United States Copyright Office

Public Rulemaking Hearing on the Possible Exemptions from the Prohibition against Circumvention of Technological Measures that Control Access to Copyrighted Works

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Good afternoon. My name is Siva Vaidhyanathan. I am a media studies scholar and cultural historian at New York University. Thank you for allowing me to testify today. I am not a lawyer or law professor. I am not a librarian. I am a user, a reader, a teacher, a researcher, and a citizen. Worse than that, I am an unauthorized user. I am a fair user.

I am deeply concerned about the potential harm the anticircumvention powers of the Digital Millennium Copyright Act will have on media studies and scholarship in general. I am just as concerned about the effects that this emerging leak-proof, highly regulated electronic regime could have on American culture and deliberative democracy.

Today, most of the subjects of media studies research are widely accessible. A handful of works of film and early radio are even in the public domain. So scholars and teachers benefit from ample and easy sources. But that might change over the next few decades as more works – even those already in the public domain – become enclosed behind electronic locks and gates and delivered in streams of digital signals. The potential for abuse of this technology and of the legal power behind it is immense.

You will notice that most of the tenses I am employing in this testimony are subjunctive and conditional. As you must have gathered from all the previous testimony on this issue, this law has caused little harm yet, save the immeasurable and undocumentable – but nonetheless real -- chilling effect it might have had on those frightened by the combined cultural power of media companies and the state.

Yes, my fears are speculative and alarmist. But they are not outlandish or inconceivable. Not every media company is as harmless as a mouse. Not every

government is invested in the free flow of ideas and information. Call me Cassandra if you must.

Please imagine my classroom 35 years from now. As I do every semester, I plan to show my class a film that explores conflicting values and loyalties during wartime: Casablanca. But some time during the 2020s, all the VHS players at New York University fell into disrepair. The library has the tape, but nothing to play it on. Kim's Video store on Bleecker Street is now a Starbucks. Blockbuster is now a hand-held device instead of a large store. The only means for showing this film to my class is to have it streamed in via a satellite feed into a video projector.

Casablanca would have entered the public domain the previous year (assuming Congress does not extend the term once again). But it remains well protected, "double-wrapped" by both by "click-wrap" contract and technological access controls.

The class settles down. On my palm computer, I call up the interface page for either Via-Disney-AOL-Warner-Mount or its competitor, MicroFox. I enter my "educator's code." I hit "play." Nothing happens. Once again, I must do my poor Bogart impression for the class in lieu of the film.

What happened? Perhaps there was some technical failure. Perhaps this was my second class of the day and the service blocks “fair users” from watching a film twice. Perhaps the NYU Library could not negotiate a contract renewal with the company and stay within its tight budget. Perhaps my “educator’s code” revealed me to be the one who wrote that scathing review of the major summer blockbuster of 2034, Battlefield Earth IX: The Psychlos’ Revenge. Perhaps the company identified me as someone who testified against the industry at Copyright Office hearings way back in May of 2000.

The Digital Millennium Copyright Act grants complete power to allow or deny access to a work with the producer or publisher of that work. The producer may prohibit access for those users who might have hostile intentions toward the work. This power could exclude critics and scholars. Most likely it would exclude parodists and satirists as well. The anticircumvention provision shifts the burden of negotiating fair use from the user (and the courts in the case of likely infringement) to the producer. The producer has no incentive to grant access to any user who might exploit the work for fair use -- including scholarship, teaching, commentary, or parody. Under this regime, a user must agree to terms of a contract with a monopolistic provider before gaining access. One must apply to read, listen, or watch.

But why would a company restrict access to its product? In his testimony at these hearings in Washington, DC, Bernard Sorkin, senior counsel formTime-

Warner asserted that the content industries “cannot exist and prosper by barring their works from public availability,” and that any such fear “flies in the face of economic logic.” Sorkin would be correct if his industry were perfectly competitive. But the very economic basis of copyright is that we need a state-granted limited monopoly to create artificial scarcity where natural scarcity could not exist. Once the content industry has a perfect, technological monopoly on high-demand back-catalog films such as “Casablanca,” the industry has an incentive to limit the number of times it could be shown for free. Restricting free and “fair” use bolsters monopolistic pricing power. And companies have great incentive to restrict harsh critics and parodists from viewing their films.

I am very concerned that the Librarian of Congress is entrusted with composing a list of “classes of works” that would be exempted from the anticircumvention provision. As someone whose work spans from Twain to 2 Live Crew, and includes such sources as legal documents, private letters, diaries, movie soundtracks, and television and film, I have serious misgivings about a government agency allowing greater access to some works over others. All elements of expressive culture are fair game for scholarship -- at least they are today and for a little while. If any categories of works should be exempted from the provision, all of them should. The Librarian of Congress should not have the power to favor one type or subject of scholarship over another.

But as Arnold Lutzker testified at your hearings in Washington, DC, “classes of works” are not “categories of works.” Privileging one “category of works” might let you exempt literary or scientific work but not music or film. I assume that the Librarian of Congress recognizes this distinction and plans to execute his power based on it.

Any proposal that libraries and librarians enjoy some sort of special exemption from the legal threats inherent in the DMCA would not satisfy my concerns. First, libraries are not users per se, and much scholarship occurs outside of libraries. Second, such a move would turn librarians into “copyright cops,” who would be entrusted to determine which uses would be fair and which would not. Fair use is something I as a user must be willing to employ without having to apply for it. All fair use is unauthorized. If a content company has a problem with my use, bring it on. Let’s go to court. But let’s not involve a third party in the dispute, either by requiring her to preempt my use or by threatening her with liability for any infringing use I might make.

Copyright was invented in the British Isle as an instrument of censorship, a way of regulating the traffic of ideas through the selective granting of licenses. Fortunately, copyright has grown in the American context as something very different. Up until a few years ago, when it still embodied a balance among creators, publishers, and users, copyright served as an essential foundation of

democratic culture. Its very imperfections helped American culture and commerce thrive in the past 200 years.

American users have benefited from the proliferation of American cultural products, but they have also enjoyed four important safety-valves against the censorious power of copyright: the first sale doctrine; fair use; allowances for private non-commercial copying; and the idea-expression dichotomy which allows facts and ideas to flow freely while protecting specific displays of those ideas. Now, all four of these notions are under attack by the content industries through the World Intellectual Property Organization treaties. The DMCA is only the first step of this process.

If the music and film industries continue to tighten the reins on use and access, they will strangle the public domain and the information commons. This trend presents a much greater threat to American culture than just a chilling effect on scholarship. Shrinking the information and cultural commons starves the public sphere of elements of discourse, the raw material for decision making, creativity, and humor.

So what should we do about this pernicious trend? How can we revive the beauty and genius of the American copyright system and maintain its positive externalities on our culture and democracy? Well, for a start:

• The Librarian of Congress should exercise his power to exempt from the anticircumvention prohibition any works that are not easily and widely available for teaching, research, and unauthorized reading in an unsecured format. Unsecured formats might include VHS videotapes, printed paper volumes, or standard compact discs. That means these products must be archived in a public or university library somewhere.

• Second, the Librarian of Congress should ensure that the anticircumvention prohibition does not apply in any case to material not covered by Title 107, the Copyright Act. Therefore, a publisher could not stifle access to works in the public domain, to government documents, or facts, ideas, or data.

• Third, the Librarian should exempt any works that enjoy technological controls that deny access based on editorial concerns. There are no bad readers, authorized or not.

• But ultimately, the Librarian's actions – even if he provides as broad an exemption as possible -- will do little or nothing to restore the sense of public interest to copyright law. It would only be an endorsement of the value. Congress has granted the Librarian the power to exempt the use of certain classes of works from prosecution, but not to exempt the sale and distribution of the very anticircumvention technologies and devices that we users would require to exercise our rights in such an environment. That's like granting us the right to

record television shows for later viewing, but prohibiting the sale of video recorders. It's like having freedom of the press, but not the freedom to own a press. Congress should revisit this issue. I trust Congress would recognize the value of an imperfectly regulated yet balanced copyright system. The Digital Millennium Copyright Act is an absurd, Orwellian law. And it should be abandoned. If Congress does not fix it, I hope the U.S. Supreme Court, which several times in the 1990s stood up for users' rights, would once again rescue our copyright system from those who would corrupt it.[i]

On one final note, I offer an anecdote that should illustrate the value of unauthorized use. In December of 1906, Mark Twain donned his white suit to testify before a congressional committee on the new copyright bill. Twain expressed his desire for copyright to be expanded from mere expressions to ideas as well, and to be extended in perpetuity. While Twain described the very copyright regime we seem to have built in his absence, a young actor in New York was busy reading a short story by Twain called "The Death Disk," a fable set in the time of Cromwell's rule of England. The young actor made unauthorized us of Twain's story (which Twain himself had lifted from Thomas Carlyle), to make a short silent film in 1909 for the American Mutoscope and Biograph Company. In his short films, this enterprising young man worked out the technical challenges of narrative filmmaking. That man's name was David Wark Griffith, the father of American film.

[i] Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164 (1994). Feist Publications, Inc. v. Rural Telephone Service, 499 U.S. 340, 111 S Ct. 1282, 113 L. Ed. 2d 358 (1991).