

March 31, 2000

David O. Carson, Esquire
General Counsel
Copyright GC/I&R
Southwest Station
Washington, D.C. 20024

RE: Section 1201(a)(1) of the Digital Millennium Copyright Act (Docket #RM99-7)

Dear Mr. Carson:

After reviewing the comments received by your office regarding the Notice of Inquiry announced in the Federal Register Volume 64, No. 102 -- many of which cited the hack of the Contents Scramble System ("CSS") as an activity which should be permitted by the Digital Millennium Copyright Act ("DMCA") -- we would like to clarify our shared view of the anticircumvention provision contained in the DMCA as it relates to DVD discs protected by CSS.

The availability of CSS was an important incentive for content producers to make available to consumers the high quality video content offered by the DVD format. CSS is used to encrypt audio-visual programs distributed on DVD discs. Although the programs are decrypted immediately for purposes of display, the encryption nevertheless serves the purpose of allowing control over access to works that are distributed in this new packaged media format and, through the related CSS licensing requirements, allowing control over unauthorized copying of works protected with CSS. Participants in the consumer electronics, motion picture, information technology and computer and video games industries have generally recognized that technical measures, and their accompanying license requirements, can serve as a strong incentive for release of content onto new formats, even where the same content may be made available later or through different distribution channels in a form that allows copying in conformance with recognized consumer expectations.

CSS is licensed on a royalty-free, non-discriminatory basis, and the licenses are available to any person agreeing to abide by their terms. The technology can be licensed on the same terms for any computer operating system or platform and is available for both software and hardware implementations.

In October 1999, certain individuals “hacked” CSS and posted to the Internet a Windows-based software utility called DeCSS. DeCSS uses trade secret information to enable users to break the CSS copy protection system and to make and distribute unauthorized digital copies of DVD movies. The Superior Court of Santa Clara County, California enjoined the distribution of DeCSS because it found compelling evidence that the hackers had used improper means to discover the trade secret information and knew that the trade secrets had been gained through improper means when they posted them to the Internet. While the associations which we represent have frequently disagreed -- and may continue to disagree -- about fair use issues and the proper scope of exceptions to the anticircumvention provision, we are in agreement that this hacking of the CSS technology is also the type of activity that is and should be prohibited by the DMCA’s anticircumvention provisions. We disagree with comments that suggest that the use of CSS technology has adversely affected the availability of works to consumers who are or desire to be lawful users of such works. To the contrary, the protections offered by CSS played a key role in the highly successful launch of DVD and, thereby, made it possible for consumers to enjoy an enormously expanding choice of copyrighted motion pictures and copyrighted computer and video games in a high quality digital format.

For these reasons we recommend that the Librarian should not suspend the availability of the cause of action established under section 1201(a)(1) with respect to any class of works which have been distributed with the CSS technological protection measure.

Respectfully submitted,

William T. Archey
President & CEO
American Electronics Association

Rhett B. Dawson
President
Information Technology Industry Council

Jean M. Prewitt
President
American Film Marketing Association

Douglas Lowenstein
President
Interactive Digital Software Association

Robert Holleyman
President and CEO
Business Software Alliance

Jack Valenti
President and CEO
Motion Picture Association of America

Gary Shapiro
President and CEO
Consumer Electronics Association

Hilary Rosen
President and CEO
Recording Industry Association of America,
Inc.

John Hoy

President
DVD Copy Control Association