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**Consortium of College and University Media Centers**
**Testimony on Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies**

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CCUMC Government Regulations and Public Policy Committee

The Consortium of College and University Media Centers appreciates this opportunity to speak on the rulemaking regarding section 1201(a)(1) of the Copyright Act, 17 U.S.C. which was added by the Digital Millennium Copyright Act. Our members have important concerns regarding the question of whether there are classes of works as to which users are, or are likely to be, adversely affected in their ability to make non-infringing uses if they are prohibited from circumventing technological measures that control access to a copyrighted work.

Representing our organization today are: Jeff Clark, James Madison University, Dan Hamby, Public Broadcasting Service, and Diana Vogelsong, American University

The Consortium of College and University Media Centers (CCUMC) represents institutions of higher education, primarily in the United States, as well as a number of media producers and distributors. Many of the distributor members work closely with our academic institutions to support their educational objectives. As Dan Hamby, our representative from PBS has stated, "We're wrestling with issues from enhanced content to new delivery systems. Protecting the copyright, but still making the material available to as wide a base of users as possible is still a key goal."

CCUMC's educational members acquire and manage collections of material in a broad range of formats. They also provide curriculum support for faculty and others who wish to make effective use of these materials in teaching and learning. Members play an active role in educating users about respect for intellectual property.

Issues related to use of and access to materials for educational purposes are at the core of CCUMC's mission. CCUMC led development of the Fair Use Guidelines for Educational Multimedia in conjunction with the Conference on Fair Use (CONFU) of the National Information Infrastructure's Working Group on Intellectual Property Rights. These guidelines were published as part of a non-legislative report of the Subcommittee on Courts and Intellectual Property, Committee of the Judiciary, U.S. House of Representatives on September 27, 1996. We want to preserve the gains made by helping to define fair uses within that document.

The guidelines meet educators' needs for a better understanding and application of fair use. They deal with integrated presentations created and used by faculty and students, composed of their original material (such as course notes or commentary), together with various copyrighted, lawfully acquired media formats including motion media, music, text material, graphics, illustrations, photographs and digital software. The purposes for which faculty and students can apply these guidelines cover curriculum instruction and study, including some limited distance education application over secure networks, peer conference presentation for faculty, and portfolio evidence for both faculty and students.

On the issue of possible exemptions to the prohibition against circumvention of technological measures that control access to copyrighted works, CCUMC testimony will focus on the following areas:

1) **The feasibility of identifying classes of works to be considered for exemption under this rulemaking procedure;**
2) **Concern about the ability to distinguish access from use in technological implementation;**
3) **Identification of examples where educational activity is or may be constrained under the anti-circumvention rule if exemptions are not permitted;**
4) **A recommendation for an exemption for instructional media centers.**

1. **This rulemaking procedure has been established in part to determine whether classes of works are likely to be adversely affected by the prohibition against circumvention of technological controls on access to copyrighted works. CCUMC questions the requirement to restrict exemptions only to certain classes of works.**

When examining this issue in light of teaching and learning requirements, the distinction between classes of works affected becomes difficult to determine. Some works are created expressly for use in the classroom, as dedicated "instructional materials". Their express purpose is to enhance the teaching and learning process. Other classes of works represent cultural "expressions," which have other primary purposes in the market but are useful as instructional resources in two broad ways: they provide rich content for teachers to draw upon to achieve instructional objectives similar to those achieved by so-called "instructional" resources; and, secondly, they can be analyzed and studied as cultural, social and political artifacts which reveal important meaning about their human sources and uses.

As front line educators and producers of educational material, CCUMC recognizes the valuable role that anti-circumvention technologies play in assuring protection of the rights of creators and producers. However, we also recognize the value of all types of media as educational resources. When selecting teaching resources, educators must first identify their teaching objectives and understand the varied learning styles of their students. Only then is the medium or delivery format effectively selected. Indeed, recent theories of "multiple intelligences" stress that educators recognize the importance of using a variety of teaching approaches to meet student needs. With this in mind, it is evident that any attempt to identify classes of works to be exempted under the anti-circumvention ruling imposes a burden on the educational process.

2. **The difficulty of distinguishing access and use in the digital environment places educators at a disadvantage.**

A distinction is made in the new section 1201(a)(1) of the copyright title, between "access" to works --circumvention of whose security measures is prohibited-- and the

"noninfringing uses" (fair uses) that may be made of them, which is not. This makes sense in terms of controlling circumvention of protective measures for purposes of illegal access to copyrighted materials that have not been properly licensed. Publishers and producers have argued that fair uses would be permitted, therefore, for those who have acquired materials lawfully. In this scenario, where a broad based license encompasses or even goes beyond the fair use criteria to meet established educational needs, few would have concerns about protection for copyright holders.

The dilemma arises from evolving technologies where technological measures for controlling both are blended or even bound inseparably. This trend may grow as the market aim of some copyright holders becomes a "pay per use" model that compromises the ability to educate freely. The Committee on Commerce, House of Representatives, H.R. Rep. No. 105-551 (1998) recognized this risk in considering the DMCA when it "felt compelled to address [...] the risk that enactment of the bill could establish the legal framework that would inexorably create a 'pay per use' society" (26).

Both of these issues are important because the rulemaking proceeding will determine whether classes of works are likely to be adversely affection by encryption, secure envelopes or other means of control in the digital realm. Increasingly materials are available only in electronic formats and traditional media cannot be relied upon as back-up resources when educators seek to exercise "fair use" options. Because decisions made on this matter would hold for three years, until the next review process, educators will be at risk if projections regarding access measures, marketplace changes, or even teaching needs and methodologies do not track as anticipated and pay per use technologies become a norm. The rulemaking process therefore puts the counterbalancing operation of fair use, as it is traditionally understood and applied, at a clear and unnecessary disadvantage. Such an unfortunate legal restriction may not be immediately quantifiable in monetary terms, but could substantially restrain the effectiveness of educational efforts over the intervening period that they may be in effect until the next Copyright Office review.

**3. To illustrate the above issues, CCUMC offers the following examples of educational situations involving protected, copyrighted materials where fair use is or might be compromised or educational activity is unreasonably constrained under the anti-circumvention rule of the DMCA.**

- The in-process legal action against DeCSS decryption of DVD software is relevant to the following teaching method cited by a CCUMC member: "One very popular method used in visual media studies is the direct side by side comparison of two similar pieces. In this instructional style, the two examples are placed side by side in 'Quicktime' windows and the clips are played first on one side and then the other. The instructor then has the ability to line up exact points in the two scenes to demonstrate visual differences. With the proposed [DMCA's] provisions we would be unable to do this simple task because the visual media would be protected." If the provision under review in these hearings applies in full force, DVD—the highest

quality video format readily available—would be unavailable for use in the teaching method described here.

- Another CCUMC colleague experienced one of the unexpected effects that technological security measures can have on occasion. The CD-ROM version of the Oxford English Dictionary, though usable on an individual PC workstation, would not output to a data projector for group instructional purposes. While perhaps unusual, this speaks to the unpredictability factor that can be introduced when software security measures are implemented.

- Images databases are licensed by many institutions through their libraries or media centers. Currently some may not offer a full range of manipulation tools for their contents to accommodate different teaching goals and styles, and may not allow extraction of contents to achieve this manipulation (under fair instructional use) through other software means. For example, a sophisticated form of such need for manipulation is offered by one CCUMC member. In a pilot project involving an art image database, images were loaded by students into Adobe Photoshop software and manipulated to create new designs for museum posters. Similarly students could combine the images with other materials in other software to create virtual exhibitions. The instructional aim met by this form of working with the images was to allow students to study their formal meaning and content in ways which could not be pursued had they been limited to viewing images in the original format and database only. Even should databases used to meet this sort of teaching and learning purpose not currently prohibit this manipulation technologically, this status quo could change unexpectedly in the future, thereby jeopardizing an effective educational method that has become an integral part of instruction.

- Many media, statistical and text databases used in group instruction are currently, and in future will continue to be, subject to licensing restrictions on the number of simultaneous users that are implemented technologically--and rigidly. This may mean that for instructional purposes, the database may not be dependably available for display when needed. When the primary aim of the class instruction is to demonstrate how to use the database features and locate or manipulate its elements, the intellectual content is not at issue. Nonetheless, such a use is being counted as one of the simultaneous users, and subject to restrictions that may make the teaching process difficult if restrictions cannot be readily circumvented.

- In their submitted remarks, libraries have already identified examples where off-campus access by enrolled students to legally acquired databases may pose a problem under the new ruling. As all formats are migrating to digital and electronic delivery, these restrictions have the potential to inhibit access to a full range of media, including music, speeches and other recorded sound, video, and still images. Circumvention measures, such as proxy servers, can provide access to legitimate users for educational purposes without violating the rights of copyright holders.

**4. Exemption of instructional media centers**

Given these aforementioned concerns, CCUMC proposes consideration of an exemption for educational media centers in the use of materials lawfully acquired by the institution. Like libraries, of which many of our members are organizationally affiliated, media centers provide many forms of curricular support that generally have been acknowledged as appropriate fair uses. It seems reasonable to assure that this activity continue under the DMCA .