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

By email: 1201@loc.gov

Dear Copyright Office,

I appreciate this opportunity to reply, as a private citizen of the United States, to comments on this new law, the DMCA. The opinions expressed in this letter are mine, though they are shared by several submitters during this NOI. Similar to the opinions expressed by Mr. Michael Sims in his comment (#136), I find that the enforcement of Section 1201(a)(1) will adversely affect all non-infringing uses of all classes of copyrighted works.

Prior to the DMCA, United States copyright law contained what is traditionally referred to as the Fair Use clause, which provided the delicate balance between users' rights and copyright holders' rights. The Fair Use clause allows all manner of non-infringing uses of copyrighted works. The general rule of thumb has always been, "you don't own the copyright to it, so you can't reproduce it for others." However, you were allowed to reproduce something for your own use. A relatively recent example of this has been the copying of CDs to cassette tapes for personal use (say, in a car where CD players were not commonplace until recently).

The DMCA removes this delicate balance from copyright law, and greatly swings the balance of power to the side of the copyright holder. As Mr. David Apfelbaum points out in his letter of comment (#234),

> In exchange for your money, you are allowed to watch these movies on "sanctioned" platforms.
> * Any other platform is prohibited by law! This includes Linux, BEOS, DOS, Alpha-base hardware, Sparcs, SGIs, MIPS machines, etc.
> * If you want to feed the video imagery into software designed to sort video clips? It's outlawed!
> * If you want to use the video to test new your new 4-D video compression algorithms? It's outlawed!
> * If you want to perform histograms? If you want to perform statistical analysis of the video imagery, or perhaps the audio data? It's outlawed!
> * If you want to project the video image onto a warped (non-flat) surface? It's outlawed!

* If you want to use the video imagery as wallpaper on your computer? It's outlawed!
* If you want to use the audio as part of your computer's sounds? It's outlawed!
* If you want to write software to count the number of cuts to different cameras? It's outlawed!
* If you want to perform 3-D scene extraction? It's outlawed!
* If you want to extract a 3-D representation of a character? It's outlawed!
* If you want to run facial-recognition software on the video imagery? It's outlawed!
* If you want to run image enhancement software? It's outlawed!
* If you want to run speech-recognition software on the audio? It's outlawed!
* If you want to view every 10th frame, backwards? It's outlawed!
* If you want to colorize? It's outlawed!
* If you want to make it black and white? It's outlawed!

Mr. Apfelbaum then summarizes it quite nicely:

> Let's face it, if you can think of it, and it's not merely watching the movie under Microsoft Windows, it's outlawed! And by outlawed, I mean OUTLAWED! Title 17 USC Section 1201(a)(1) clearly states that it is illegal to circumvent a technological measure that effectively controls *ACCESS*! Literally, it is illegal for me to view the raw data I have LEGALLY PURCHASED!

Since piracy and other forms of infringing use are addressed in other copyright law, they need not be specifically addressed in this law. In fact, the rules for fair use should not be different for digital media. Unfortunately, changing those rules of fair use is exactly what Section 1201(a)(1) attempts to do. That section states that, "No person shall circumvent a technological measure that effectively controls access to a work protected under this title." Note the specific terminology there: the section effectively allows copyright holders the ability to control not only the copying of their work, it also allows them to control *access* to that work. As Mr. Sims points out (in comment #136),

> 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.

The purpose of access control is only to restrict usage of a product, as Mr. Sims points out:

> 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.

Not only has it never been a "legitimate subject of copyright rights," it has been traditionally handled through licensing. Licenses are used to control what a licensee can do with his product. The Motion Picture Association of America (MPAA), in their letter, points this out: "Access control technologies are used, for example, to permit access to a work for a limited period [of time]." They then go on to attempt to muddy the waters between product licensing and product purchase:

> In short, access control technologies are implemented in a variety of ways to facilitate authorized or licensed access to works while discouraging or blocking unauthorized users. Such authorized or licensed users are certainly among the universe of legitimate users with whom Congress was concerned when it ordered that this rulemaking proceeding be held. In this regard, the many references in the NOI to "lawful users" of copyrighted materials (see, e.g., questions 3, 4, 5) and to "noninfringing uses" (see, e.g., questions 13, 15) may improperly be read to refer solely to uses falling within one or more of the exceptions to copyright protection set forth in sections 107-121 of the Copyright Act. To the contrary, most "lawful users" are licensed users, and most "non-infringing uses" are uses that are carried out pursuant to a license agreement.

Most non-infringing uses are, in fact, uses pursuant to the Fair Use clause of copyright law, not licensing. From their letter, is is quite clear that the MPAA would have the entire industry using pay-per-use licensing. It's interesting that they would desire this; DIVX was a movie format similar to DVD, but DIVX was a pay-per-use format: to use a DIVX disc after the expiration time, you had to pay an additional fee. The DIVX format was touted as being a movie at a rental price, but without the hassle of the rental return. DIVX was disliked by consumers so much that its creators have stopped using it and the format is now completely dead.

The Library Associations, in their comment #162, also finds pay per view to be a problem:

> In the legislative history, the Congressional committee that introduced Section 1201(a) insisted that the provision "shall not have *any effect* on rights, remedies, limitations, or defenses to copyright infringement, including fair use." H. Rep. 105-551, Part 11, acccompanying H.R. 2281, Digital Millennium Copyright Act of 1998 (105th Cong., 2d Sess.) at 41 (emphasis added).
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> Nevertheless, it was the Libraries that expressed concern that the primary goal of the technological measures would be to move all users rapidly toward a "Pay-Per-View/Pay-Per-Use" information world one with electronic tollbooths on every information highway and access point. Congress echoed that concern. Id at 26. Unfortunately, the reality of the current and planned technological measures bears this out.

Regarding infringing and non-infringing conduct, Mr. Sims points out some other truly bothersome parts of this law, which I touched on earlier:

> 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.

Nobody is arguing that current copyright law should be changed so that purchasers of a copyrighted work would have the ability to reproduce that work for others. That would be an obvious copyright violation, and is protected under copyright law that existed before the DMCA. The only scenario in which this new law is useful is one in which the user is not infringing on copyright - that the user is engaged in fair use activities.

No one is arguing that product licensing should be altered such that one has access to an entire work without paying for it. There are good reasons for which product licensing can

be used. Product licensing allows users to purchase only that which they desire, often at a savings over the cost of the entire product, much of which may be unnecessary. For example, my company sells a product licensed in several parts. Some users do not wish to use a particular portion, so they do not pay for that portion. Other users desire the entire product, so they pay for the entire product.

As I said, no one is arguing that this should change. We are arguing that fair use rights be granted to digital media, and that the DMCA does not provide for this. In fact, to quote EFF (Electronic Frontier Foundation), from their comment #204:

> Recently, eight major movie corporations sued Web site owners under the DMCA for posting software (DeCSS) that allows DVDs to be viewed on unauthorized players. The use of the DMCA in this case to prevent people from building and using unauthorized players to watch their legally purchased DVDs dramatically shifts the delicate balance the Constitution designed for copyright.

The Library Associations expand on this to point out that "Technological measures will be determining the uses of copyrighted works that have traditionally been decided by federal judges." One excellent statement of theirs that could summarizes this is, "Only if a magical chip with the fairness and wisdom of a diligent federal judge could be incorporated into the digital controls would the voice of the public interest be heard."

Industry observers have seen that we do not currently have fair use rights in the DVD industry. A Norwegian teenager was recently working on software (DeCSS, mentioned above) to allow Linux users to view DVDs on their computers. This work would have been covered under 1201(f), because he was working to allow interoperability between DVDs and the Linux operating system. However, this programmer released a preliminary version of his software, DeCSS, and was promptly taken to court. This preliminary version was released to show proof of concept, which would then have been applied to a Linux program. Clearly this was work to allow interoperability, covered under section 1201(f)(2).

Another industry that could be affected in the near future is that of Audio DVD. We have already seen how the DMCA is affecting fair use of Video DVD, and the same thing will undoubtedly happen with Audio DVD for the same reasons. With these access controls in place, and with barriers such as 1201(a)(1) in place, users of Audio DVD will have no recourse but to unnecessarily purchase multiple Audio DVD players - one for each location in which they wish to listen to Audio DVDs. As stated earlier, under current Fair

Use rights users are allowed to copy audio CDs to other formats for use while away from their CD player.

Digital music delivery over the Internet may also be affected by the DMCA. The MIT Media Lab has pointed out, in their comment #185, that "a set of measures to control access to music and other audio works distributed on compact disc (CD) and via digital delivery is presently being developed through the Secure Digital Music Initiative (SDMI)." The Media Lab comment later goes on to say, "it is likely that, if the SDMI initiative is a success, some musical works will fall into this category within the next two years." (This was in reference to your question #7: "Are there works or classes of works that are available electronically and only in formats to which such technological measures have been applied?")

The Library Associations, in comment #162, had this to say:

> anticircumvention technologies in place or facing imminent rollout have a primary purpose, not simply the limitation of access to particular works, but more precisely the persistent control over all uses of such works. Thus, the technological measures that must be the focal point of the Librarians' review are those that will erase distinctions between "access" and "use," regulating every exploitation of a work. The impact of these types of technological measures will be to:
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> 1. Limit sharply the applicability of the first sale doctrine;
> 2. Curtail the ability of libraries to archive and provide long-term access to information resources; and
> 3. Impede all other non-infringing activities that greatly advance the fundamental public purposes of copyright law.

EFF brings up some important points about this in comment #204. Regarding the SDMI, EFF states, "Any such systems that are designed to prevent consumers from making fair use of their property should be ruled exempt under the DMCA's anticircumvention ban." EFF brings up another important consideration regarding copyright protection schemes:

> Copy protection schemes that do not protect specific rights granted to authors under copyright infringe upon a user's right to use and manipulate information in lawful ways and should constitute a class of works to be exempt from the DMCA's anticircumvention provisions. DVDs are an example of such a class of works that should be exempt from the DMCA's anticircumvention provisions because the protection measure taken (CSS) does not protect rights afforded to a

> copyright holder, but controls viewing of a DVD, the scope of which is intentionally outside an author's control under copyright law. Thus, it grants new and unprecedented rights to movie studios to control others' use of creative expression.

Again, it's obvious that the DMCA affords copyright holders much more control than existing copyright allows, and more than copyright law should. It's also obvious that the law allows copyright holders to use technological mechanisms, which currently cannot determine the difference between lawful, fair use activities and illegal activities, to control access to copyrighted works. To quote EFF:

> The type of technological protection measure applied to DVDs is particularly harmful to peoples' ability to make noninfringing uses and tips copyright's delicate balance significantly in favor of copyright holders at the expense of free speech, innovation, and competition.

The Association for Computing Machinery (ACM), in comment #171, put it this way:

> The Digital Millennium Copyright Act must expressly allow the use of circumvention measures for fair use purposes. The fair use doctrine is fundamental to copyright law, which is derived from the U.S. Constitution and underscores the necessity "to promote the Progress of Science and the useful Arts" (U.S. Constitution, Article 1, 8). The draconian criminal measures imposed for violation of section 1201 will deter individuals from conducting bona fide forms of science and technology research that is fundamental to innovation.

ACM also goes on to discuss the current DeCSS litigation. ACM goes on to point out that computer security may be at risk: "As a consequence, experts in computer security may not be able to take the steps necessary to safeguard the nation's computer systems." This would be a tragic result of this law, and it could happen within the next two years if broad exceptions to the law are not mandated.

Mr. Sims probably states it best toward the beginning of his letter:

> 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.

Let me repeat that: "enforcement of Section 1201(a)(1) *will* adversely affect non-infringing uses of copyrighted works for ALL CLASSES of copyrighted material." As a result, all classes of copyrighted material should be exempted from the anticircumvention clause of the new law, at least for the first three-year period.

Thank you for your time.

Sincerely,

Daniel C. L'Hommedieu