

Statement to the Copyright Office
Opposing Exemptions to the Prohibition on Circumvention of Technological
Measures that Control Access to Copyrighted Works
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My name is Daniel Abraham. I am a long-time illustrator and a practicing attorney, and serve as Public Affairs Chair on the national board of directors of the Graphic Artists Guild, UAW Local 3030. The Guild's membership of illustrators, graphic designers, and other members of the graphic arts industry have an interest in preserving and protecting the use of copyrighted works within the expanding digital environment.

It is the opinion of the Graphic Artists Guild that exemptions should not be granted to the prohibition on circumventing copyright protection systems, either on the basis of particular classes of works, particular classes of users, or to accommodate particular technologies. The potential damage to the rights of copyright holders far outweighs any countervailing benefit that such exemptions might offer. To the contrary, the creation of an exemption in any one of the foregoing classes will be self-defeating, for it will operate to restrict the willingness of copyright holders to make works readily available to the public.

The rapid expansion of the digital environment has fostered a widespread contempt for copyright protection, beyond the ignorance already extant in the public at large. The rights of authors are readily dismissed by those who knowingly or unknowingly confuse the physical ability to copy works with their legal right to do so. Authors and other copyright rightsholders desire no less than before to make their works widely available, but if the protections granted by the copyright statute are not to become a dead letter, the means to protect works from casual infringement must be encouraged so as to ensure that a return on the dissemination of works remains possible.

Exemptions for Classes of Works

Exempting a particular class of works from the circumvention prohibitions should not be permitted. Such an exemption will encourage distortion of the classification, however closely it is drafted. Rightsholders will seek to avoid inclusion of their works within the exempted category, and would-be users will seek through litigation to include greater numbers of works within it. Regardless of the outcome of the explosion of litigation that will be fostered by instituting an exemption, a two- or more tier system of protection will be created. There is no value to dividing or ranking the protection works are afforded according to the class of the work; the copyright law currently and properly leaves determination of the need for physical protection, and its potential effect of such protection on financial return, to the judgment of the author or rightsholder where it rightly belongs. Potential economic benefit has historically been deemed the appropriate incentive for authors and rightsholders to permit access; copyright protection systems do not alter that determination, but merely make the determination workable in the digital age.

Exemptions for Classes of Users

Permitting a certain class or classes of users to circumvent protection systems will distort the dissemination of works in much the same way as creating a protected class of works, but from the user side. Distortion of the class by users seeking to be classified in it, or by authors and rightsholders seeking to restrict such membership, is an invitation to unnecessary litigation. Worse, creation of an exemption for a particular class of users will foster an entitlement within the class which cannot but have an ill effect on the understanding of, and respect for, copyright protection in society at large. Mandating the availability of circumvention technology under license to schools and libraries is a better course than designating them a protected and exempted class, for licensing will permit access while ensuring that protection of the works themselves remains intact.

Exemptions for Particular Technologies

Writing an exemption for a particular technology into the law would unwisely yoke this rapidly-changing area of innovative commerce to the much slower deliberations of governance. Competition in the marketplace will be fostered far more readily by encouraging widespread distribution of technology through licensing than by tilting the playing field in favor of or against one or another technological innovation which

happens to be momentarily ascendant, or in need of assistance, at the time regulations are adopted.

Fair Use

It is too often forgotten that fair use is not an entitlement to the work of authors enjoyed by particular classes of users, but a defense which permits users to avoid, in certain circumstances, the penalties of infringement. The right to decide whether, and how, to place a work before the public belongs to the author or rightsholder alone, before any use may occur, whether that use is licensed, infringing, or an infringement ultimately adjudged "fair." A user's legitimate desire or decision to access a particular work will not be changed by the author's or rightsholder's precautions to physically safeguard his or her legally protected property. Copyright protection systems will not in themselves prevent infringement of content, but such systems may delay the technical ease by which infringement is accomplished. If the user infringes the work by electronic means, judgment that the use was "fair" will of itself obviate the penalties attendant to circumvention. There is, however, no reason to create, in advance, a protected class of infringements beyond that which already exists. To do so will simply encourage an expansion of claims that infringements belong to the protected class.

Conclusion

No exemption, whether for classes of works, classes of users, for particular technologies, or under an expanded theory of fair use, will avoid distorting the protection currently afforded the marketplace judgments of authors and rightsholders by the copyright law itself. The entire purpose of favoring copyright protection systems is to enhance the ability of authors and rightsholders to retain control over their property rights in the face of technological advancement. Creating exceptions, particularly before the law has been tested significantly, negates the promise of such systems without significantly enhancing user access, save for the purpose of infringement. If the copyright law is to continue to offer protection for original works, exemptions from the prohibition against circumvention must be avoided, until such time as the market makes the need for such exemption clear. It currently does not.