To whom it may concern:

This is a COMMENT concerning:

"Exemption to Prohibition on Circumvention of Copyright Protection Systems
for Access Control Technologies"

I feel that there are three broad areas that are not addressed adequately by
the current law. Those areas are:

1) Proprietary Restriction not related to copy protection (non-infringing use)
2) Unnecessary restriction on reverse engineering (non-infringing use)
3) Lack of recognition for related, prior works and well-known practices

Part 1: Proprietary Restriction

Under this law, in Chapter 12 Title 17, the following restriction is made:

"No person shall circumvent a technological measure that effectively controls
access to a work protected under this title."

This phrase is being widely interpreted as a restriction on illicit copying,
and additionally, on lawful, non-infringing uses including viewing of such
works on alternative systems or in alternative ways. Recent examples include
the DeCSS DVD viewing program; other examples might include recasting works in
a form suitable for the blind or to compensate for other impairments. There
are several significant problems with such a view.

First, restriction of, for example, the choice of a DVD viewer program neither
restricts potentially illegal copying of material, nor does it enhance value
to the Copyright holder. Illegal copies of works can be made for existing,
"authorized" material, without regards to the eventual viewing program, for
example, and are adequately covered by existing copyright and other laws. At
the same time, viewing paid, licensed copies, regardless of utility program or
tool involved in the viewing, has nothing at all to do with with Copyright
protections, but rather, with expansion of monopolies, such as Microsoft, who
control viewing programs and the Copyrighted material they use, to expand their
monopoly. Examples include MPAA agreements with Microsoft and Microsoft-
approved vendors, outright purchase of source material such as the Bettman
archives and other national treasures, etc. The separation between a simple
translator, and illicit copying, is not just a perception problem with the
general public; rather, it is being demonstrated at all levels of the judicial
process, including DoJ pressure on Norwegian officials to arrest a young
computer programmer, despite the indisputable fact that his program does not
in any way lead to illicit copying. This action by DoJ was done under the
guise of 1201, and shows the danger associated with misinterpretation by such
special-interest groups as MPAA.

Even "artistic" groups such as MPAA seek to have this two-edged sword trimmed
to their benefit. For example, MPAA has championed the exclusive licensing of
movies and other works to the benefit of the copyright holders, even when it
involved harm to actors and others involved in the production of the works. As
an example, years ago, nobody foresaw the impact of video tapes, video disks,
and other new media channels. When those new channels became available, and
despite the increased revenue that they provided to motion picture companies

and others, MPAA and related concerns were unwilling to share the increased revenue with actors and others. A repeat of this scenario is being played out on the Internet today, via the "MP3" audio standard; various groups are using the easy distribution of MP3 as a battle cry against illegal copying, not by judicial remedy, but by introducing a new, proprietary, and restrictive "SDMI" protocol, licensed under 1201 and other laws, despite the knowledge that the protocol does not, of itself, prevent copying at all!

Without a clear separation between non-infringing uses, and the programs or tools to accomplish those non-infringing uses, 1201 does not serve the best interests of the general public, leads to expansion of monopolistic practices, and does not enhance the value of copyrighted works to the authors, nor does it easily lead to expansion of the associated arts in non-infringing ways.

Part 2: Unnecessary restriction on reverse-engineering

A common problem with many technological advances which might fall under 1201 "protection", such as computer programs, is the difficulty in determining whether, or not, those programs have themselves infringed on prior art, or whether there are, or not, alternative and improved mechanisms associated with operation of such programs. Companies have already indicated that they intend to invoke 1201 protection to limit access to reverse engineering, including restrictions under "shrink-wrap" licenses. Such restrictions harm the industry in at least three ways:

1) They reduce the chance for individuals or companies to lawfully determine whether their own copyrighted or patented materials have been violated.
2) They ignore the considerable leverage that nearly every participant in the computing industry (for example) has added to the current state-of-the-art. The same is true for artistic works, scientific results, etc.
3) They operate under a "sham", in that they claim that the reason for applying protection under 1201 is to limit illegal copying, when the true intent is to harm competitors, and to reduce consumer choice. Since the proponents of the bill are themselves operating in these for-profit realms, the combined fact of improper application of 1201, and restrictions on profitability of direct competition, appears to satisfy the two-prong "sham exception" test to First Amendment rights as defined by the United States Supreme Court.

Improper application of 1201 leads directly to a reduction in the expansion of the arts, and rewards those who fail to recognize prior art (either through malice, or negligence) with untoward "protection" against those who might themselves have suffered damage.

An example of such activity is reverse-engineering. Since an attempt is being made to ban reverse-engineering activities via 1201, without considering that such activities do not, in and of themselves, imply that illicit copying has occurred or will occur, and since there is no provision in the law for such improper application of the law, then it is entirely possible and indeed likely that individuals or companies will use 1201 to legally entangle those who try to perform otherwise legal operations on so-called proprietary works.

In short, 1201 needs explicit restrictions on those who apply for protection under the Act, and needs explicit expansion of the allowed uses that cannot and will not result in expensive legal entanglements, a.k.a. "SLAPP" suits, when used in accordance with those explicit expansive provisions, even if the method

or methods used might, in and of itself, otherwise violate anti-copying provisions of the act.

Section 3: Related, prior works and well-known practices

Chapter 12, Title 17 fails to provide protection for related, prior works, and well-known practices, and provides an unfair judicially-sanctioned "trigger" for companies to bypass scrutiny of their material. It also fails to lead to the desirable end of expanding knowledge in a way that enhances innovation and rewards the creators of truly innovative material, both artistic and technical. For example, while the Act does not specify any particular protection strategy, at the same time, it does not allow those involved in, say, encryption studies or other legitimate uses, to view the material in any way deemed appropriate to the furtherance of those (non-infringing) uses. In fact, the recent Norwegian case shows that the intent was, and is, to hide the encryption method used in a legal shroud. The DeCSS case provides a timely example: neither DoJ, nor the Norwegian officials, have demonstrated that the juveniles' activity resulted in any harm, or that it in any way undermined the value of the artistic works held by individual copyright holders, or even that the tool could or would be used to make illegal copies in any event. On the contrary, by limiting the viewing possibilities to a single, monopolistic platform (Windows), such groups have unwittingly harmed their own members and copyright holders. The reason is simple: in this example, and in many others, the cost of copying material (and the act of copying is not assisted by the choice of viewer program) far exceeds the cost of purchasing material through legitimate channels. The indisputable fact is that the Act is being invoked to restrict an individual, in this case, a foreign juvenile, from using the tool of their choice to view material, whether or not that material honors the copyright provisions of the Act. This is clearly restraint of trade, since the providers of "authorized" services are only those with the financial resources necessary to submit to restrictive, and unrelated, license requirements. The fact that the authorities have now entangled the youth and his family in a lawsuit that is at once expensive to defend, and which does not address the true issues of copy protection or violation of the act, is proof that companies and individuals will attempt to use the Act as a judicial "hammer" to drive competitors, investigators, the curious, and even innocent parties to great legal expense to protect themselves from false charges. Nothing in the current Act precludes such improper use of the law, and expansion of the law in the manner proscribed in Title 17 does nothing to clarify the situation. On a larger scale, various groups are using the Act to attack the "Open Software" movement and other emerging technologies that are a benefit to consumers. By applying the massive funds gathered from, say, acts of a monopoly such as has occurred with Microsoft, companies attempt to use the Act to gain legal "protection" from free-market forces, and they do so not only in their own realms (software, in this example), but in unrelated areas such as restrictive access to national treasures.

Restricting free access to such information, including the underlying rendition technology, leads directly to restriction on expansion of the arts, which was not a stated intention of the Act; any such statement would be justifiably greeted with scorn and derision, and the framers of the Act were led to to leave such restrictions out of the Act. Yet various parties now seek to expand the Act in exactly those ways, and if allowed to continue, the result will be a diminished techological and artistic base for future workers, and the possibility of harm, either through unchallenged but false "copyrights" since some individuals and companies will not be able to defend themselves from

expensive legal entanglements even if they are lawfully engaged in review of the material covered by the Act, or through a reduction in the availability of materials for lawful purposes through a restriction on unassociated tools and utilities, again enforced by SLAPPs or other actions.

Examples of underlying technology that should not, in and of themselves, be covered by the Act, are: file formats, data formats, encryption techniques, steganographic signatures, viewing programs and related code, algorithmic expressions of any kind, and identification marks including names of creators, authors, and others. Other examples are certainly possible, and likely.

Summary:

In summary, the Digital Millenium Copyright Act, and extensions, is being improperly invoked in many cases, and, if allowed to continue, will cause harm to consumers, other artists, and those with an interest, professional or amateur, in various and unrelated facets of the copyrighted works including lawful reverse-engineering, product review, encryption studies, and others. It is indisputable fact that improper applications of the law are already being made. Expanding the Act to further reduce consumer choices, artistic expression, expansion of the arts (both directly and indirectly related), and protection of prior works, would be wrong and unnecessary.

Thank you.

Sincerely,
John Drabik