

**Copyright Office Section 1201(a)(1) Rulemaking on Possible Exemptions
to the Prohibitions Against Technological Measures
that Control Access to Copyright Works**

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The Digital Future Coalition consists of 42 national organizations including a wide range of for-profit and non-profit entities. Our members (a list of whom is attached) represent educators, computer and telecommunications industry companies, librarians, artists, software and hardware producers, archivists, and scientists. Organized in the Fall of 1995, the DFC was taken an active part in the discussions that led up to the conclusion of the World Intellectual Property Organization treaties in December 1996, and to the final passage of the Digital Millennium Copyright Act, implementing those treaties, in October 1998. I speak for the membership of DFC when I say that throughout the process, our paramount concern was to assure that, however United States copyright law might be modified to suit the conditions of the new technological environment, it would maintain its traditional balance between proprietors' control rights and consumers' use privileges (including, but not limited to, so-called "fair use.")

Thus, we were gratified when the WIPO treaties, in language unprecedented in the annals of international intellectual property law, specifically recognized "the need to maintain a balance between the rights of authors and the larger public interest...." — in addition to calling for party states to provide protection and remedies against the circumvention of technological protection measures. At the same time, we were concerned that so-called "anti-circumvention" measures had the potential to disturb that balance significantly, at least where the law of the United States was concerned.

Sec. 1201(a)(1) of the DMCA, if enforced as enacted, would do just that. As it stands, Sec. 1201(a)(1) (bolstered by the provisions of succeeding sections) provides content owners with the legal infrastructure required to implement a ubiquitous system of "pay-per-use" electronic information commerce. The basis for this statement is simple and self-evident. Technologies now exist that permit information proprietors to continue to regulate "access" to digitized copies of content after those copies have been lawfully acquired by others (whether on pre-recorded media or via an Internet download). In today's technological environment, the fact that Sec. 1201(a)(1) prohibits circumvention of technological measures controlling "access" to information, rather than those protecting against its unauthorized "use," is of little real significance to consumers. Indeed, in this proceeding, the Joint Reply Comments of the American Film Marketing Association and 16 other content industry associations make it clear (at p. 21)

that their business plans go beyond implementation of access controls for “initial binary permissions or denial” of access; in addition, they describe second-level access controls that “allow management of who can have access, when, how much, and from where.”

At the heart of this rulemaking is the inquiry into whether users of copyrighted works “are likely to be adversely effected” by the full implementation of Sec. 1201(a)(1). Necessarily, such an inquiry must be speculative, since it entails a prediction about the future.* However, the stated commitment of the content industries to the technological implementation and legal defense of “second-level” access controls is the best available evidence of the potential for adverse affectation.. This is because if circumvention of “second-level” technological access controls were prohibited, the use of such controls would enable content owners to deny consumers the practical and legal ability to make the various kinds of uses now permitted under copyright law, including the “fair use” doctrine codified in Sec. 107 of Title 17 and the various exemptions provided in Sec. 110. Indeed, the implications of full enforcement of Sec. 1201(a)(1) are potentially even more far-reaching. Access controls could be employed to prevent consumers from passively reading or viewing the content of digital information products they had purchased — unless, of course, they were willing to pay again (and again) for the privilege!

Lest these concerns appear far-fetched, I would point out that under current “fair use” precedents, a purchaser of digitized entertainment content that has been packaged with technological access controls is permitted to copy, read and analyze the security software in order to achieve interoperability by means of circumvention. Notwithstanding this, in Universal Studios v. Reimerdes, 82 F. Supp. 2d 211 (S.D.N.Y. 2000), the member companies of the Motion Picture Association of America currently are employing provisions of Sec. 1201 not involved in this rulemaking to frustrate what is asserted by the defendants to be just such a privileged practice. Whatever the merits of this particular case, it raises a number of issues concerning the interaction between Chapter 12 and traditional copyright doctrine. Thus, for example, it has been the plaintiffs’ argument that because Sec. 1201 defines rights, wrongs and penalties that are independent from those provided for in the copyright law itself, “fair use” is inapposite to the analysis of their claims. To date, the judge has concurred. Of course, because Sec. 1201(a)(1) is not yet in effect, individual Linux users who have employed the DeCSS patch to play back DVD’s on their computers were not sued in the Reimerdes case. Had the provision been operative, there is no reason to believe that they would have been omitted from the complaint.

Cases such as this one highlight the importance of Sec. 1201(a)(1)(B-E), pursuant to which this rulemaking is taking place. While there are other provisions of Chapter 12 intended preserve aspects of the traditional balance between owners and users of protected works, most are so drafted that they can be read not to reach many real-world situations that are covered by the more

* The House Judiciary Committee’s “Section-by-Section Analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4, 1998 ,” Comm. Print, 105th Cong., 2d. Sess., Sept. 1998 [the so-called “House Manager’s Report”], states that “the determination should be based on anticipated, rather than actual, adverse impacts only in extraordinary circumstances....” Self-evidently, the circumstances that exist now, before the prohibition has gone into effect, are “extraordinary” in that a showing of actual impacts is impossible!

flexible exceptions and exemptions of copyright law. Thus, for example, in the Reimerdes case Judge Lewis Kaplan has ruled that the defendant's activities did not qualify under the Sec. 1201(f)(2) exception relating to reverse engineering because (among other things) the entertainment software products contained in DVD's are not "computer programs."

Along similar lines, consider the situation of someone who purchases a DVD in France and brings it to the United States, only to find that it will not play in her machine here because of the regional coding that is part of the DVD technological security system. There is no exemption under the DMCA that clearly would authorize the purchaser to avoid the security code to enable playback. More generally, with respect to the DMCA's specific exemptions as a whole, a recent expert study concluded that:

More legitimate reasons to circumvent access control systems exist than are currently recognized in the Digital Millennium Copyright Act. For example, a copyright owner might need to circumvent an access control system to investigate whether someone else is hiding infringement by encrypting a copy of that owner's works, or a firm might need to circumvent an access control system to determine whether a computer virus was about to infect its computer system.

National Research Council, The Digital Dilemma: Intellectual Property in the Information Age 222 (2000). Additional examples of the narrowness of various Chapter 12 exemptions are collected in Professor Pamela Samuelson's recent article, "Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised," 14 Berkeley Tech. L. J. 519 (1999).

By contrast to these specific exemptions, Sec. 1201(c)(1) is generously formulated: "Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title." Given its plain meaning, this provision would require judges to interpret and apply Sec. 1201(a)(1) so as to preserve fair use and other traditional limitations on copyright. In the event of such an interpretation, many of the concerns just expressed about the specific exemptions would become at least somewhat less urgent.** However, this does not appear to be the interpretation preferred by the content industries. Although courts ultimately may recognize the importance and appropriateness of preserving fair use and other traditional copyright defenses pursuant to Sec. 1201(c)(1), this is not a foregone conclusion, as David Nimmer recently has pointed out in his article, "A Rif on Fair Use in the Digital Millennium Copyright Act," 148 U.Pa. L. Rev. 673 (2000). At least until such time as this point is clarified, the Librarian of Congress' rulemaking function under the DMCA remains critical.

** Note, however, that even in this event a further dilemma would remain. Only if traditional limiting doctrines such as fair use were applied not only to the Sec. 1201(a)(1) "conduct" prohibitions of the DMCA, but also to the Sec. 1201(a)(2) and (b) "device" prohibitions, would users' interests be meaningfully advanced. Without the means to circumvent a technological measure, the bare legal right to do so is a hollow one. By the same token, any exemptions to liability that may be recognized in the current rulemaking may be more symbolic than real if they are not coordinated with a parallel relaxation in other provisions of Sec. 1201.

Its importance is reinforced by a consideration of the legislative history of the relevant provisions. Here, the House Commerce Committee's July 22 Report on the DMCA, House Rpt. No. 105-551, Pt. 2, 105th Cong., 2d. Sess., July 22, 1998, is of particular significance, since it accompanied the first version of the legislation to contain, in substance, the provisions which ultimately became Sec. 1201(a)(1)(B-E).

Among other things, the Committee noted (at pp. 25-26 of the Report) that:

The principle of fair use involves a balancing process, whereby the exclusive interests of copyright owners are balanced against the competing needs of users of information. This balance is deeply embedded in the long history of copyright law. On the one hand, copyright law for centuries has sought to ensure that authors reap the rewards of their efforts and, at the same time, advance human knowledge through education and access to society's storehouse of knowledge on the other....

Fair use, thus, provides the basis for many of the most important day-to-day activities in libraries, as well as in scholarship and education. It also is critical to advancing the personal interests of consumers. Moreover, as many testified before the Committee, it is no less vital to American industries, which lead the world in technological innovation.....

The Committee was therefore concerned to hear from many private and public interests that H.R. 2281, as reported by the Committee on the Judiciary, would undermine Congress' long-standing commitment to the concept of fair use....

The Committee on Commerce felt compelled to address these risks, including the risk that enactment of the bill could establish the legal framework that would inexorably create a "pay-per-use" society.... The Committee has struck a balance that is now embodied in Section 102(a)(1) of the bill, as reported by the Committee on Commerce.... H.R. 2281, as reported by the Committee on Commerce, fully respects and extends into the digital environment the bedrock principle of "balance" in American intellectual property law for the benefit of both copyright owners and users.

As this passage makes clear, it falls to this rulemaking to consider how fair use in particular, and the principle of balance in United States copyright law in general, can best be preserved in the near term. If it is likely that the implementation of technological measures backed by legal sanctions against circumvention will fundamentally alter (and thus adversely affect) the information consumer's experience, the remaining challenge (I need hardly say) is how to craft meaningful exemptions that are cast, as the statute specifies, in terms of "classes" of works. Here, the legislative history of the DMCA offers relatively little specific guidance. Some of the suggestions made by other participants in the comment phase of the rulemaking (e.g., the American Association of Universities' proposal to exempt "thin copyright works") have considerable merit. Standing alone, however, these suggestions do not respond fully to the most likely adverse affect on consumers' welfare identified in this testimony: their loss of the ability to make free choices about how, when, and to what extent to use copyrighted works embodied in lawfully acquired copies, subject (of course) to the constraints imposed by traditional copyright law.

The original Notice of Inquiry for this rulemaking (at 64 Fed. Reg. 66,143) suggests that it might be appropriate to define “classes” of exempt works, at least in part, in terms of the manner in which those works are being used. This suggestion opens the way for the proposal with which I would like to close my statement (one that, I should make it clear, represents my personal views and not necessarily those of all DFC member organizations). It is that the Librarian should exempt from the operation of Sec. 1201(a)(1) “works embodied in copies which have been lawfully acquired by users who subsequently seek to make non-infringing uses thereof.”

The proposed language specifies a focused “class” of works cutting across the various categories of works defined in Sec. 102(a). Significantly, it would exclude works that proprietors had chosen to make available by means other than the distribution of copies (as, for example, by providing limited electronic access only). Indeed, as electronic information commerce evolves, the proposed exemption may become less and less significant in practice, just as new business models may require other or additional exemptions in future triennial rulemakings. For the moment, however, limited though the proposed class is, its exemption would provide a safeguard against the most imminent and easily foreseeable harms to otherwise law-abiding information consumers that full implementation of Sec. 1201(a)(1) otherwise is likely to generate. At the same time, by emphasizing the purpose of the intended use, the proposal would provide no safe harbor to those who seek to override access controls for illegitimate purposes — even if they are the owners of the copies subject to such controls.

The proposal has one further advantage: Its adoption would bring the reach of Sec. 1201(a)(1) into conformity with what the legislative history of the DMCA suggests was the original understanding of its Congressional sponsors as to the section’s proper scope. The record reflects that as conceived of by its proponents, the section was intended to apply to the activities of individuals who engaged in circumvention in order to acquire unauthorized initial access to copyrighted works, and not to “fair” and other non-infringing uses made by those already in lawful possession of copies. Thus, for example, the House Manager’s Report (at p. 5) explains Sec. 1201(a)(1) by stating that “[t]he act of circumventing a technological protection measure put in place by a copyright owner to control access to a copyrighted work is the electronic equivalent of breaking into a locked room to steal a book.” And in a letter dated June 16, 1998, addressed to Representatives Rick Boucher and Tom Campbell, the Judiciary subcommittee chairman, Representative Howard Coble, stated that the anti-circumvention provisions of H.R. 2281 were intended to leave “users free to circumvent [technological protection] measures to make fair use copies.” Congressional Record, August 4, 1998, at H7907. This sensible vision of the Sec. 1201(a)(1) prohibition now deserves attention and respect.

The future of fair use and other traditional copyright defenses will be determined, in significant part, by the outcome of the current rulemaking. By adopting the proposed exemption, the Librarian could take an important step toward stabilizing the “balance” of copyright law in the new electronic information environment. Thank you for your attention.

Membership of the Digital Future Coalition

Alliance for Public Technology
American Association of Law Libraries
American Association of Legal Publishers
American Association of School Administrators
American Committee for Interoperable Systems
American Council of Learned Societies
American Historical Association
American Library Association
Art Libraries Society of North America
Association for Computers and the Humanities
Association of American Geographers
Association of Research Libraries
Chief Officers of State Library Agencies
College Art Association
Committee of Concerned Intellectual Property Educators
Computer & Communications Industry Association
Computer Professionals for Social Responsibility
Conference on College Composition and Communications
Consortium on School Networking
Consortium of Social Science Associations
Consumer Federation of America
Consumer Project on Technology
Electronic Frontier Foundation
Electronic Privacy Information Center
Home Recording Rights Coalition
International Society for Telecommunications in Education
Medical Library Association
Modern Language Association
Music Library Association
National Association of Independent Schools
National Council of Teachers of English
National Education Association
National Humanities Alliance
National Initiative for a Networked Cultural Heritage
National School Boards Association
National Writers Union
Society for Cinema Studies
Society of American Archivists
Special Libraries Association
United States Catholic Conference
United States Distance Learning Association
Visual Resources Association