

**TESTIMONY OF DAVID MIRCHIN ON BEHALF OF
SILVERPLATTER INFORMATION, INC. ON
SECTION 1201(a)(1) OF THE DIGITAL MILLENIUM COPYRIGHT ACT**

**COPYRIGHT OFFICE
LIBRARY OF CONGRESS
May 2, 2000**

Good Afternoon. My name is David Mirchin, and I am Vice President of SilverPlatter Information, Inc. We are a small, but globally-oriented, electronic publishing company. We have been in business since 1985 and employ 175 people worldwide. Our employees consist primarily of software developers, librarians, database designers and those marketing and supporting the products. Our largest office is located in Norwood, Massachusetts. In addition, we have offices in London, Amsterdam, Berlin, Paris, Bologna, Hong Kong and Sydney.

- I will start by giving a brief overview of what my company, SilverPlatter Information, does.
- I will then talk about what access controls we use, and how these controls benefit users.
- The groups advocating that it should be permissible to circumvent access controls for a particular class of works have not met their burden that the current situation warrants this exemption. If the situation really does get worse in the next three years, as they fear, then the Copyright Office/Librarian of Congress can propose an exempted class of works at that time.
- I will talk about how we would be harmed if our access controls could legally be circumvented.
- We believe there is no basis for the American Association of Universities' proposal to permit circumvention for the scholarly journals, databases and other works labeled as "Thin Copyright Works" or the scholarly journals, scientific databases, textbooks and other works used for educational and scientific purposes labeled as "Fair Use Works".

I. About SilverPlatter. First, about our company. SilverPlatter publishes about 250 reference databases in electronic formats. Almost all of our databases contain material protected by the Copyright Act, abstracts of articles and/or the full text of articles, in the humanities and scientific disciplines. Our databases cover subjects such as medicine, math, life sciences, social sciences like psychology and economics, and humanities such as literature, history, and religion. SilverPlatter licenses these databases primarily from professional organizations (such as the American Psychological Association, which produces PsycLit, a database of psychology abstracts, and AARP, which produces Ageline, a database containing dissertations on aging, as well as summaries of books, research

reports and consumer guides on aging, and abstracts from 300 magazines and journals), and private companies (such as Bell & Howell Information and Learning, which produces Dissertation Abstracts, a database of abstracts of doctoral dissertations and master's theses in various disciplines).

Our primary markets are university libraries and medical libraries worldwide. We also serve, to a lesser extent, public libraries and research libraries of corporations, such as biotechnology, engineering and pharmaceutical companies.

II. SilverPlatter's Access Control Technology. Now I'd like to discuss the access technology that we've used. SilverPlatter databases are primarily accessible via the Internet or from servers located at the customer's premises via SilverPlatter's ERL® networking software. Customers can choose their preferred access method.

SilverPlatter has used access control technology since our early days.

The access control technology currently consists of the following:

- A. ERL servers at an institution. SilverPlatter has developed networking software (ERL software), which permits access to databases from local-area networks or wide-area networks. ERL technology controls access through internet protocol filtering, and username and password. To subscribe, a customer receives a "Database Authorization Sheet" which indicates the number of simultaneous accesses of each database at any particular time. Typical options are one simultaneous user, 2-4 simultaneous users, 5-8 users, up through an unlimited amount of access. **I would emphasize that our price per user drops steeply as the library subscribes for more simultaneous users.**

SilverPlatter sends an authorization code to the institution which includes a string of numbers which they must enter into their servers. This number permits access for all members of the institution up to the agreed-upon number of simultaneous accesses per database.

To confirm that those accessing the database are from that institution, we use (1) internet protocol filtering and (2) username and password. Internet protocol filtering limits access to a particular domain, say, "stateuniversity.edu". If a faculty member is on sabbatical, or a student wishes to access the database remotely, however, they may not be accessing it from the stateuniversity.edu domain. They could be accessing it from studentname@aol.com. In this case, the user can enter a username and password and be able to access the database from anywhere in the world. **The**

username/password is an access control technology which allows increased availability of the copyrighted material.

B. Internet subscriptions. Customers may access their information via the internet from servers located at SilverPlatter offices or hosted by SilverPlatter distribution partners. The access control technology is the same, except that we implement the Database Authorization information at our servers.

In addition to technology, SilverPlatter controls access to the databases by entering into signed or electronic click-wrap agreements with our customers. These agreements limit access to an “authorized user”, who is defined as “an employee, student, registered patron, or other person affiliated with, or permitted to use the facilities of, the Customer, who: (i) is covered by the applicable user fee paid by the Customer, (ii) is authorized by the Customer to access the Databases, and (iii) is generally eligible to use other electronic databases of the Customer.”¹

III. Benefits of the Technological Protection Measures. In enacting the DMCA, Congress instructed the Librarian, in deciding whether a class of works should be exempted is whether the use of technological control protection measures has had a positive effect on the availability of copyrighted works. In this light, I wish to emphasize five traits [habits] of these highly effective access control technologies:

First, they meet the varied needs of different institutions. An institution can subscribe for an unlimited level of access, or it can limit the access to a specific number of users who may access the information at any one time. These subscription fees, however, are fixed for each level of access. No matter how much use an institution makes of the database, they pay no more during that subscription year. It is NOT a “pay per use” system.

Second, our access controls do not dictate what use is made of the information. We impose no limitations through technology on the use of the information which a user may make.

Third, the access controls in practice facilitate more convenient access to information, and increase the availability of information. We do not tether the information to a particular computer in the library, but free it up to be accessed from anywhere in the world.

Fourth, our access controls do not exacerbate the so-called “digital divide”. By limiting the risk of unauthorized use, our technological protections enable us to permit any library patron, including “walk-in” patrons, to access the databases.

¹ The SilverPlatter license is available at <http://www.silverplatter.com/license/>

Fifth, this access control technology is not new. Contrary to the American Library Association assertion that there are “a wide range of controls just now being developed and deployed by content providers”², we have priced our products on the concurrent access model for 15 years, and used our current access control technology, essentially unchanged, for over 6 years. These have not impeded fair use or other non-infringing uses.

IV. The scope of this rulemaking is for a 3-year window, not forever. In this morning’s testimony, the witnesses suggested that they believed that, starting on October 28, 2000, the effective date of Section 1201(a), publishers would use significantly more aggressive access controls. Peter Jaszi ominously warned, “The worst is yet to come”; that we were “on the brink” and on the “threshold” of “most aggressive use of access controls”. Betty Landesman warned that we “haven’t seen the impact yet.” They cited the problem that producers of eBooks don’t wish to permit the books to be passed around.

I believe that these are not existing problems and therefore it is inappropriate for the Copyright Office to permit circumvention at this point. There is no problem now. If it turns out that there really is a problem during the next three years, then the Librarian of Congress can make that determination at that point. But there is good reason to believe that publishers will respond to market pressures in making their products more widely accessible. This is the exact pattern which we saw in the database publishing industry. Five years ago, database producers typically had geographic restrictions on their products, limited to a particular computer, or a particular building. The market resisted this, and now it is routine to see database publishers like SilverPlatter making their products available to authorized users (typically those affiliated with the customer in some way) from anywhere in the world.

V. The Association of American Universities has argued that it should be permissible to circumvent access control measures for a class of works called “Thin Copyright Works”.

These are defined as “classes of works, including scholarly journals, databases, map and newspapers, primarily valuable for the information they contain, not for the richness of their protected expression.”

All SilverPlatter products are databases. That is all we sell. Virtually all of SilverPlatter’s databases consist of full text articles or abstracts of scholarly journals. If these databases are exempted from the anti-circumvention rules, then any user may with impunity override our access control technology. In other words, even if a customer pays for only one

² American Library Association Comments, p.11.

simultaneous access, it would be permissible to circumvent the access controls and permit unlimited use.

SilverPlatter was successful precisely because we introduced a pricing model which moved customers from paying for each minute of use—with the clock ominously ticking in the background—to a model where customers had unlimited use within their access level. This clearly increases the availability of copyrighted materials. If SilverPlatter were not able to use technology to control access to its databases in the current manner, this would lead inexorably to “pay-for-use”—precisely what our concurrent access level pricing system for 15 years has allowed us to avoid adopting. The reason is as follows:

- A. If we cannot enforce the concurrent access pricing arrangement which we developed in conjunction with the library community and have used successfully for 15 years, we would not be able to charge varying amounts for different levels of access. Accordingly, we would be required to charge a single price to all institutions. This might be beneficial to the large institutions, but could make it difficult for the smallest and poorest universities, medical schools, public libraries and smaller institutions, and the communities they serve, to be able to afford a subscription. It is precisely the ability to circumvent the access control technology which would exacerbate the “digital divide”.
- B. If we cannot employ internet protocol filtering and password protection to limit access to a particular university’s or company’s domain, however, then we will be forced to abandon the unlimited simultaneous access category offered to customers. That’s because users could search from any domain rather than say, just State University X.
- C. Finally, since we would no longer be able to limit a particular university’s subscription to individuals affiliated with that university, we could be put in a situation where there could be unlimited worldwide access from a single institution’s subscription.

The economics are clear. If we cannot charge an amount which provides a reasonable return on our products and services, then we cannot remain in business. The losers would not only be SilverPlatter’s employees, business partners and investors, but also our customers, who are the users of the high-quality research products which we produce.

The “Thin Copyright Works” category has other serious problems. The Commerce Committee recommended that a particular class of works should be “a narrow and focused subset.” But this is hardly that narrowed and focused subset. When you register a work with the Copyright Office, you don’t check a box “Thin Copyright Work” or “Thick Copyright Work”.

Why should scholarly journals not be protected? And how is “scholarly” determined? Does that mean that the most authoritative, scholarly works are not protected, but the magazines at the checkout line in the supermarket are? This makes no sense.

VI. The same problems apply to the AAU’s suggestion that there is a class of works called “Fair Use Works”. I have not seen that as a category for copyright office registration. “Fair use” is a defense to copyright infringement; it is not a “class of works”. It does not describe a “class of works”. The only market to which SilverPlatter licenses its products is the educational, science and research market. If SilverPlatter, and similar companies which are serving the research community, are not able to use control access technology, this will undermine our viability, resulting in a loss of information for the very communities which we aim to serve, and which the AAU and the American Library Association represent.

VII. Conclusion. We believe that none of the comments have met their burden of establishing a justifiable basis for permitting circumvention of access-control technologies. In particular, we believe that:

- There is no basis for permitting circumvention for the scholarly journals, databases and other works labeled as “Thin Copyright Works”
- Contrary to the AAU’s assertion, these works usually include a significant amount of copyrighted material in the form of articles or abstracts. And of course, the databases are copyrighted because of the creator’s “selection, coordination and arrangement” of the material
- Contrary to the AAU’s assertion, there is no definable class of works which are “Fair Use Works”.³
- Certain access controls, such as passwords, limits on the number of concurrent accesses on reference databases, and internet protocol filtering, have been used for years.
- Flexible access controls benefit users by allowing publishers to offer appropriate price level options for different levels of access in situations such as:
 1. Facilitating remote access to university-licensed databases for faculty members on sabbatical and students in distance learning programs;
 2. sharing of resources by consortia of universities or community libraries;
 3. permitting smaller universities, medical schools, public libraries and companies to pay fees less than those charged to larger institutions; and
 4. permitting access to all patrons of the library including “walk-in” patrons.

³ Id.

Thank you for giving me the opportunity to testify this afternoon. I would be happy to answer any questions that you have.

David Mirchin
Vice President & General Counsel
SilverPlatter Information, Inc.
100 River Ridge Drive
Norwood, MA 02062
Dmirchin@silverplatter.com
Tel: 781-769-2599, x235
Fax: 781-769-8763