regarding what is necessary to show likelihood of "adverse effects," the copyright industries make much of the House Manager's statements purporting to require a standard of proof far higher than that which obtains in administrative proceedings generally. But, as Arnie Lutzker has explained, that clearly is not the law. If Congress – the full Congress – had wanted to subject this proceeding to such an anomalous standard of proof, it would have said so in the statute.

There remains the substantive question whether *access* controls implicate the ability to make noninfringing *uses*. The copyright industries argue that they do not, and for some access control technologies this may well be true. *See* Joint Reply Comments at 9. The stated intent of the copyright industries, however, is to implement persistent controls that require continual reauthorization of access, and so technologically conflate access and use. With respect to these technologies – already beginning to be implemented in, for example, DVD movies, video games, and some software – the issue of leeway to make noninfringing uses is squarely joined. The problem exists, however, for any work to which persistent access controls are, or are threatened to be, applied. As I have just discussed, this type of access control technology poses very real and concrete threats to uses that are both traditionally privileged and vital to research and education. The risk to noninfringing uses exists for all digitized works because all such works reside in computer memory simply as an agglomeration of bytes, and access control technologies are portable without limitation to all such works. That is sufficient to show *likelihood* of adverse effects, and that is all that the statute requires.

It is simply no answer to say, as the copyright industries do, *see* Joint Reply Comments at 9, that the Librarian also must consider the extent to which access controls facilitate uses that are noninfringing because they are licensed. Section 1201(a)(1)(C)'s enumeration of factors that track the traditional fair use factors indicates that these *authorized* uses are not the uses Congress had in mind. Proof of a "noninfringing use" is a defense to charges of infringement; it follows that a *noninfringing* use must be an *unauthorized* one.

It is worth noting, too, that individuals seeking privileged access to copyrighted works may not be able to avail themselves of the exemption to circumvention provided in section 1201(f) for reverse engineering to achieve interoperability with computer programs that control access to digitized works. *See Universal Studios v. Reimerdes*, 82 F. Supp. 2d 211 (S.D.N.Y. 2000). It is true, as the copyright industries note, *see* Joint Reply Comments at 7, that *Reimerdes* was decided under section 1201(a)(2), which prohibits trafficking in technologies to circumvent access controls. Nonetheless, *Reimerdes* is squarely relevant in this proceeding. If *Reimerdes* is

right – a question that is not raised here – then the scope of the reverse engineering exemption in section 1201(f) is quite narrow – so narrow that it does not extend to the production of devices designed to allow individuals' computers to interoperate with digital works to which they have purchased lawful access. If the reverse engineering exemption does not authorize this type of interoperability, then the only way of authorizing such interoperability is through an exemption promulgated under section 1201(a)(1).

In sum, there is a strong likelihood that the increasing use of persistent access control technologies will sharply curtail the access privileges that individuals have enjoyed under the fair use doctrine and other limitations on copyright scope. Certainly, there is sufficient likelihood to satisfy the civil preponderance of the evidence standard that obtains in administrative proceedings generally. *See Steadman v. SEC*, 450 U.S. 91 (1981) (interpreting Administrative Procedure Act §556(d)). For this reason alone, the Librarian should conclude that the need for circumvention privileges extends broadly across any "class of works" that may lend value to the research and educational process, and which is not otherwise available without technological gateways. Section 1201© clearly indicates Congressional intent to preserve fair use and the other statutory limitations on the exclusive rights of copyright owners. That intent must inform the Librarian's interpretation of the exemption. It bears repeating that the interpretation of the statute adopted in this proceeding must be a reasonable one. As the Supreme Court has recently explained, what is reasonable is a function of overall statutory context. *See FDA v. Brown & Williamson Tobacco Co.*, 120 S. Ct. 1291, 1300-01 (2000).

But there is more. As I have indicated, an interpretation that preserves fair use and other limitations is constitutionally required. In its *Harper & Row* decision, the Supreme Court indicated that fair use serves as a First Amendment safety valve within copyright law. *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 555-60 (1985). Other decisions, including *Feist Publications v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991), and the venerable case of *Baker v. Selden*, 101 U.S. 99, 103-04 (1879), suggest that preserving access to uncopyrightable elements of copyrightable works is required by the policies animating the Patent and Copyright Clause. Simply put, Congress cannot eliminate fair use or extend copyright-like exclusive rights to uncopyrightable components of protected works. For the same reasons, where another interpretation is available, the Librarian cannot adopt an interpretation that would give an act of Congress this effect. These constitutional considerations, moreover, should inform the assessment of the burden of proof that section 1201(a)(1) places on proponents of exemptions.

(I note, in passing, my belief that the lack of a parallel exemption to the ban on trafficking in circumvention technologies is in any event fatal to the statute's constitutionality. Without such an exemption, any exemptions arising from this proceeding will be available in theory only.)

In light of the Joint Reply Comments submitted by the copyright industries, it is worth specifying, here, what my argument is not. First, this is not an argument that circumvention should "be shielded from liability in virtually all circumstances." *See* Joint Reply Comments, p.2. So far as I am aware, no member of the library and educational communities has urged this result.

What is argued, instead, is simply that the exemption must be extended to those users and uses that have traditionally enjoyed the privileges of the fair use doctrine and other limitations on copyright owners' exclusive rights.

Nor is this an argument that the fair use doctrine or other limitations should "provide a defense to liability for circumvention of access controls." *See* Joint Reply Comments, p.2. Quite clearly, section 107 does not itself afford a defense to the separate cause of action that Congress created in section 1201(a)(1). However, the record shows that Congress recognized that the new anti-circumvention provision would threaten fair use and other copyright limitations with respect to works protected by access control technologies. Accordingly, Congress authorized the Librarian to craft exemptions to circumvention that are *analogous* to fair use, and rest on the same considerations. *See* § 1201(a)(1)(C); *see also* § 1201(c).

I would like to close by mentioning two other constitutional considerations that are relevant in this proceeding. First, the interpretation of section 1201(a)(1) also must be informed by due process considerations. Although nonprofit libraries and educational institutions are not subject to criminal penalties under Chapter 12, *see* 17 U.S.C. § 1204(b), this exemption does not extend to the individuals who constitute their clientele. Enormous vagueness and overbreadth problems would flow from the threat of criminal liability for circumvention in cases where the underlying use is, and has traditionally been, fair and privileged under copyright law. This rulemaking should interpret section 1201(a)(1) to avoid these problems.

Second, the persistent access control technologies that are now beginning to emerge generate records of the details of individual access to the technologically-protected work. This raises enormous privacy problems. As I have argued in my published writings, because the records reflect intellectual activity and often associational activity as well, their creation also raises First Amendment concerns. Specifically, the enforcement of criminal penalties against individuals who circumvent access controls to protect their intellectual privacy represents a constitutionally impermissible threat to freedom of intellectual inquiry. *See* Cohen, *A Right to Read Anonymously*, *supra*. A well-crafted exemption to the anti-circumvention provision should foreclose this threat.

As others have noted, this rulemaking is about determining what is necessary to preserve the balance of rights and limitations that copyright law establishes. The totality of the statutory evidence suggests that Congress intended to preserve that balance, and the Constitution requires it. Thank you.