June 23, 2000

David Carson
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Washington, D.C. 20024

RE: United States Copyright Office section 1201 Anticircumvention Rulemaking

Mr. Carson,

Thank you for the opportunity to comment on the testimony, statements, and hearings surrounding the Copyright Office's anti-circumvention rulemaking. Your office is to be lauded for its comprehensive and timely release of information on the Library of Congress' web site.

I write to you not as a legal or legislative scholar, but as a consumer. I wish to address some of the points which representatives of the copyright-owning community have offered for your consideration. I urge you to weigh heavily the concerns expressed in the overwhelming majority of comments and reply comments to your office's Notice of Inquiry: an exemption to section 1201(a)(1) must be strongly considered for recommendation to the Librarian of Congress.

Section 1201(a)(1) forbids the circumvention of a technological measure which effectively controls access to a work. There are currently no works or uses explicitly exempt from this prohibition. It is in the best interest of consumers and society at large that such a prohibition not be applicable to private copying, or private use at all, of legitimately-acquired, prerecorded media for uses which do not infringe the content owner's copyright.

The comments of Peter Jaszi of the Digital Future Coalition include, in my opinion, the most appropriate proposed language thus far in your proceedings. My understanding of your current procedural dilemma is that you must resolve a few questions on which I am professionally unqualified to advise, specifically: (1) whether your definition of "class of work(s)" may refer to the possible uses of those works, and (2) whether your exemption may be tailored to exempt the prohibition for certain uses and preserve the prohibition for other uses.

I write this post-hearing comment assuming resolution of both questions in the affirmative; that is, "class of work" *may* be defined incorporating use into the definition, and your exemption *may* selectively exempt and preserve the circumvention prohibition according to the affected work's subsequent use.

Background: the motion picture industry.

I return your attention to the subject which has provoked perhaps more commentary and press coverage than any other issue in this rulemaking proceeding: DVD, and its CSS encryption system.

It is of the highest importance that you understand the significance of the DVD situation in the context of how motion pictures are currently created, archived, and distributed. Our collective historical record, as a nation and as a world, will be in a position of great peril if your office fails to exempt legally-acquired media from the prohibition in section 1201(a)(1). The DVD scenario is relevant not because your office has any authority to affect or remedy any perceived injustices surrounding pending litigation. It does not. On the contrary, no one may reasonably expect your office to interfere with judicial authority. However, the DVD scenario is relevant because your office can, and will in this rulemaking proceeding, determine if the historical record we leave behind is complete and accurate, or revised and fractured.

Bernard Sorkin, Esq., senior counsel of Time Warner Inc., made statements in testimony which do not accurately represent the reality of the motion picture industry as it exists today. I direct your attention to a few of his comments in testimony on May 4, 2000.

Mr. Sorkin, at page 126, lines 10-16:

> Secondly, and very fundamentally, copyright owners, distributors, and publishers are interested in the widest possible distribution of their works. The Salinger case, which involved an author's seeking seclusion for himself and his works, is not an exemplar of the content owning community.

Mr. Sorkin, at page 141, lines 22-26:

> That would be on that company's part a piece of unmitigated silliness. That's one of the points I tried to do. We are not in business to keep our stuff locked up and keep it away from the public. Quite the contrary.

At page 180, line 9, to page 181, line 13:

> MR CARSON: I'm writing a treatise on the history of science.
> MR. WEISGRAU: Right.
> MR CARSON: I'd like to be able to reconstruct what the state of scientific knowledge was in 1990. I can't do that. That knowledge has been withdrawn from circulation.
> MR. WEISGRAU: Well first of all, I certainly don't see that example ever existing, but if it did, the first question I'd say is are you really sure there's no other place you can get this information? I mean, this information exists nowhere else?
> MR. CARSON: Well, it's my hypothetical.
> .
> .
> .

> MR. SORKIN: . . . That happens in the paper world as well, you know. It's nothing new, and it may happen, may well happen less in the digital world unless some of the owners do things that are eminently foolish because there's no reason why that stuff should disappear.

My concern with these assertions are those of a film lover and of a historian. In the above comments, the content-owning community assures your office that works which exist today will exist forever. There is no public need, the argument follows, for archivists, librarians, or consumers to create copies of those works, particularly when such copying requires circumvention of a technological access-control measure. Their assertion of perpetual availability could not be more alarmingly false. Content owners are revising, altering, editing, and passively destroying their works all the time. I offer you some background for comparison with Mr. Sorkin's statements.

Studios *are* withdrawing their works from circulation.

1.) Neglect.
Historically, let us note that motion pictures exist first on film, and film degrades. The original elements of *Citizen Kane*, widely praised as the greatest American film ever made, no longer exist. Existing elements of *Vertigo*, hailed as Alfred Hitchcock's masterpiece, were salvaged at arguably the last possible moment before suffering similar decay and decomposition. With high-profile, multi-million-dollar salvage jobs involving *My Fair Lady*, Alfred Hitchcock's *Rear Window*, Stanley Kubrick's *Spartacus* and David Lean's *Lawrence of Arabia* among numerous other films, there is great doubt cast on whether our nation's rich film legacy will endure the cost-saving storage and archiving procedures employed by the motion picture industry.

2.) Revisionism.
Perhaps more deplorable than ignorant neglect of decaying film elements is the now-common, active revisionism employed by major film artists and studios. Most notable is George Lucas' *Star Wars* trilogy, which was released to home video "for the last time in its original form" in 1996. All future releases, it was announced, would be of the trilogy's "Special Editions," incorporating a makeover of alterations, edits, insertions, and cuts. All that is left to our archives, to consumers, and to the historical record of the original films is a scattered distribution of rotting laserdiscs and oxidizing video cassette tapes.

The phenomena is widespread. Walt Disney is responsible for re-editing *Who Framed Roger Rabbit?*, *Melody Time*, *Fun & Fancy Free*, and *Saludos Amigos* for home video release on the DVD format, as well as a famous alteration to the opening lyrics of *Aladdin* (not yet on DVD). Warner Brothers recalled DVDs that included the highly anticipated original ending to *Little Shop of Horrors*, and altered portions of *The Devil's Advocate* and Stanley Kubrick's *Eyes Wide Shut* for DVD release. Warner Brothers also enabled the release of Ridley Scott's "director's cut" of *Blade Runner*, significantly different from the theatrical release, with no announced intentions of ever releasing the original to home video again. Live Home Video's DVD of Oliver Stone's *Platoon* included a feature length audio commentary by the director, a highly demanded recording which was omitted when that DVD was discontinued and subsequently re-released. Steven Spielberg has announced his intention to make significant visual alterations to *E.T: the Extra-Terrestrial* when it is released again to theaters or on home video.

The significance of the "Salinger case" example cannot be overstated. Our films, our music, and our videos will be among the vital keys that future historians use to learn who we are and why we make the decisions and tradeoffs that we do. Lamentably, within our culture there is a tacit

acceptance of content alteration, a *de facto* green-light to withdrawal from circulation. If the artists and studios are unwilling to preserve their content for the future, then it is the obligation of the consumers, the archivists, and, yes, the Library of Congress, to ensure that preservation occurs.

Given the motion picture industry's current behavior patterns – altering films, allowing film elements to decay, and therefore effectively "withdrawing" original versions of films – it should be clear that the marketplace, in the form of studios, has no intention of preserving its artistic heritage untouched. Copyright law must step in to assure that preservation. Without the ability to copy prerecorded media, our media legacy is in great danger. After the videocassettes of the original *Star Wars* trilogy decay, no one will see firsthand what the original versions were. After the uncensored, international prints of *Eyes Wide Shut* disintegrate, no one will have the tools necessary to examine the inequities of the MPAA's rating system. After the existing *E.T.* laserdiscs and videocassettes decompose, no one will be in a position to judge the changes Mr. Spielberg plans to make.

Consumers, librarians, and archivists *must* be allowed to make archival copies of the works they legally obtain. Your office *must* allow an exemption to section 1201(a)(1) for the non-infringing copying of media works to preserve our cultural and artistic heritage.

If DiVX is better, why are studios selling DVDs?

Furthermore, the Librarian of Congress *must not* be intimidated by the content owners' assertions of harm should an exemption be made. In the interests of brevity, I will spare you an enumeration of moments in comments, reply comments, statements, and hearing testimony in which content owners insist that technological copy-protection and access-control measures actually *increase* the quantity of works available to the public.

But I will offer you evidence that such an assertion is patently false. When DVD was launched in March, 1997, exactly three major studios had plans to release films to the public: Warner Brothers, Columbia/Tristar, and New Line Cinema. The competing pay-per-view DVD format, DiVX, was embraced by Twentieth Century-Fox, Paramount, Buena Vista (including Walt Disney, Touchstone, Hollywood, Dimension, and Miramax), and Universal. The reasons for such broad support of the DiVX format were many, but all agreed on one indisputable point: DiVX offered encryption, access-control, and copy-protection measures which were vastly superior to those employed in the open DVD format.

In the months prior to DiVX's announcement on June 16, 1999, that it would cease operations, those DiVX-only studios began to release films on the open DVD format.

Again, many factors were involved in the studios' decisions. But I must assert that if DVD's access-control and copy-protection technologies were inadequate in 1997, they were certainly no more effective in 1999. The DiVX-supporting studios simply chose open DVD based on potential revenue, the one goal which all businesses must consider.

Private copying of copyrighted works.

Much has been said in comments to your office that private copying privileges are essential in our society. But nowhere in section 1201 is there a single indication that private copying privileges should be slighted when the new law comes into effect.

The reason why private copying is even an issue in this rulemaking is simple: DVD discs employ an access-control technology, CSS, which also prohibits the copying of the disc's digital content.

In fact, the content-owning community has gone so far as to suggest that an exemption to allow copying DVDs grants an unnecessarily broad privilege, since DVD content is available on another format, VHS video cassette tape, which is not currently protected by an access-control measure. The implication is that if a user wants to make a copy, they may do so with the VHS tape.

Anyone who has ever used a DVD video, and compared the movie experience to a VHS tape, should immediately know better than to assert that VHS is "good enough" for fair use. And yet, DVD's access-control technology forbids users from making a copy of the DVD.

An itemized list of ways in which DVD is technically and aesthetically superior to VHS would be outside the scope of your discussions. But you might consider some elementary information about the format:

1.) DVD video content is stored with color information ("chrominance") independent from black-and-white information ("luminance"), thus bypassing the television display's comb filter. This improves the picture significantly, and enables copies, even in the analog tape domain, to carry a slightly better image quality than would a reproduction of a VHS tape.

2.) DVD images can be stored using "progressive-scan" technology. VHS tapes require the display to draw half the television image in 1/60 of a second, and the other half in the next 1/60 second. Modern DVD players, connected to a digital television, can display the entire image simultaneously, resulting in a vastly superior movie experience.

3.) DVD videos can immerse the viewer in up to seven discrete channels of surround sound, using Dolby Digital and/or DTS compression technologies. VHS tapes are limited to two-channel stereo, with the option of low-tech, matrixed four-channel "surround."

Obviously, your office should be concerned only with predictable impacts to non-infringing uses of copyrighted works. Private copying for sale, redistribution, exhibition, transmission, or other purposes does infringe on the content owner's copyright – and those are exactly the purposes which section 1201 was drafted to criminalize. Copying for personal or archival use does not infringe copyright, and it simply could not have been our national legislature's intention to erode such privilege.

All you need to know is readily in front of you: consumers cannot copy DVDs. You need not wait for section 1201(a)(1) to come into effect before recognizing the "distinct, verifiable impacts" of this situation. Should you permit Federal law to compound CSS' technological affront to consumer rights with section 1201's legislative affront, the damage will be no greater than it is already. Should you exempt, however, fair use of pre-recorded media from the prohibition in 1201(a)(1), you will remove consumers' legal obstacle to restoring their fair-use privileges.

Consumers bear no burden of proof to explain why they require private copying privileges, as long as our uses do not infringe copyright. The inherent paradox within section 1201 is the maintenance of consumer defenses to copyright infringement, including fair use, coupled with

section 1201(a)(1)'s prohibition which effectively outlaws the exercise of those fair use privileges.

Your office must reconcile the paradox, Mr. Carson. Your office must state, in no uncertain terms, that copyright piracy will not be fought at the cost of eroding legitimate consumer privileges.

Technical information.

If I may offer one more bit of assistance in your proceedings:

There has been some confusion over what, exactly, is the role of CSS in playing and regulating DVD video discs. CSS has been called, in your comments and reply comments, an access-control measure, a copy-control measure, both, and neither. In your hearing transcripts, I have not seen a suitable demonstration of expertise in exactly what CSS does, so I offer for your assistance a graphic illustrating its operation. (Exhibits A, B)

CSS is an access-control measure. It restricts access to the DVD video contents with a system of encryption and decryption. This system ensures that only those DVD players manufactured by the cartel of DVD-CCA licensees will play movies released by the cartel of American motion picture studios. CSS is also a measure which inhibits copying. Analog copying of a DVD is ineffective, since an analog copy will look poor in comparison. Digital copying of a DVD's contents is possible and has already occurred in foreign video markets. Digital copying by American consumers, however, is prevented by the nature of the only blank, recordable DVD media which is legally available in the United States.

It is CSS's ability to prevent consumer copying which should alarm your office. With a Federal prohibition on circumventing access-control measures in place, our society loses its precious balance between the interests of content owners and those of content consumers. Consumers must be permitted to copy media works, and to make any use they choose as long as the use does not infringe the copyright privileges of the content owner.

Please, exempt from section 1201(a)(1) lawful uses of media works.

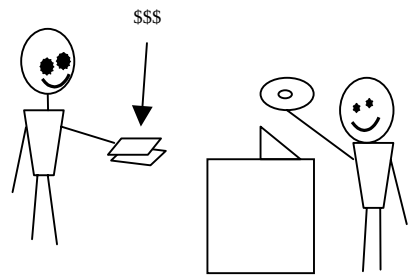
I thank you for your time and consideration in these rulemaking proceedings. You have asked and answered some difficult questions, and you are to be applauded for your efforts. Please, don't blow it now. History is depending on you.

Sincerely,

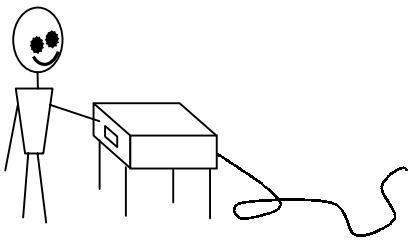
Matt Perkins
2647 Girard Ave. S. #2
Minneapolis, MN
55408

Exhibit A: How DVD's CSS access-control works

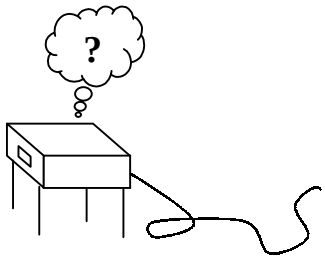
1. User purchases DVD.
(obtaining legal access to copyrighted work)



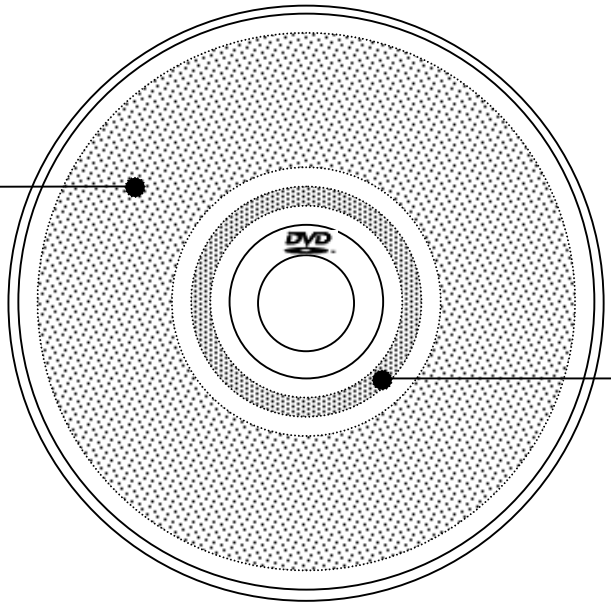
2. User inserts disc into DVD player.
(exercising authority to access copyrighted work)



3. DVD player examines disc.

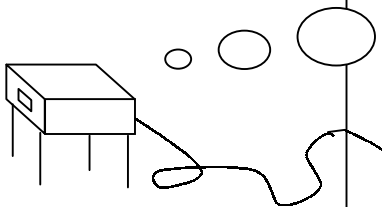


Content: ENCRYPTED.
(audio, video, multimedia)



Decryption keys.
(AAA, AAB, AAC, AAD .

4. Disc is encrypted. DVD player has a licensed decryption key, so it searches the disc's key-section for a match.



My key = AAG.

AAG = AAA? No: do not play.
AAG = AAB? No: do not play.
AAG = AAC? No: do not play.
…
…
AAG = AAG? Yes: play DVD!

5. User is happy.

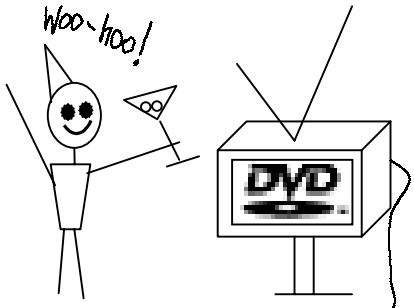
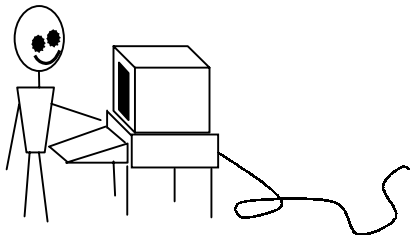
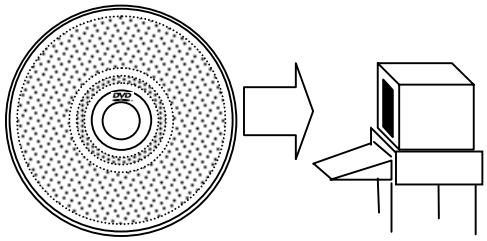


Exhibit B: How DVD's CSS access-control prevents copying a DVD

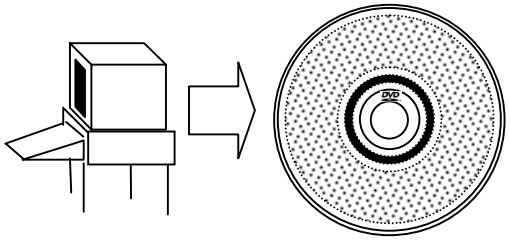
1. User inserts disc into computer.



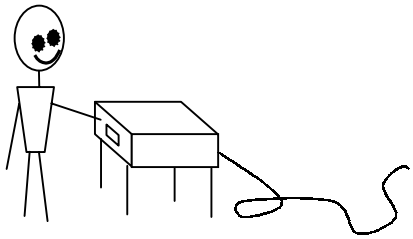
2. User copies encrypted data onto hard disk.



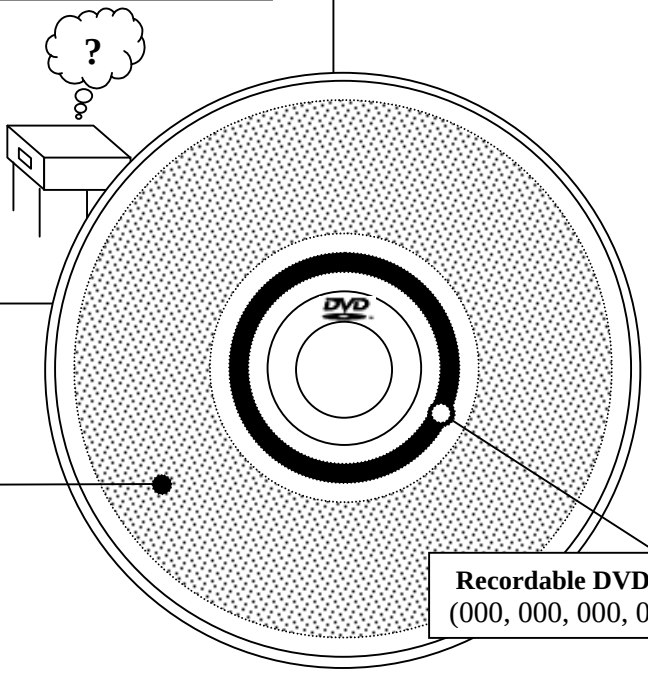
3. User copies encrypted data to blank DVD.



4. User inserts disc into DVD player.
(exercising authority to access copyrighted work)



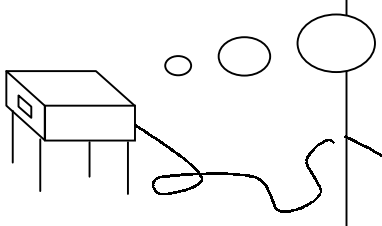
5. DVD player examines disc.



Recorded Content: ENCRYPTED.
(audio, video, multimedia)

Recordable DVD decryption keys.
(000, 000, 000, 000, 000. . .000.)

6. Disc is encrypted. DVD player has a licensed decryption key, so it searches the disc's key-section for a match.



My key = AAG.

AAG = 000? No: do not play.
AAG = 000? No: do not play.
AAG = 000? No: do not play.
…
…
AAG = 000? No: do not play.

7. User is not happy.