

Electronic Frontier Foundation

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Mr. David O. Carson
Office of the General Counsel
Copyright Office GC/I&R
P.O. Box 70400
Southwest Station
Washington, D.C. 20024
Sent via email: 1201@loc.gov

RE: EFF Post-Hearing Comments Requesting Exemption of DVDs from § 1201(a)

Dear Mr. Carson:

EFF is grateful for the opportunity to participate in this important process. CSS adverse effects upon individuals' ability to make fair use and even play their DVDs has been well documented throughout these proceedings. This wide spread and substantial impact easily warrants exempting DVDs from the DMCA's circumvention ban.

CSS Invokes "Authorization" Under DMCA Improperly

CSS is not the type of "access" control technology that Congress intended to protect when it enacted the DMCA. Section 1201(a)(1) was designed to protect against unauthorized access to a copyrighted work. DVDs using CSS do not protect against unauthorized access to a work. Pirated DVDs have no trouble playing in DVD-CCA's licensed players. Rather, the system's design and ultimate objective is to prevent *unauthorized copying* – by requiring consumers to use devices which obey design restrictions that prevent such copying.

Just because this technology employs encryption does not automatically qualify it for protection under the access control provision of the DMCA. CSS must also protect the interest that Congress sought to achieve by creating access controls if it wishes to receive the special privileges created by the statute.

By granting rights holders access control protection, Congress' aim was to ensure that only those with lawful permission to access works would have the ability to access those works. CSS does not accomplish this objective; nor does it attempt to. The CSS scheme prevents people from having the means to copy any portion of a DVD. This is plainly copy protection – not access protection – and Congress addressed this issue in § 1201(b) of the statute.

Congress Denied Absolute Protection

Section 1201(b) prohibits devices that circumvent technological protections that “effectively protect a right of a copyright owner”. Copyright holders' rights are statutorily limited to copying, distribution, adaptation, and display/performance. CSS effectively controls copying, so Section 1201(b) provides guidance for Congressional intent in determining the appropriate legal protection due CSS.

Yet even under 1201(b), CSS' over-reaching protection measures would fail under the statute's plain language. CSS prevents all unauthorized copying – which is substantially more than copyright law and §1201(b) prohibit. The DMCA does not prohibit “unauthorized copying” although the statute's drafters considered that particular phrase during deliberations. Preventing all unauthorized copying would stretch authors' rights to such an extreme that it would unhinge copyright's delicate balance.

By its refusal to prohibit “unauthorized copying” in the statute, language that would have extended copyright protection beyond its traditional limitations, Congress

expressed its intent that society have the ability to continue to make noninfringing unauthorized uses of works. The statute's carefully chosen wording in §1201(b), thus protecting "the rights of a copyright holder" reflects this clear intention. Since copyright holders do not have the right to prevent fair use copying, Congress chose not prohibit devices that enable people to exercise those fair use rights.

CSS + DMCA = Circumvent Congress & Constitution

Hence, the movie studios are attempting to achieve under §1201(a) what Congress expressly denied them by the plain language of §1201(b) – a right to prevent unauthorized copying. By disguising CSS as an "access control" technology, although in practice its goal is to prevent unauthorized copies, the studios are stealthily usurping rights that the statute was unwilling to grant. This Rulemaking proceeding should therefore rule DVDs exempt from §1201(a) in order to ensure that only those technologies that truly protect the interests Congress sought to secure by creating an "access" right receive the rewards of the legal privilege.

Many Lawful "Accesses" Prevented by CSS

Congress plainly intended that those authorized to access a digital work be permitted to do so under §1201(a). Yet many individuals legally authorized to access a DVD are unable to do so because the restrictive CSS scheme prevents them. For example, a person who purchases a DVD from region code 2, but lives in region coded 1 has obtained a legal right to access that movie. An open-source software developer who refrains from using proprietary software protocols, but nonetheless wishes to view the DVD she purchased on an alternative platform has also obtained the legal right to access the content on that media. In both these scenarios, as in countless others, consumers have obtained the legal right to access films, but CSS prevents access from

a practical standpoint. The interests protected by region-coding scheme are not those Congress sought to promote in creating an access right for authors.

Studios Inventing New Standard for Legal “Authorization”

At the point of the DVD’s purchase an individual obtains the appropriate legal “authorization” to access (and hence the legal right to access) its contents. Absent an express agreement to the contrary, the copyright holder cannot alter the traditional understanding of lawful “authorization” any more than it can proscribe binding terms under which creative expression must be experienced. This amounts to the creation of private copyright law – where a copyright holder unilaterally sets the scope for permissible uses and the state blindly enforces the restrictions. Congress rejected this proposition in its enactment of the DMCA.

The movie studios’ proffered interpretation of “authorization” under the DMCA is unprecedented. In both testimony before this proceeding as well as legal filings in the related court case, *the movie studios claim a person obtains the legal right to view a DVD only after purchasing the DVD and also a DVD-player licensed through DVD-CCA.*¹ The studios have further testified that such person only acquires the right to view the material on selected players and that such persons are not thereby authorized to access the material on the DVD to make a fair use, or any non-infringing use, or such material.² There is no consumer assent to – let alone knowledge of these relinquished

¹ *Universal City Studios v. 2600* (S.D.N.Y) 00 Civ. 0277 (LAK) [Deposition of Fritz Attaway](http://www.eff.org/pub/Intellectual_property/Video/MPAA_DVD_cases/20000607_attaway_dep.html), MPAA General Counsel, at 29:21-32.6 (a consumer does not get authorized access to the material on the DVD by purchasing the DVD; “access” is only gained by purchasing the DVD and a licensed player). Transcript available online at: http://www.eff.org/pub/Intellectual_property/Video/MPAA_DVD_cases/20000607_attaway_dep.html and also DMCA Public Hearing Testimony of Dean Marks at 247:21-248:25. Docket No. RM 9907, May 19, 2000, Transcript available online at: <http://cryptome.org/dmca-may-19.html>.

² *Id.* [Attaway Deposition Transcript](http://www.eff.org/pub/Intellectual_property/Video/MPAA_DVD_cases/20000607_attaway_dep.html) at 68:19-69:7. Transcript available online at: http://www.eff.org/pub/Intellectual_property/Video/MPAA_DVD_cases/20000607_attaway_dep.html

rights. Lacking any credible legal theory or consumer agreement to transfer rights the studios' usurpation of these privileges comes out of thin air and wishful thinking.

CSS Extends Copyright Monopoly to Players, Threatening Speech

These extreme and over-reaching claims illustrate the fundamental danger inherent in accepting the movie companies' position: To extend copyright's monopoly to allow the studios to control the market for player technology would go beyond its limitations and impinge upon freedom of expression principles. Copyright holders are not guaranteed with controlling every context in which their works may be invoked. Nor are they permitted to dictate the terms and design restrictions of player technology. While neither is copyright's objective, both are CSS' objective.

In *Sony v. Connectix*, the Ninth Circuit Court of Appeals recently ruled, "Sony understandably seeks control over the market for devices that play games Sony produces or licenses. The copyright law, however, does not confer such a monopoly."³ "An attempt to monopolize the market by making it impossible for others to compete runs counter to the statutory purpose of promoting creative expression and cannot constitute a strong equitable basis for resisting the invocation of the fair use doctrine."⁴

Courts are thus clear. Congress has made its determination. Fair use remains a vital part of copyright law in the digital realm. CSS reaches for more control than the law is willing to legally sanction. Overreaching copy protection schemes like CSS deny the consumer the benefit of her bargain and deny society its due in the copyright bargain. The adverse impact on individuals resulting from their impinged ability to make fair use of their property necessitates exempting DVDs from § 1201(a) of the DMCA.

³ *Sony v. Connectix* 2000 U.S. App. 9th Cir. No. 99-15852.

⁴ *Sega v. Accolade* 977 F2d 1510 at 1523-24 (9th Cir. 1992).

CSS Prevents ALL Fair Use Copying of DVDs

CSS prevents fair use copying in entirety. It is impossible for a student to copy 30 seconds from a DVD featuring the film *Schindler's List* for a school media project. CSS ensures that it is impossible to include a small snippet from a DVD film into a new work for purposes of commentary or criticism. Public domain works protected by CSS are forever locked-up away from the public commons. In order to prevent this wholesale piracy, circumvention of DVDs is necessary to exercise the rights Congress and the courts intend individuals to have.

Consumers Entitled to Personal Use Copy of DVD

Consumers are completely prevented from making any personal use copies of DVD films using CSS. A wide range of both judge-made case law and copyright statutes firmly establish an individual's right to make a personal use copy of material of which she is the lawful owner. Under Section 117, software owners may make copies of their software. Similarly, under Section 1008, people may make noncommercial copies of digital or analog musical recordings which they own.⁵ Personal use copies of other media, such as video cassettes and printed matter, while not explicitly provided for by statute, are nevertheless protected under the doctrine of fair use.

In *Sony v. Universal City Studios* the U.S. Supreme Court validated personal use copying of complete television shows and movies. "A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the

⁵ The AHRA prohibits legal actions for copyright infringement "based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings." See 17 U.S.C. Section 1008.

copyrighted work. ... if it is for a noncommercial purpose, the likelihood must be demonstrated,”⁶ stated the court.

Copyright Act Recognizes Personal Use Copies for Digital Works

Congress recognized the need to allow consumers to make personal use copies of digital media in 1979.⁷ Because of the special nature of software, a fragile string of 1s and 0s, Congress amended §117 of copyright law to ensure personal use copies of digital media would be protected.⁸ DVDs have the same fragile make-up as software and other forms of digital media and could fall under §117 granting consumers a statutory right to make personal use copies of their DVDs.

Specifically, Section 117(a)(2) grants a software owner the right to make a “copy or adaptation for archival purposes [provided] all archival copies are destroyed” should the owner of the software end her rightful ownership. Case law defines “archival purposes” in broad terms. Specifically, the owner of a software program is entitled to make an archival copy to obviate the risks of mechanical or electronic failure. See *Atari, Inc. v. JS & A Group, Inc.*, 747 F.2d 1422 (Fed. Cir. 1984). Indeed, an owner is entitled to make archival copies to protect against all types of risks, including human error and physical mishap as well. See *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 267 (5th Cir. 1988). The right to a personal use copy of software is thus well-established under copyright law and there is no reason to believe it wouldn’t extend to DVDs given the broad range of reasons a person might copy a DVD.

⁶ *Sony v. Universal City Studios* 464 U.S. 417, 451 (1984).

⁷ See Final Report of the Commission on New Technological Uses of Copyrighted Works (1979) at 13-14.

⁸ 17 U.S.C. 117(a).

Personal Use Copying of Music Well-Established

The history of the Audio Home Recording Act⁹ is replete with Congressional desire to protect personal use copies. As one lawmaker stated, "No longer will consumers be branded copyright pirates for making a tape for their car or for their children."¹⁰ In the words of another, "[t]his legislation will end the 22-year-old debate and make it clear that home taping does not constitute copyright infringement."¹¹ The AHRA Senate Report was clear, "the making of an audiogram by a consumer for use in his or her home, car, or portable tape player, or for a family member, is protected."¹²

As mass-marketed entertainment products masquerading as culture, motion pictures are similar to musical recordings in many respects. A parent making a personal use copy of a DVD movie to play on their child's VCR is analogous to the well-recognized home taping privilege for music.

Last year in *RIAA v Diamond Multimedia*, the 9th Circuit Court of Appeals further upheld personal use copying of digital musical recordings.¹³ "The Rio merely makes copies in order to render portable, or 'space-shift,' those files that already reside on a user's hard drive."¹⁴ The unanimous court stated that this type of copying falls within the personal use right of consumers to make analog or digital copies of copyrighted works for private, noncommercial use. "Such copying is paradigmatic noncommercial personal use entirely consistent with the purposes of the Act."¹⁵ The court explained that consumers have a right to make their music portable rather than forcibly tied to any

⁹ See 17. U.S.C. 1008.

¹⁰ See Cong. Rec. H9033 (daily ed. Sept. 22, 1992) (statement of Rep. Hughes).

¹¹ 138 Cong. Rec. H9033 (daily ed. September 22, 1992) (statement of Rep. Moorhead).

¹² S. Rep. (AHRA), p. 51.

¹³ 180 F.3d 1072 (9th Cir. 1999).

¹⁴ *Id.* at 1079.

¹⁵ *Id.*

particular media. *This freedom is exactly what CSS aims to prevent – consumers from having the ability to render their entertainment portable.*

Freedom to experience and manipulate movies should not be granted less protection than freedom to use music. Society must be constantly recontextualizing its culture to determine meaning and create democratic social change. The only way tomorrow's digital artists will be able to recall and recast their culture is to allow them to circumvent the air-tight packages contained on DVDs. I urge the Librarian to resist the arbitrary conclusion that personal use copies are somehow permitted for music but *piracy* for movies.

Lots of Lawful Reasons to Copy Entire DVDs

Personal use copies of works in their entirety is hardly the unthinkable proposition that the movie studios claim. In *College Entrance Examination Bd. v. Pataki* the court stated situations exist in which “the total reproduction of a copyrighted work” does not weigh against fair use.¹⁶ It has also been held that copying an allegedly obscene motion picture film for the purpose of bringing a nuisance abatement action against the producers of such motion picture is a defensible fair use.¹⁷ “It is almost unanimously accepted that a scholar can make a handwritten copy of an entire copyrighted article for his own use...”¹⁸ Thus, under fair use, it is not unreasonable to expect that a person may make a personal use copy of a DVD she rightfully owns. Yet CSS deliberately prevents the exercise of this right.

Without an exemption to §1201(a) for DVDs, CSS completely destroys the ability to archive motion picture film prints. The social importance of archiving films was

¹⁶ 889 F.Supp. 554, 578 (N.D.N.Y. 1995).

¹⁷ *Jartech, Inc. v. Clancy* 666 F.2d 403 (9th Cir. 1982).

¹⁸ *Williams & Wilkins Co. v. United States* 487 F.2d 1345, 1350 (Ct. Cl. 1973).

recognized as early as Congress' 1942 House Report. The Report noted the urgency of "preserving for posterity prints of motion pictures made before 1942."¹⁹ It concluded that "the making of duplicate copies for purposes of archival preservation certainly falls within the scope of 'fair use'."²⁰ Yet libraries and archives are completely unable to serve their public functions with DVDs guarded by CSS. If the Librarian fails to exempt DVDs, an entire body of creative work will be lost when the public moves on to the next format and has no means of "format shifting" their films.

Need to Preserve Digital Fair Use for DVDs

The movie studios' claim that individuals must sacrifice their fair use rights in the digital world rings hollow. The theory that one can simply re-purchase a work in analog form if she needs to make fair use of a DVD she owns does not take seriously the important function fair use plays in spreading knowledge and propelling society forward.

It is unlikely that one already in possession of a legally-gained copy of a work will be willing to acquire a second copy if she were denied the right to a personal use copy. Instead she will likely forgo the personal use which necessitated a copy.

Additionally there is no reason to believe that works will be made available in analog form as the world becomes increasingly more digital and the studios enjoy the greater control digital technology provides them. More importantly, consumers should have the ability to exercise the full range of their legal rights at any quality level.

No Contract to Justify Enforcing Player Technology as with HBO

The movie studios attempt to justify legal protection for CSS as a typical "access" encryption technology because there is federal protection for subscription based

¹⁹ 1942 H. Rep., p. 73.

²⁰ *Id.*

programming that requires the use of special set-top boxes remains unworkable. Those services, such as HBO are all contract-based. The user agreement sets forth terms and conditions for service and mandates the use of a particular set-top box for decryption of programming.

In these cases, the act of “authorization” to view occurs upon the creation of the contract. In the case of DVDs, legal authorization to view occurs at the point of purchase. Unlike the DVD owner, the HBO subscriber has *agreed* to only view the programming on particular decryption equipment. The movie studios point to legal backing that requires people to use certain equipment in cases where they *have agreed to do so* as justification for requiring it in circumstances where people lack the necessary knowledge and assent to impose the use certain viewing equipment. The situations are completely different in that one backs-up a legitimate contract and the other lacks any proper legal foundation for requiring particular player technology.

The studios claim the substantial risks digital technology poses warrants the added legal rights granted to them in the DMCA. The copyright industries’ testimony and comments are replete with rhetoric about enormous and immeasurable harm stemming from Internet piracy. Yet, despite the wide-spread availability of the DeCSS decryption program for DVDs on the Internet for over nine months, the MPAA has stated under oath that it has failed to uncover a single instance of piracy related to the code that allegedly violates the DMCA.²¹

²¹ *Universal City Studios v. 2600* (S.D.N.Y) 00 Civ. 0277 (LAK) Deposition of Kenneth Jacobson, MPAA, 7:23-8:4 (no personal knowledge of anyone who has used DeCSS to hack a DVD and make an unauthorized copy), 321:20-322:11 (MPAA admits no lost sales have been attributable to the use of DeCSS). Transcript available online at: <http://cryptome.org/mpaa-v-2600-kjd.htm>. See also Deposition of MPAA President Jack Valenti 14:25-19:1 (no knowledge of whether a DVD has ever been decrypted by DeCSS, whether a DVD has ever been viewed via DeCSS over the Internet.) Transcript available online at http://www.eff.org/pub/Intellectual_property/MPAA_DVD_cases/20000606_valenti_dep.html. See also Deposition of Robert Schumann (MPAA technology expert) 106:7-109:12 (no knowledge of any movie

“Iron-Clad Guarantee” of No Risk v. Balanced Risk

Throughout these proceedings the copyright industries have insisted upon an “iron-clad guarantee” of no risk before the public can be trusted with their works.²² But copyright law was designed to *balance* the competing legitimate interests in creative expression. How can society maintain balance when one side absolutely demands an “iron-clad-guarantee” of no risk? Neither the plain wording the DMCA, nor the Copyright Clause could grant the studios an “iron-clad guarantee” that they will face no risk of infringement in the digital realm. Any additional risk brought on the advent of digital technology is far out-weighed by the added opportunity it provides.

Demonstrated Adverse Impact Warrants DMCA Exemption for DVDs

In conclusion, by incorrectly labeling CSS an “access” control technology, when its actual function is to control copying of DVDs, the movie studios are now asking this Rulemaking Proceedings to do exactly what Congress has already refused to grant – the right to prevent copying. Ruling DVDs exempt from §1201(a)’s circumvention ban would ensure Congress’ clear intent to maintain balance remains.

Additionally, the CSS region coding scheme prevents millions of people from being able to view the DVD of their choosing on the players that are available to them, artificially shrinking markets for DVDs. Millions of people are simply unable to play the DVDs that they purchased on the machines that they own.

studio or MPAA claim that a pirated DVD enabled by DeCSS has actually been sold.), 172:2-22 (no personal knowledge of anyone who has tried to transmit a DVD via the Internet.). Transcript available online at: <http://cryptome.org/mpaa-v-2600-rsd.htm>.

²² See Docket No. RM 9907, May 19, 2000, DMCA Public Hearing Testimony of Steve Metalitz 263:22-264:2 (single individual user might circumvent solely to view DVD in the privacy of home, if iron-clad guarantee that that circumvention would not lead to further risks of unauthorized reproduction and distribution). Transcript available online at: <http://cryptom.org/dmca-may-19.html>.

The unprecedented public participation in these proceedings has collectively established that the ability to engage in fair use of DVDs is substantially adversely impacted by the DMCA. The CSS system ensures consumers never have an opportunity to copy any portion of DVD. All copying for commentary, criticism, archiving, and personal use is precluded by the CSS technology and will be enforced by the DMCA unless the Librarian exempts DVDs. This flagrant attempt by the movie studios to take what the law expressly denies them easily justifies exempting DVDs from the circumvention ban of §1201(a).

Respectfully submitted,

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Electronic Frontier Foundation