

UNITED STATES COPYRIGHT OFFICE

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

Docket No. RM 99-7

WRITTEN TESTIMONY OF

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on behalf of

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AMERICAN SOCIETY OF COMPOSERS, AUTHORS, AND PUBLISHERS
AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS
ASSOCIATION OF AMERICAN PUBLISHERS
ASSOCIATION OF AMERICAN UNIVERSITY PRESSES
THE AUTHORS GUILD, INC.
BROADCAST MUSIC, INC.
BUSINESS SOFTWARE ALLIANCE
DIRECTORS GUILD OF AMERICA
INTERACTIVE DIGITAL SOFTWARE ASSOCIATION
THE MCGRAW-HILL COMPANIES
MOTION PICTURE ASSOCIATION OF AMERICA
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Thank you for this opportunity to present the views of seventeen copyright organizations in this proceeding. These organizations, listed on the cover sheet, represent the gamut of Americans -- creators, businesses and other participants in the creative industries -- who depend for their livelihood and prosperity upon strong copyright protection.

Congress established this rulemaking proceeding to answer a single question: should the October 2000 effective date of the statutory cause of action against circumvention of access control measures be delayed with respect to any "particular class" of copyrighted works? It is clear from the statute and the legislative history that Congress intended the default answer to this question to be "no." Put another way, those who believe that circumvention of access controls should remain legal after October 28 bear the burden of persuasion, including the burden of defining the "particular class" of works as to which the prohibition should not go into effect.

That is, of course, a substantial burden. And it may be a particularly difficult burden to meet in this first congressionally-mandated rulemaking proceeding under the Digital Millennium Copyright Act (DMCA), because the prohibition which it concerns has not yet gone into effect. But clearly it is the burden that Congress has set. It is a key part of the ground rules that Congress established for this proceeding.

Furthermore, Congress has not imposed an insurmountable or impossible burden. Meeting it is not, as one witness complained to you in Washington two weeks ago, an "illusory" goal, or an "unattainable dream." This burden could be met, by "specific, strong and persuasive evidence" of the likely effects of the prohibition on the ability of users to make noninfringing uses of particular classes of works. But the burden has not been met; this type of evidence has not been presented to you.

You have already received a huge volume of evidence: hundreds of written submissions and hours of oral testimony. The vast majority of that material, while no doubt submitted in good faith and with the utmost sincerity, is simply misdirected. It does not help you to answer the single question Congress posed in this proceeding. Instead, it expresses a wide range of concerns, some real and substantial, others illusory or based on a misunderstanding of the law, about a broad spectrum of issues.

Certainly the copyright owner groups that I represent here today have concerns as well. We are concerned about the impact of rapid technological changes on the way copyrighted materials are created, produced, marketed, and distributed. We are concerned as well about the burgeoning problems of online and digital piracy of copyrighted works. We are concerned about the upheavals that these changes are bringing to the relationships among creators, intermediaries, customers, and other stakeholders. And many of these groups have concerns about some aspects of the legal response that the DMCA has provided to these profound technological transformations.

But, unlike many of the witnesses from whom you heard earlier this month in Washington, we will forego this opportunity to vent these concerns with you today.

Instead, we will focus on the single question before you, and on the quality – as distinct from the quantity – of evidence that has been presented to you.

We have already explained, in our reply comments, why most of the evidence submitted to you in the initial comment round is of no use to you in this proceeding. Much of that evidence seemed aimed at persuading you that copyright owners should not be allowed to employ technology to control or manage access to their works. Or, it argued that Congress should not have enacted section 1201(a)(1) at all, and that it should remain permissible to circumvent access controls for all works. Or, it argued that Congress enacted too broad a prohibition on trafficking in circumvention devices or services, or that at least the courts are interpreting this prohibition too broadly. Or, it seemed bent on persuading you that Congress did not grant a broad enough exception for reverse engineering activities, or that Congress made a mistake when it failed to provide a “fair use” defense to the circumvention violations created by section 1201.

All of these submissions provide answers to questions that Congress has already fully answered in enacting the DMCA. Congress did not ask the Librarian to revisit any of these questions in this proceeding. These submissions shed no light on the answer to the single question Congress directed this proceeding to resolve. Accordingly, they are irrelevant to the task before you.

Our reply comments analyze in some detail the few submissions that actually sought to propose “particular classes” of works as to which circumvention of access controls should remain legal after October 28 of this year. We thought that none of these proposals passed muster. Most of them did not designate any “class” of work, particular or general, but instead argued for an exemption based on the status of the user, as a library, archive, or educational institution, for instance. This is an approach Congress considered, but ultimately rejected, in passing the DMCA. Where something resembling a class of works was proposed, such as “thin copyright works,” or “fair use works,” the class turned out to be enormous and its boundaries virtually undefined.

But the fundamental flaw of all these proposals is that they were not based on any specific evidence that the ability to make noninfringing uses of works would be harmed if section 1201(a)(1) came into effect for all works as Congress provided. The limited number of anecdotes that were tendered as evidence of this adverse effect did not withstand even cursory scrutiny. Even to the extent that any real threat of harm had been demonstrated, that likelihood of adverse effect would be overwhelmed by evidence that the use of access control measures has, on balance, increased, not decreased, the availability of works for non-infringing uses.

Let me devote the remainder of my limited time to four points that were stressed in the testimony that you heard in Washington earlier this month. All these themes were at least implicit in the written submissions that you have already received, but I believe that the proceedings in Washington brought them to the fore.

The first is the notion that it should be permissible to tamper with access controls, so long as they manage something other than initial access to copyrighted material. I will use for this concept the shorthand of “initial lawful access,” because that is what its proponents called it two years ago when they sought, without success, to persuade Congress that these so-called “second level” or “persistent” access controls ought to be fair game for circumvention. Under this approach, access controls should function as an on-off switch, and nothing more. Or more precisely, as something less: because under this analysis, once access is switched on, it should never be switched off. In this view, every license is a perpetual license. Subscribers, like diamonds, are forever.

The “initial lawful access” perspective underlies the proposal by Professor Jaszi (supported by several other witnesses) that it should remain acceptable to circumvent access controls on the following “class” of works: “works embodied in copies which have been lawfully acquired by users who subsequently seek to make non-infringing uses thereof.” Professor Jaszi claims that this formulation should be adopted because it fulfills the “original understanding” of Congress in creating this rulemaking proceeding.

Leaving aside the question of whether this formulation adequately delineates a “particular class” of works – I certainly believe that it does not – Professor Jaszi is at most half right. Originally, this rulemaking proceeding may have been intended to give a privileged status to those who could claim to have achieved “initial lawful access” to a copy of a work. But Congress, to the disappointment of Professor Jaszi and his colleagues in the Digital Future Coalition, thought better of this approach, and it was dropped like a stone in the conference committee. The phrase “initial lawful access” does not appear anywhere in the statute as enacted, which is probably why it also does not appear verbatim in Professor Jaszi’s formulation.

The reasons for Congress’s change of mind are not hard to understand. The idea that persons who gain “initial lawful access” ought to be free to circumvent any access controls thereafter is antithetical to promoting the availability of copyrighted works. If the on switch can never be turned off, there is little incentive ever to provide initial access in the first place. By contrast, access controls can be used – and are being used – to maximize access by the greatest number of users in the most efficient manner permitted by digital technology.

Consider one example of the kinds of access controls that Professor Jaszi wants to remain free to circumvent: allowing access at particular times or for a set duration. Time-limited access to copyrighted material is neither a new nor a radical concept. It is as old and familiar as the nearest public library, where borrowing a book does not entitle you to keep it forever. The video rental store offers another example. And technological measures have been used for decades to enforce these limitations. Once your premium cable subscription expires, scrambling technology denies you access to re-runs to which you once enjoyed “initial lawful access.” “Black boxes” aimed at overcoming this access control mechanism have been outlawed for many years. In all these instances, the dissemination of copyrighted materials has been promoted – not inhibited – by putting a time limit on the period of authorized access.

Our libraries and our research institutions do not seem to have been imperiled by the concept of premium cable subscriptions, so it is difficult to understand the intensely expressed fears of their imminent demise now that the model has been extended to online and other digital media. Certainly libraries are more used to dealing with the traditional environment, in which purchase of a physical copy (such as a book) entitled the purchaser to perpetual access to the work it contained. But as long ago as 1976, Congress made it clear that to equate the copy with the work is a fallacy. As the testimony of David Mirchin of Silver Platter makes clear, libraries have functioned successfully for years in an environment which includes so-called “second level” access controls, such as a licensed limit on the number of simultaneous users. According to all the witnesses, libraries have not found it necessary to circumvent existing access control measures in order to deliver to their users the enhanced, expanded access to copyrighted materials that digital technology enables. There is no sound reason to expect that cataclysmic changes – or indeed, any significant “adverse effect” -- will occur once the legal prohibition against such circumvention comes into force on October 28.

While there is much more that could be said on this topic, let me conclude by refuting the suggestion made by some witnesses, that Congress really did not have these “persistent” or “second level” access controls in mind when it enacted section 1201(a), and that therefore allowing their circumvention to remain legal would vindicate Congress’ true intent. Even a cursory glance at the legislative history shows how specious this argument is. The House Manager’s Report, for instance, gives the example of an access control that “would not necessarily prevent access to a work altogether, but could be designed to allow access during a limited time period, such as during a period of library borrowing.” This is cited as one example of a technological measure that would “support new ways of disseminating copyrighted materials to users, and safeguard the availability of legitimate uses of those materials by individuals.” In other words, one of the “persistent access controls” so feared by some of the previous witnesses turns out to be exactly what Congress directed the decisionmaker in this proceeding to count on the positive side of the ledger, when calibrating the anticipated net impact of access control measures on the availability of copyrighted materials for noninfringing uses.

The second issue I would like to mention is the persistent effort to focus this proceeding solely on the issue of fair use. In establishing this proceeding, Congress did not ask about the impact of the circumvention prohibition on fair use; it asked about its impact on “non-infringing uses,” which is a much broader category because it includes licensed or permitted uses. According to some of the witnesses you heard in Washington, licensed uses really don’t count because they depend upon the agreement of the copyright owner. The apples you filch from the orchard may taste sweeter than those you buy at the store, but from the standpoint of the end user the difference is a matter of supreme irrelevance. Congress, it appears, took the same practical view; so long as the public is able to make use of these materials without violating the copyright law, why is that availability somehow tainted if it takes place with the consent of the copyright owner?

Perhaps the mindset that reads “non-infringing use” to mean only “fair use” is the reason why the witnesses were unable to come up with any concrete instances in which circumvention of technological measures is necessary in order to serve library patrons, students and researchers. Time and again you were told that there are potential problems, but that so far they have been resolved in negotiations with the copyright owner. This is no doubt disappointing to some of the intermediaries who are shouldering the burden of persuading you of the need for an exception to section 1201(a)(1)(A). But it is most certainly good news for the end user, in whose name and for whose benefit Congress directed that this proceeding be carried out.

Third, it is worth spending a moment on the concept of “pay per use,” a pricing strategy that some witnesses portrayed as not only fatal to the American scholarly enterprise but actually unconstitutional. Pay per use, like time-limited access, has a very distinguished pedigree, dating back to the first concert or play for which admission was ever charged, up to the present day, where it is widely used for the delivery of performances of some works by cable, satellite, and over the Internet. Interestingly, the arena in which it seems to have made the least inroads is in the academic and library markets where it is apparently most dreaded. I venture to guess that “unmetered use,” the holy grail of constitutionally mandated fair use in Professor Cohen’s view, is probably more prevalent in these markets today than it was ten or fifteen years ago, when connect time and per-search pricing were more common. Certainly, part of this change is due to technological developments, as online connectivity has become a routine commodity rather than a scarce resource to be carefully rationed; but much of it reflects the way in which market forces have molded these commercial environments.

Some have argued that pay-per-use, in some form and in some circumstances, may be a cheaper, more efficient means for libraries and educational institutions to serve their constituencies than the unlimited use model which currently prevails. If that argument has merit, we can expect the market to develop in that fashion; where pay-per-use is disfavored, it will remain an exception, not the norm. For purposes of this proceeding, the opponents of pay-per-use have failed to make any persuasive showing that the pay-per-use model will become more prevalent unless the effective date of section 1201(a)(1)(A) is delayed for some “particular class” of work. They are even farther from showing that such an outcome would be likely to lead, on balance, to the “adverse impact” which Congress was concerned to prevent.

Finally, I believe that anyone who attended the hearings in Washington, or who reviews the testimony online, has to be struck by the complete absence of concrete evidence upon which the Librarian could rationally base a finding that an “adverse impact” is likely to occur if section 1201(a)(1)(A) goes into effect on schedule. The witnesses are apprehensive about “pay per use” and “persistent access controls”; but so far, they have not encountered them. They worry about licensing terms that will be inflexible or intrusive, and ask you to manipulate this proceeding to improve their bargaining position; but so far these problems have not materialized. They predict that it will be necessary to circumvent access controls in the future, and implore you to stop the Congressional prohibition on that behavior from taking effect; but so far, even though it

is not currently a violation of law to circumvent these measures, they cannot point to a single instance when they needed to do so.

In short, in a proceeding which must be based on facts, these witnesses bring you fears. The evidentiary foundation is far too flimsy to support a decision to delay the effective date of section 1201(a)(1)(A) for any class of works. On behalf of the organizations representing the broad spectrum of U.S. copyright owners, I urge you to recommend to the Librarian that the cause of action for circumvention of access control measures take effect as scheduled for all works protected by copyright.

I would be glad to try to answer any questions you may have about our submission or this statement.