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March 31, 2000

Mr. David O. Carson  
General Counsel  
GC/I&R  
P.O. Box 70040  
Southwest Station  
Washington, DC 20024

Dear Mr. Carson,

**REPLY COMMENT**

**CONCERNING THE COPYRIGHT OFFICE'S RULEMAKING ON EXEMPTIONS FROM PROHIBITION OF CIRCUMVENTION OF TECHNOLOGICAL MEASURES AND CONTROL ACCESS TO COPYRIGHTED WORKS**

I would like to thank you for the opportunity to submit this reply comment concerning the Copyright Office's Rulemaking on Exemptions from Prohibition of Circumvention of Technological Measures and Control Access to Copyrighted Works.

**With regard to clarification of Section 1201**

I support and affirm those comments submitted by Andrew Oram on behalf of the Computer Professionals for Social Responsibility, and the comments of the Electronic Frontier Foundation, the American Library Association, the Massachusetts Institute of Technology, the National Association of Independent Schools, and the Association of Computing machinery.

I believe that the Digital Millennium Copyright Act (DMCA) is already proving to have devastating consequences for consumers and that an overhaul of the Act or precise clarification and broadening of scope of section 1201 is required to stem abuse by corporations.

Principle suggestions for clarification:

1. *The overbroad wording regarding "access" should be removed.* US copyright law has never supported the notion of extending copyright to the access of works, but rather their reproduction and use of works expressed in a fixed medium, including rights for derivative works.  
The notion of access is especially ambiguous when related to digital information. All digital information is, by necessity of the technology, encoded in a structured format. Currently, the United States does not provide guidelines that can be used to determine whether a given data format constitutes a form of access or copy

restriction – all digital information is essentially unreadable without decoding and rendering software, even ASCII text.

2. *The Section should not prevent users who have lawfully obtained or licensed a work from choosing a device, technology, or medium to view the work other than ones approved by the copyrighted work's vendor.* Under the auspices of the DMCA, the Motion Picture Association of America (MPAA) is currently suing the authors of a software utility used to display DVD movies on personal computers equipped with DVD drives, DeCSS. The DeCSS program was written for the display of DVD movies under the Linux operating system, for which no method was available for displaying DVD movies (though the same computer, with Microsoft Windows installed, could view the movie using available software).

However, under the DMCA, the software is illegal. Though DeCSS is not useful for copying DVDs or transmitting the information thereon, the software can be used to watch a DVD (ostensibly one legally purchased in the conventional manner) and thus violates the access clause of the DMCA. Similarly, a blind person using an electronic device for reading books can not be held in violation of copyright if a book publisher decides that the method of access is not permitted; this could be used to boost audio book sales.

The MPAA explicitly prohibits DVD players not licensed by them (through the DVD Copy Control Association) and has prosecuted any one involved in such development. Further, manufacturers are required by the MPAA/DVD-CCA to pay licensing fees and implement hardware schemes that usurps the fair-use rights of users (such as viewing a work purchased abroad, or purchasing domestic films as gifts for foreign relatives, or even making archival backups of works.).

3. *Section 1201's ban on circumvention of technological measures should not be used to suppress the production of competing or alternative compatible technologies or devices.* See the discussion of the MPAA suit in the previous paragraph. **By permitting the author of a work to restrict access to that work by requiring the licensee of that work, as a condition of said license, to use only technology licensed by the licensor, the DMCA effectively grants the works author patent protection on the medium of expression for the duration of the copyright applicable to the work.** In the case of DVDs, that patent would be essentially indefinite as the medium would be constantly constrained by such agreements until such time as the licensor stops distributing works expressed in that medium.

4. *Section 1201 should not net used to suppress the use of material for criticism, comment, news reporting, teaching, scholarship, or research.* The DMCA has already been abused to prosecute individuals with respect to critical reviews of software and may prove catastrophic if the Uniform Computer Information Transactions Act is ratified.

Recently, the Mattel Corporation, makers of a web page filtering software package called CyberPatrol, sued three foreign nationals in U.S. courts for submitting to the public domain certain computer source codes that, when compiled, permitted the user of CyberPatrol to view the list of Internet sites the software

was blocking access to. The purpose of the software was to document the that, as sold, the CyberPatrol product prohibits access to a wide array of Internet sites that contain non-objectional educational materials. The authors are concerned that over-zealous censoring is improper and that if people were aware of the sites being censored by the software (and those not being censored), that people could make an informed decision about the software's use and utility.

Under the auspices of the DMCA, Mattel argued that the software for viewing the database of blocked sites, as well as the essay criticizing the software, violated section 1201 of the DMCA. Mattel was able to obtain a court injunction forcing the authors to retract their software and their essay. Further, Mattel was able to exert sufficient legal pressure (in the form of threats of protracted and expensive prosecution under the DMCA) that the authors of the essay and associated software were forced to assign their copyrights on the essay and software to Mattel. Additionally, the injunction forced all web sites within the US to withdraw any copies of said software and essay from their sites.

5. *Explicit exceptions must be made for software.* The DMCA would make reverse engineering of software and development of maintenance fixes of such to be prohibited. The encrypting of encoding of data files and formats would be subject to the access clauses of the DMCA as well as prohibitions pertaining to circumventing copy and access restrictions.

For example, many modern software packages require periodic software license renewals or the software will disable itself or cease to function. Should the vendor of such software go bankrupt, decide not to support the package, or otherwise abandon the product, or if the software exhibits a bug related to such access and copy control methods that affect its essential function, the company may be severely affected.

For example, Microsoft's most recent version of their Microsoft Office product requires users to register the product and type in an authentication code to verify it is registered. The product is designed to fail if the registration is not done. However, many users have found that despite having authenticated the product, the product disables itself and becomes unusable after 30 days, in some cases stopping office activities until computer staff can fix the problem. The DMCA would prohibit repairing the problem, even for legal licensees of the product, if the solution requires decrypting a password file, disabling the authentication check, et cetera. Under US law, the software vendor or author has no liability for the software failure or obligation to fix the bug.

6. *Access control measures should in no way prohibit access to works legally purchased abroad or in a manner otherwise designed to arbitrarily affect segments of the population.* For example, my wife's primary language is Danish, but we live in the United States. Though the DVD format is not restricted by video format (such as NTSC or PAL), the industry has enforced a strict region encoding scheme so that hardware sold in one region (the US) cannot playback movies sold in another region (such as Denmark). As a result, my wife cannot legally view Danish movies in the United States, though she can legally purchase them. Further, the vendor will not create Danish movies (or movies with Danish subti-

titles) for distribution in the United States because of the perceived small market. The principal reason for such region locking is to control pricing and distribution of media (in the countries where region locking is not illegal) to maximize profit at the expense of wholesale restriction of access to works to which the individual is a legal licensee on the basis of country of origin.

I'd also like to explicitly address the comments by Time Warner Incorporated which uses the analogy of stealing a book to viewing a DVD with unlicensed DVD hardware. In the context of a book, stealing a book from a store is simple theft. Purchasing a book and then reading it using eyeglasses not manufactured by the publisher would not be theft.

Further, Time Warner states that access control measures do not infringe on a consumer's fair use rights. However, the access control methods currently required of all manufacturers obtaining licenses from the DVD-CCA to build DVD players are **explicitly required to implement features that restrict or prohibit use of works previously deemed "fair use" by US courts**. Specifically, DVD players contain CSS encoding to prevent playback of DVDs on players not licensed by the MPAA, they contain Macrovision circuitry to prevent copying (even for personal archival use) of videos to videotape (see the Betacam decision), and they contain embedded region identifiers and region restriction circuitry to permit the industry to prevent viewing of content obtained from a foreign source. Most of these features stand in violation of WTO agreements and violate several international laws (as a result, many countries require the players to have such restrictions removed before the player is sold there).

Time Warner states that they no of no works or classes of works that has, because of the implementation of technical protection measures, become unavailable or less available to lawful users. However, currently only users of Windows and certain models of Macs with licensed DVD players can use them to view DVD movies because of said restrictions. Some users of Microsoft Office 2000 are currently deprived of use of their legally licensed products do to such technological restrictions, and <http://www.lawnetwork.com/stories/A20129-2000Mar30.html> points out that author Steven King is prohibited from reading copies of his electronically distributed novelette "Riding the Bullet" because he uses a Macintosh computer but the publisher released the work with a proprietary reader that worked only with Microsoft Windows.

Time Warner states that they no of no negative effects of access control on the availability of works for nonprofit archival purposes, yet the DVD Macrovision protection requirement of DVD hardware vendors and the current action to require viewing of DVDs only on licensed hardware effectively prohibits any archival copying or restoring of such data.

Time Warner also asserts that permitting circumvention of certain access control methods would minimize profits and precipitate abandonment of the media. This argument was also used to argue that VCRs should be illegal for identical reasons. However, the market quickly took off for videos and widespread piracy was never realized. Abandonment of the medium is also not likely for similar reasons.

It is my personal opinion that access control related to copyrighted works is a poorly conceived notion. Copyright already sets restrictions on the use of works based on the notion that the licensor deserves credit and remuneration for the enjoyment thereof by other parties. The circumvention of any technological copy or access restriction control should not be prima facie criminal on the basis that such activity is essentially fair use until such time as a copy of a work is made and distributed in a manner that deprives the copyright holder due payment and credit. Should a copyright be so violated the holder should be entitled to full remediation under the law. However, no *a priori* restriction on the fair use rights of consumers should be permitted.

Sincerely,

James D. McIninch, Ph. D.