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David Carson, Esq.
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Dear Mr. Carson,

In comments regarding §1201(a) rule-making Mr. Dean Marks and Mr. Bernard Sorkin have suggested that only as a last resort should one or more classes of works be excepted from the prohibition on access control circumvention. This proposed near- or total-absence of exceptions to §1201(a)(1) has been justified as necessary to "protect" copyright owners' works (without specifying whether that protection is access control, rights control or both), or to control piracy. Both sets of arguments are erroneous:

- In several submission, and particularly in Mr. Marks' written comments made during the Stanford hearing, the word "protection" is used in such a vague and nonspecific manner as to render parts of the comments meaningless. The issue of whether or not a particular effect on use of a work stems from access control or rights control is central to understanding whether a particular impact on use of a work is relevant to §1201(a) rule-making.
- In the second instance, where commentators mention technological rights control, it is important to note that circumvention of these measures is an violation of §1201(b), and is not directly connected with (a). The scope of this rule-making does not of necessity include circumvention of rights controls.

In these two general categories, issues of uncertain provenance or which are properly outside the scope of §1201(a) are being offered as a basis for this rule-making.

Because some commentators allege or imply that a single technological measure is both access control and rights control, it will be useful to have a working definition of access control. Please note that the statute does *not* define "access." §1201(a)(3)(B) is a definition of "effectively"; with respect to "access" (a)(3)(B) is circular:

> a technological measure "effectively controls **access** to a work" if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain **access** to the work.

While "access" is an old concept in infringement litigation, the definition of access in that subfield is not completely settled.[1] Because comments to date regarding this rule-making are primarily limited to the consideration of encryption techniques, a definition of "access" specific to encryption should aid in analysis, even if such a definition is not universally applicable. A limited and working definition of access control may be had as the cryptographic scrambling of a work. This is so even if some access control mechanisms fail the tests of effectiveness laid out in (a)(3)(B).

By this definition, the scrambling of a work is access control. Claims for example that the Content Scrambling System (CSS) is partial copy control are incorrect. Strictly speaking, access to some unauthorized copies is denied; the copying itself is not prevented. The claim is that the denial of access after certain unauthorized copying (but not all unauthorized copying to be sure[2]) *might as well* be copy control.

The implication of claims that a single technological measure implements both access and rights control is that a copyright owner's interest in exclusive rights must be balanced against the public's right to access published works. Dual-function claims are an attempt to impose further constraints on this rule-making beyond those explicitly stated in (a)(1)(C)(i-iv). The inclusion of such considerations under (a)(1)(C)(v) would not match the structure of the statute in creating distinct access control and rights control clauses. *The sole aim of §1201(a) should be understood to be enabling commerce where a copyrighted work is not embodied in a copy.* Novel means for the electronic delivery of a work without the *transfer* of a copy have created a situation where the traditional means of compensating a copyright owner will fail. Historically, copyright owners have been compensated when a copy enters the stream of commerce. If the entry of a work into the stream of commerce is not accompanied by the *transfer* of a copy, then clearly a new means of compensating the copyright owner is in order. Suggestions that the unauthorized reproduction of digital works or that widespread redistribution of works over the Internet should be regulated by §1201(a) ignores the existence of §1201(b) and §106.

An extension of §1201(a)'s protection of access control past the point of first sale, or to access controls on a work embodied in a tangible copy after publication, would radically change the nature of copyright and it would violate the statutory guarantees in §1201(c)(1,4) that fair use and non-copyright use[3] should be unaffected by the provisions of §1201. My suggestion is that the classes of works exempt from §1201(a)(1) should include all works after first-sale, and all works embodied in an authorized copy after publication. Access controls on a disembodied work during delivery of that work would insure that no third party makes unauthorized copies while the work is in transit.

In closing I would like to note that during the Stanford proceedings Mr. Marks mentioned

[1] See for example Nimmer on Copyright §13.02[A] at 13-16 where several possible definitions are given.

[2] The bit-for-bit copying of whole DVDs using industrial equipment produces a fully-functional copy.

[3] e.g. The right to read is a non-copyright use. For a discussion of non-copyright use, see Seltzer, "Exemptions and Fair Use in Copyright" (1978) at 6. The "right to read" Griswold 381 U.S. 479, Martin v. Struthers 319 U.S. 141, 143 is implicated by access control.

the Communications Act and it regulation of access in §§47 U.S.C. 553, 605. One should note that while these sections may establish precedent for access control, they do nothing to establish precedent regarding *exceptions* to access control circumvention. 47 U.S.C applies narrowly to a particular venue for the delivery of a disembodied work and authorization to access is granted by a party in the stream of commerce. The Digital Millennium Copyright Act operates with the authority of the copyright owner, and applies to all venues. Clearly 47 U.S.C.'s narrow scope does not establish a rule-making precedent for 17 U.S.C.'s potentially all-encompassing scope.

Sincerely,

Paul Fenimore