

Comments on 17 USC Section 1201(a)(1), Digital Millennium Copyright Act

Michael Sims
76 Swan St.
Staten Island, NY 10301
(718) 556-1002
<michael@slashdot.org>

David O. Carson
General Counsel, Copyright GC/I&R
P.O. Box 70400
Southwest Station
Washington, DC 20024

By email: 1201@loc.gov

Comments on 17 USC Section 1201(a)(1), Digital Millennium Copyright Act

Dear Copyright Office,

My comments on this section of the Digital Millennium Copyright Act are simple: I recommend that the Librarian of Congress find that enforcement of Section 1201(a)(1) will adversely affect non-infringing uses of copyrighted works for ALL CLASSES of copyrighted material, and thus the prohibition in subparagraph (A) should not apply to any user for any copyrighted work for the next three years.

Digital copyright protection systems offer the potential for copyright holders to totally eliminate any "unauthorized" uses through technology. The copyright system employed on Digital Versatile Discs (DVD's), for example, does not permit users to make copies, grab still screenshots or audio snippets, or even to play the disc in an unauthorized piece of hardware, on an unauthorized operating system, or in an unauthorized country. This is the model for future digital distribution systems. No technological system can tell whether a user is making "fair use" copying or not, so they restrict all copying.

Users already pay for whatever unauthorized copying may occur. See 17 USC Sec. 1004, which describes the government-mandated royalty payments on digital audio recording devices and media, which go to producers of copyrighted content. Everyone who purchases any equipment relating to digital audio pays a tax directly into the pockets of the recording industry, whether they ever infringe any copyrights or not. These forced royalties were put into place specifically to compensate copyright holders for the alleged "casual copying" that users would perform.

There is already plenty of copyright law on the books. Copyright infringement is unlawful and punishable. By definition, a corporation pursuing claims under the copyright infringement laws is enforcing its rights to the maximum extent of the law - so what use is the prohibition against circumventing access control measures? The only use of such a prohibition is to attack conduct that is NOT infringing, yet still involves some sort of access to a copyrighted work, since infringing conduct could be attacked under other parts of the copyright laws. The usual name for conduct that isn't infringing but involves copying from a copyrighted work is "fair use".

And of course "effectively controls access to a work" reaches far beyond a copyright holder's rights under our current laws. The phrase is not "effectively controls copying of a work", though even that would eliminate fair use copying. Copyright is the right to prevent copying. The right to prevent or regulate access to a specific work is one that has never been enforced by copyright - when one book vendor tried to do so, the Supreme Court ruled against them, in *BOBBS-MERRILL CO. v. STRAUS*, 210 U.S. 339 (1908). Once a book is sold the copyright holder loses all powers over it - the purchaser can sell it

again, loan it out, or read it in the country of his choice. Under section 1201(a)(1), a digital book author could restrict any or all of these abilities, and violating the restrictions would be grounds for civil and criminal penalties, including up to five years in prison. Once more: reading a book in a location or manner not authorized by the copyright holder could land you five years in prison. In a world that is rapidly moving to digitization of all works of creativity and scholarship, this is a frightening thought.

I'm not sure I can emphasize this enough. The only purposes which 1201(a)(1) can be used for is to restrict consumers from non-infringing copying and from accessing the copyrighted content in the time, place and manner of their choosing, which has never been a legitimate subject of copyright rights. That is, if a lawsuit is brought against someone, only two situations can exist: either that person was actually infringing copyright, in which cases claims could be brought under both the copyright infringement statutes and this circumvention provision; or the person was not actually infringing, in which case the claim under this provision would necessarily affect non-infringing conduct. In the first case this provision is simply tacking on more liability to the copyright infringement codes (which Congress should do independently if it wishes); in the second case it is making tort-feasors or criminals out of persons who have not infringed copyright in any fashion.

So we've established that the only conduct which section 1201(a)(1) affects is conduct which is non-infringing copying, or unauthorized access. Nothing in the law requires copyright holders to set "fair" standards for access to works - for instance, a digital book, perhaps a work by Stephen King or Danielle Steele, could cost \$5.00 for individuals to buy, but \$500.00 for libraries to buy. The mass market books could be issued with the "access restriction" that the purchaser may not lend the book to anyone else, ever, and thus the library would have no recourse but to purchase the \$500 lending-permitted version. Access could be further restricted by only allowing the purchasing library to lend the book out; inter-library loans would be a thing of the past. Or maybe digital books would expire after a set time period; trying to gain access to them afterwards would be a violation. Naturally, copyright holders will seek to maximize their profits by setting the most restrictive access terms that the market will accept. Conduct like this is allowed by the law, hugely profitable to copyright holders, and under section 1201(a)(1), taking any action to circumvent it is illegal.

The Federal Register notice asks for specific examples of abuse. As an example, the standard for Digital Versatile Discs forces DVD players disable the user's ability to fast-forward when instructed by the disc. This allows copyright holders to include advertisements in the content which the user has no choice but to watch. If I want to be able to make certain non-infringing uses of a DVD I've purchased - such as watching only the 90% of the content which is not advertisements while skipping past the rest - the access controls in the work prohibit me from doing so, and the DMCA prohibits me from circumventing those access controls. There are hundreds or thousands of examples of abuses related to the software field. Many software programs limit their use to a single machine CPU, prevent users from making back-up copies of the original software, inform on users via the internet to the company which produced the software, and otherwise limit the user's ability to copy or access the software in the manner of his choosing.

Access controls will also adversely affect the ability of libraries to archive copyrighted works. Digital Versatile Discs may last as little as 5-10 years (that is how long CD's last) and the access controls built into all DVD players and recorders mean that is impossible for a library to transfer a copyrighted work to a new medium for archival purposes. While a library's rare book collection can be digitized so that even when preservation efforts fail, an authentic copy remains available, no such preservation measures are allowed by the DMCA.

I hope I have made my point adequately. Honestly, the Librarian's action on this matter is likely to have little practical effect. Section 1201(a)(2) of the law, already in effect, outlaws the production, importation or distribution of any devices (including

software code) which would circumvent access control measures. This part of the DMCA is already being used against individuals who wanted to play DVD's on an "unauthorized" computer operating system, Linux, and constructed a device to allow them to play lawfully-purchased DVD's on computers running Linux. The outcome of that lawsuit is not yet determined, but it is clear that making lawful, non-infringing uses of lawfully purchased DVD's (the defendants have not been accused of any copyright infringement whatsoever) is being hampered by the DMCA.

Thus, even if the Librarian accepts my recommendation and negates the effect of 1201(a)(1) for the next three years, a library may still find itself in the position of being permitted to circumvent an access control measure but not being allowed to construct or otherwise obtain a "device" which would allow them to perform it, unless the library desired to be sued by a copyright holder. However, if the Librarian were to reject 1201(a)(1) for all copyrighted works, this would send a strong message to Congress that the current attitude toward protecting copyrighted works, which involves no consideration of the fair use rights of the public, is unacceptable to the library community.

-- Michael Sims
February 16, 2000