



IP JUSTICE

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Comments of IP JUSTICE

Copyright Office Rulemaking Proceeding
Pursuant to Section 1201 of the Digital Millennium Copyright Act

Submitted: December 17, 2002

**IP JUSTICE RECOMMENDS EXEMPTING THE FOLLOWING SIX (6)
CLASSES OF WORKS FROM THE DIGITAL MILLENNIUM COPYRIGHT
ACT'S GENERAL BAN ON CIRCUMVENTING TECHNOLOGICAL
CONTROLS THAT RESTRICT ACCESS TO A COPYRIGHTED WORK:**

I. Tethering

Class 1: Literary works restricted by access controls that tether the work to a specific device or platform, thereby preventing a lawful possessor from using the work on an unsupported system in a non-infringing way.

Example: E-books

Summary:

When a publisher distributes an E-book tethered to a specific device or platform, the DMCA prevents purchasers from reading content they lawfully acquire on the devices of their choosing. An exemption for this class of works would allow purchasers of E-books to lawfully circumvent access controls for the lawful purpose of reading a literary work on multiple devices or platforms.

Facts:

Literary works distributed in electronic format, often called E-books, are increasingly restricted by technological access controls that prevent owners from reading the book on the system they choose. For example, some Adobe E-books employ access control measures that prevent users from reading an E-book on any machine other than the one it was first downloaded onto. This is a problem for E-book purchasers who upgrade their computers or switch operating systems and are unable to read the E-books they had lawfully purchased on their new machine. It is also a problem for E-book

purchasers who choose to read their E-books on a different computer or device, such as a laptop or PDA, from the one onto which it was originally downloaded.

Argument:

There is a legitimate need for purchasers to be able to move their E-books from a desktop to a laptop, from an IBM to a Macintosh, or from a Tablet to a PDA. Consumers have long exercised the option to read books on planes and on trains and in their backyard and in bed. Copyright law has never been construed to allow authors to prevent a reader's freedom to read a lawfully purchased literary work where and how they choose. No less opportunity should be available because the reader purchases an electronic book. E-books that employ technological restrictions that deny someone in lawful possession from accessing it where and how and on which device they choose allow content creators much greater ability to control reader's choices than they have ever had under copyright law.

Furthermore, tethering literary works to a specific device limits an E-book owner's ability to exercise the full bundle of property rights long associated with ownership of a book. For example, the First Sale doctrine allows a reader to resell a book after she has finished it. Access controls that restrict the platforms on which an E-book can be read interfere with that right. If an E-book is tethered to a platform that becomes obsolete, the owner can no longer exercise her option to resell or otherwise dispose of the Ebook according to her choosing. Since the First Sale Privilege is a limitation on a copyright holder's ability to control distribution of that work, circumvention should be permitted on technological control measures that restrict redistribution of an E-book by tethering it to a particular device or system.

Circumvention of access control measures that tether E-books to specific devices or platforms is necessary to allow purchasers to read and resell literary works with the same ease and versatility that they have historically exercised. By preventing circumvention of this class of access controls, the DMCA both denies purchasers of literary works the rights they retained under copyright's historic balance and endows creators with new rights to restrict how literary works are used in a manner never before contemplated or permitted. We urge the Librarian to recommend an exemption to the DMCA's general ban on circumvention of access control measures to permit owners to lawfully circumvent access control measures that tether literary works to specific platforms or devices.

CLASS 2: Sound recordings restricted by access controls that tether the recording to a specific device or platform, thereby preventing a lawful possessor from using the work on an unsupported system in a non-infringing way.

Example: Access-Restricted CDs

Summary:

The DMCA prevents CD purchasers from listening to recordings they lawfully acquire on the devices of their choosing, when copyright holders distribute CDs that are tied to a

specific device or platform. An exemption for this class of works would allow purchasers of CDs to lawfully circumvent access controls for the lawful purpose of listening to their recordings on multiple devices or platforms.

Facts:

Compact Discs (CDs), music downloaded from the Internet, and other types of sound recordings are increasingly restricted by technological access controls that prevent owners from listening to their own recordings on the system they choose. For example, some distributors tether sound recordings to CD players, preventing lawful possessors from listening to the music on a computer (See: “IBM Updates Copy-Protection Software” by Tom Spring, CNN, April 10, 2002, at <http://www.cnn.com/2002/TECH/ptech/04/10/copyright.software.idg/index.html>, describing how the latest CD release by pop star Celine Dion employed access controls that prevented playback on a personal computer, and “Sony: Downbeat For a New Online Music Battle” by Laura Rohde, CNN, Sept. 27, 2001 at <http://www.cnn.com/2001/TECH/industry/09/27/sony.music.battle.idg/index.html>, describing how Sony Music employed access controls to certain Michael Jackson CDs that prevented playback on computers and CD-ROMs). Other distributors tether sound recordings downloaded from the Internet onto the device they are originally downloaded (See: “Music So Nice, You Pay Twice” by Brad King, Wired News, Feb. 4, 2002 at <http://www.wired.com/news/mp3/0,1285,49188,00.html> describing how Universal Music Group employed access control measures on the downloadable recording of “Fast & Furious -- More Music”).

Argument:

There are many reasons why consumers want to be able to move their sound recordings from their computer to CD player, from their CD player to their Diamond Rio, or just from their living room to their car. Some users want to download music onto a portable MP3 player to listen to it while jogging. Others want the ability to wirelessly “beam” music from one device to another for easier or continued use. There is also a cultural heritage of making mix-tapes for one’s girlfriend, or to listen to on road trips. Today, digital technology enables people to access their music collection in unprecedented new ways. Transportability is one of the chief consumer benefits of digital technology, giving consumers the ability to “space-shift” or “place-shift” their music from one physical location to another. This versatility and portability has historically been part of the rights of ownership of a sound recording and copyright law has always been construed to empower users to ‘rip, mix, burn, and create’. Content owners have never been allowed to control where and how and in what order a user listens to her lawfully owned music. The DMCA changed that by preventing circumvention of access control measures that tether works to specific devices. To return copyright law’s traditional balance between creator and users, listeners should be permitted to circumvent access controls that restrict lawful listening to sound recordings on the users’ chosen platforms.

As further evidence of the desirability and support for such an exemption, many of these portability fact-patterns prevented by the DMCA had previously been found by courts to be protected uses. Adopting this class exemption would be in line with the many court decisions that have upheld space or time-shifting. Most recently, in RIAA v. Diamond Multimedia Systems, Inc., 180 F.3d 1072 (9th Cir.1999), a court held that “space-shifting” of sound recordings between different devices is considered a lawful personal use. Most famously, in Sony Corp. of America v. Universal City Studios, 464 U.S. 417 (1984), the US Supreme Court held that “time- shifting” an entire copyrighted television show using the VCR constituted fair use under the Copyright Act, and thus was a protected act.

Circumvention of access control measures that tether CDs to specific devices or platforms is necessary to allow purchasers to listen to their music with the same ease and versatility that they have historically exercised. By preventing circumvention of this class of access controls, the DMCA both denies purchasers of music the rights they retained under copyright’s historic balance and endows creators with rights to restrict how sound recordings are used in a manner never before contemplated or permitted. We urge the Librarian to recommend an exemption to the DMCA’s general ban on circumvention of access control measures to permit owners to lawfully circumvent access control measures that tether sound recordings to specific platforms or devices.

CLASS 3: Motion pictures and other audiovisual works restricted by access controls that tether the work to a specific device or platform, thereby preventing a lawful possessor from using the work on an unsupported system in a non-infringing way.

Example: DVDs

Summary:

The DMCA prevents DVD purchasers from watching motion pictures they lawfully acquire on the device of their choosing, when the movie studios distribute the DVD tethered to a specific device or platform. An exemption for this class of works would allow purchasers of DVDs to lawfully circumvent access controls for the lawful purpose of watching their motion pictures on multiple devices or platforms.

Facts:

Motion pictures in Digital Versatile Disc (DVD) format are increasingly restricted by technological access controls that prevent owners from watching the movie on the platform they choose. For example, under the Hollywood movie studios’ region coding system, consumers cannot play DVDs purchased in one region, such as Japan, India, or Europe on machines they purchased in another region, such as the United States. Also, DVDs can be tethered to a single platform, preventing users from playing the same DVD on a computer and a stand- alone DVD player, or on a Macintosh and an IBM. The DMCA prevents users from circumventing the technology tethering a DVD or

DVD player to the region where it was purchased or tethering a DVD to a designated platform or device.

Argument:

There are many reasons why consumers may want to play DVDs purchased in one region on a device manufactured in another region. They could be planning time abroad, have been given a gift from an overseas relative, or have purchased a souvenir movie of a vacation spot. And there are equally as many reasons why consumers might want to watch a movie on multiple platforms. They could have different DVD player in different rooms of their house, wish to upgrade their technology, or want to play a favorite movie for their children on a computer on a long plane ride. Without a new specific exemption from the Librarian, the public will be prevented from accessing their DVDs on their own equipment in perfectly lawful and previously protected ways.

The DMCA permitting movie studios to have total control over a DVD's use contrasts vividly with copyright's history of balancing the interests of publishers, creators, and users. First, copyright owners' use of tethering to enforce region coding conflicts with 17 U.S.C. Section 602(a), which states that consumers do not infringe a copyright owner's exclusive rights if they import single copies of copyrighted works for personal, noncommercial uses. Second, the alienability of copyrighted works is restricted because owners are limited in acquiring and disposing of works that are not playable on local devices or on current device models. Third, innovation is limited because movie studios have a de facto legal monopoly over who can build DVD players. This unprecedented new power permits Hollywood to enforce anti-competitive practices, such as requiring a substantial cash bond upfront to build a software DVD player, and anti-competitive license terms, which by their very conditions, do not permit open source software development of DVD playing software. Together with the monopoly on who can build DVD players, functionality and design restriction choices of major studios prevent many lawful uses of a motion picture.

The practice of tethering DVDs allows copyright owners to legally enforce region coding and consequently, price discrimination. It also allows copyright owners to increase revenues by forcing consumers to purchase multiple copies of movies to play on their various platforms, devices and operating systems. This interferes with numerous non-infringing uses of motion pictures and other audiovisual works distributed in digital format. It is particularly troublesome as the copyright owners uses the DVD format as its sole means for delivering motion pictures to users. DVDs can only be accessed on devices or systems authorized and licensed by the copyright owners through its licensing entity DVD-CCA. This means that the copyright owners can control both who makes the devices and what kinds of devices and features are available for viewers to watch their lawfully purchased movies. By preventing users from circumventing access control measures on either DVDs or DVD players, the DMCA allows copyright owners an unprecedented amount of control over which devices enter the market, how much DVDs and players cost, what functions and features are forbidden to include on a DVD player, and where and how users watch their motion pictures.

This is most famously demonstrated by the continued lack of any device to watch movies on the Linux operating system. Besides stand-alone DVD players, computer software can also be written which allows for viewing a DVD on a personal computer. Despite Hollywood's years of promises and press releases, there is still no licensed DVD player for the Linux operating system available for consumer purchase (See: "Corporate Paws Grab for Desktop" by Brad King, Wired News, Sept. 9, 2002 at <http://www.wired.com/news/business/0,1367,54941,00.html>). Because of the DMCA's restriction on circumventing access controls, users cannot circumvent the technology tethering movies to a Microsoft operating system in order to play those movies on a Linux operating system. And they cannot purchase content designed for a Linux machine, as the copyright owners do not market movies for that platform. Thus users of the Linux operating system are *de facto* prevented from viewing their legally obtained movies on their computers.

Circumvention of access control measures that tether DVDs to specific devices or platforms is necessary to allow purchasers to watch motion pictures with the same ease and versatility that they have historically exercised. By preventing circumvention of this class of access controls, the DMCA both denies purchasers of movies the rights they retained under copyright's historic balance and endows creators with new rights to restrict how movies are used in a manner never before contemplated or permitted. We urge the Librarian to recommend an exemption to the DMCA's general ban on circumvention of access control measures to permit owners to lawfully circumvent access control measures that tether motion pictures to specific platforms or devices.

II. Dual Purpose Technology

CLASS 4: Literary works restricted by access controls that limit lawful access to and post-sale uses of the work, where circumvention allows a lawful possessor to use the work in a non-infringing way.

Example: E-books

Summary:

When a publisher distributes an E-book in a format where one technology limits access to and limits post-sale uses of the book, the DMCA's restriction on circumventing an access control technology prevents the user from circumventing the post-sale control technology. An exemption for this class of works would allow purchasers of E-books to lawfully circumvent access controls for the lawful purpose of exercising the full bundle of their post-sale rights.

Facts:

Literary works distributed in electronic format, often called E-books, are increasingly restricted by technological controls that both prevent owners from accessing their book and limit owner's post-sale non-infringing use of their book. For example, Adobe's E-book access-restriction technology allows publishers to disable many post-sale lawful uses of the book, such as printing a single page, reading the text aloud, or 'space-

shifting' an E-book to a hand-held device for more convenient reading. Since it is often the same technology that restricts access to an E-book that also restricts its post-sale use, the DMCA's ban on bypassing access controls allows E-book publishers to also control the consumer's use of the E-book by technology that cannot be lawfully circumvented (See: "Digital Copyright Overkill" by the Economist, Dec. 5, 2002 at http://www.economist.com/business/displayStory.cfm?story_id=1482259 and "Security Technologies Could Backfire Against Consumers" by Robert Lemos, CNET News, Nov. 7, 2002 at <http://news.com.com/2009-1001-964628.html> describing how dual-purpose technologies inhibit post-sale uses of literary works).

Argument:

Ebook readers have a legitimate need to be able to circumvent and disable certain post-sale access controls in order to exercise the traditional rights of book ownership. These post-sale access controls, colloquially termed Digital Rights Management Systems (DRMS), allow E-book publishers to prevent a wealth of fair uses, including the right to print, parody, space shift, sell, and trade the book. Together with the rights protected under the DMCA, DRMs give E-book publishers unprecedented control over an individual's reading experience. The traditional copyright balance has tipped dramatically against the consumer and must be corrected if readers are to retain their lawful rights to use books in the digital realm.

The exemption is also necessary to satisfy Congress' intent in passing the law. In enacting the DMCA, Congress specifically intended to permit the circumvention of access controls where it was necessary for users to exercise fair uses. E-book publishers and technology companies are 'circumventing' Congress' clear intent by applying dual use technologies to E-books. By doing so, they prevent readers from bypassing any of the post-sale use restrictions lawfully, because to do so would also mean bypassing the access controls which is forbidden by the DMCA.

Circumvention of dual use technologies that limit both access and post-sale use is necessary to allow purchasers to read, print, use and resell literary works with the same ease and versatility that they have historically exercised. By preventing circumvention of this class of access controls, the DMCA both denies purchasers of literary works the rights they retained under copyright's historic balance and endows creators with rights to restrict how literary works are used in a manner never before contemplated or permitted. We urge the Librarian to recommend an exemption to the DMCA's general ban on circumvention of access control measures to permit owners to lawfully circumvent technological measures that limit both access and post-sale use of the work, where the post sale use is protected under copyright law.

CLASS 5: Sound recordings restricted by access controls that limit lawful access to and post-sale uses of the work, where circumvention of the technology allows a lawful possessor to use the work in a non-infringing way.

Example: Copy-restricted CDs

Summary:

When a recording company distributes a sound recording in a format where one technology limits access to and limits post-sale uses of the recording, the DMCA's restriction on circumventing an access control technology prevents the user from circumventing the post-sale control technology. An exemption for this class of works would allow purchasers of CDs to lawfully circumvent access controls for the lawful purpose of exercising the full bundle of their post-sale rights.

Facts:

Compact Discs (CDs), music downloaded from the Internet, and other types of sound recordings are increasingly restricted by technological controls that both prevent owners from listening to their music and limit owners' post-sale use of their music. Growing numbers of copy-restricted CDs are distributed to the public treated with a technology that disable consumers ability to copy or otherwise use CDs in various lawful ways. If music CDs are only available in a restricted format, then individuals will not be able to engage in many lawful uses, including fair use of the work, whether for review and criticism or for personal, noncommercial copying. For example, users' ability to copy their music so that they can listen to it on other devices is being increasingly restricted by the release of CDs protected by access control technologies (See: 'No more music CDs without copy protection', *claims BMG Unit*, John Lettice. The Register, November 6, 2002 at <http://www.theregister.co.uk/contents/54/27960.html>, and 'All CDs will be protected and you are a filthy pirate', John Lettice. The Register, November 8, 2002 at <http://theregister.co.uk/content/54/28009.hyml>, describing the types of post-sale access controls that are being placed on CDs).

Argument:

The DMCA distinguishes between circumventing access controls and circumventing copy controls and allows circumvention of copy controls in order to engage in fair use. In passing the DMCA, Congress clearly intended the public to continue to enjoy the right to circumvent copy controls on sound recordings for lawful purposes. While in theory, consumers continue to enjoy the right to circumvent copy controls to make fair use or to engage in other lawful uses of sound recordings, the law still forbids bypassing access technology, and since its not possible to bypass copy controls without also bypassing access controls with dual use technologies, consumers are prevented from exercising the right to bypass the copy controls on sound recordings in order to make lawful use of their music.

Copyright holders only have the right to control public performances of works under copyright law. But the private performance of a work -- the private experiencing of a work -- is intended to remain under the control of the individual. In total disregard to this

clear limitation of rights, copyright owners are usurping the individual's private performance right through the use of technological access controls that "double" as use controls. Circumvention of dual use technologies that limit both access and post-sale use is necessary to allow purchasers to enjoy their sound recordings with the same ease and versatility that they have historically exercised. By preventing circumvention of this class of access controls, the DMCA both denies purchasers of music the rights they retained under copyright's historic balance and endows creators with rights to restrict how sound recordings are used in a manner never before contemplated or permitted. We urge the Librarian to recommend an exemption to the DMCA's general ban on circumvention of access control measures to permit owners to lawfully circumvent technological measures that limit both access and post-sale use of the sound recordings, where the post sale use is protected under copyright law.

CLASS 6: Motion pictures and other audiovisual works restricted by access controls that limit access to and post-sale uses of the work, where circumvention of the technology allows a lawful possessor to use the work in a non-infringing way.

Example: DVDs

Summary:

When a movie studio distributes a movie in a format where one technology limits access to and limits post-sale uses of the audiovisual work, the DMCA's restriction on circumventing an access control technology prevents the user from circumventing the post-sale control technology. An exemption for this class of works would allow purchasers of movies to lawfully circumvent access controls for the lawful purpose of exercising the full bundle of their post-sale rights.

Facts:

Motion pictures distributed in Digital Versatile Disc (DVD) format are increasingly restricted by technological access controls that both prevent owners from accessing their movies and limit owners' post-sale uses of their movies. For example, many DVDs are distributed with an access control technology called the Content Scrambling System (CSS) that also controls post-sale use of the movie (See: "Tarzan' DVD forces viewers through a jungle of previews" Greg Sandoval, CNET News March 2, 2000 at <http://news.search.com/click?sl,news.43.282.1278.0.1.%22fast+forward%22+dvds.0,http%3A%2F%2Fnews%2Ecom%2Ecom%2F2100%2D1017%2D237585%2Ehtml> describing how Disney's "Tarzan" DVD prevents the consumers from fast-forwarding through the DVD's initial advertisements).

Argument:

The DMCA distinguishes between circumventing access controls and circumventing copy controls and permits circumvention of copy controls in order to engage in fair use. In passing the DMCA, Congress clearly intended the public to continue to enjoy the right to circumvent copy controls on motion pictures for lawful purposes. However, by exploiting the DMCA's ban on bypassing technological access controls, copyright

owners are gaining greater control over the post-sale experience and use of a motion picture. This is beyond what copyright law grants or that the First Amendment permits. By using the same technology to regulate access to, and to regulate use of a DVD, the movie studios have created the *de facto* right to control private performances where a *de jure* right never existed.

Furthermore, by refusing to license the creation of DVD players that permit copying or allow other lawful post-sale uses, copyright owners are using the DMCA to eliminate consumers' control over their own experience of audio-visual works. Without the ability to circumvent use controls, individuals are forced to experience motion pictures in a manner controlled by the movie industry. For example, parents who want to fast-forward through age-inappropriate movie-previews are prevented from that legitimate activity by CSS access controls and consumers are forced to watch advertisements, since bypassing the technology that prevents fast-forwarding during those ads would be a DMCA violation.

Circumvention of dual use technologies that limit both access and post-sale use is necessary to allow purchasers to view movies with the same ease and versatility that they have historically exercised. By preventing circumvention of this class of access controls, the DMCA both denies purchasers of movies the rights they retained under copyright's historic balance and endows creators with rights to restrict how motion pictures and other audiovisual works are used in a manner never before contemplated or permitted. We urge the Librarian to recommend an exemption to the DMCA's general ban on circumvention of access control measures to permit owners to lawfully circumvent technological measures that limit both access and post-sale use of their movies, where the post sale use is protected under copyright law.