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| In Re Rulemaking on Exemptions to the Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies | ) ) ) ) ) | Docket No. RM 99-7 |

**POST-HEARING COMMENTS OF**
**NATIONAL ASSOCIATION OF RECORDING MERCHANDISERS**

National Association of Recording Merchandisers, Inc. (ANARM@)[1] hereby submits its Post-Hearing Comments pursuant to the Notices of the Copyright Office in the above-reference matter, initiated November 24, 1999, 64 Fed. Reg. 66139. These comments relate to matters addressed at the public hearings held May 2-4, 2000 and May 18-19, 2000, or identified in the reply comments.

## SUMMARY OF NARM POSITION

NARM is the principal trade association of retailers and distributors of sound recordings to the American consumer. Although NARM members typically do not own any copyright in the sound recordings they sell or distribute, they are the primary sources for delivery of copyrighted sound recordings to consumers.

NARM=s interest in this issue is to protect the value of sound recordings for consumers, and to insure that access control technologies are not applied to copyrighted sound recordings (the copyright owners of which enjoy a limited statutory monopoly) in such manner as to constitute the

[1] NARM is the principal trade association representing retailers and distributors of sound recordings in the United States. Its members are engaged in the distribution and retail sale of digital music in pre-recorded format and through digital distribution.

misuse of copyright which may occur where that limited copyright monopoly is leveraged through Aaccess@ and Ause@ control technologies to extend the copyright monopoly power into products or services not covered by the copyright, or to gain an unfair business advantage over retail competitors.

The commentary and testimony concerning the identification of Aclasses@ of works under Section 1201(a)(1)(B)[2] has focused on either the content of the copyrighted materials (raising serious First Amendment issues) or the use to which they are placed by the consumer (raising serious evidentiary issues) to determine whether there should be an exemption from the prohibition on the circumvention of access control technologies. Although such approaches may be proper to address some concerns, NARM believes that in the case of sound recordings and other digital media sold or distributed to consumers, the proper focus should be on whether the access control technologies are being used by the copyright owner to improperly extend such copyright owner=s copyright in ways that are against the letter and the public policy embodied in the U.S. Constitution and the Copyright Act authorized by it. If such is the case, the lawful owner of a lawfully made copy or phonorecord should be permitted to circumvent access control technologies to the extent necessary to eliminate the improper extension of the copyright monopoly.

One benefit of this approach is the creation of a strong incentive against the use of access control technologies in ways that violate the public policy embodied in copyright law, and to provide an extra-judicial remedy for those who are technologically Alocked@ into abiding by arbitrary usage rules, making additional payments or having to meet other arbitrary terms, which do not further the protection of the copyright owner=s limited copyright monopoly but, instead, seek to enlarge that

[2] All Section references are to Title 17, United States Code.

limited monopoly through technological means. It gives the copyright owner the power to make the initial determination of whether a copy or phonorecord belongs in the exempted class, by deciding whether to rely on technology to gain unauthorized control over copies or phonorecords (thereby risking the lawful circumvention of such access control technologies), or instead limiting the access control technologies to the protection of the copyright owner=s actual copyright, and only to the extent such copyright is recognized by law (thereby also enjoying the protection of federal law against the circumvention of such technology).

Another benefit of this approach is that it would establish the class of material for which circumvention should be permitted, while at the same time giving the Copyright Office the flexibility to continue making determinations as to which specific practices involve the use of access control technology in a way that constitutes misuse of copyright, and also whether limitations should be placed on the scope of permitted circumvention such that the circumvention of access control technology would be no greater than necessary to circumvent the offending technology employed.

NARM members have already been directly affected by the use of technology to bundle copyrighted sound recordings with other products not the subject of the copyright, and which are bundled for the sole purpose of forcing those who desire to purchase the copyrighted works (be they retailers or consumers) to carry the bundled products or provide services against their will. The conduct has caused sufficient injury to prompt NARM to file suit on behalf of its members, seeking declaratory and injunctive relief against such copyright misuse. *See National Ass=n of Recording Merchandisers, Inc. v. Sony Corp. of Am.*, No. 00 CV 164 (EGS), in the United States District Court for the District of Columbia. The injury from such conduct will only be exacerbated by the use of technologies which the victims are prohibited from circumventing.

For many years, NARM has been helping copyright owners combat sound recording piracy, but NARM=s aid does not extend beyond the lawful limits of the copyright monopolies. Instead of giving copyright owners even greater control than allowed by law, music retailers remain free to sell lawfully made sound recordings on their own competitive terms. In the online distribution world, those terms may include the development competitive privacy policies, including express agreements not to pass on the customer=s identity to third parties. If, instead of being used to protect the copyright from infringement, access control technologies are imposed by the copyright holder to take away the competitive choices of retailers and force upon them a technological obligation to uniformly divulge customer identities or impose restrictions beyond copyright protection, then the retailers should not only be free to circumvent those technologies but encouraged to do so. *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994) (because of the social value of increased public exposure to a musical work, Aa successful defense of a copyright infringement action may further the policies of the Copyright Act every bit as much as a successful prosecution of an infringement claim by the holder of a copyright@).

## DISCUSSION

### Legal Framework

The Copyright Office=s mandate is not derived solely from Section 1201(a)(1) of the Copyright Act, but from the Constitution, laws and treaties of the United States (the Asupreme Law of the Land,@ U.S. Constitution, art. VI, cl. 2). A brief overview helps illustrate the basis for NARM=s focus on copyright misuse as the determinant of whether a work should fall into an exempted class.

**The United States Constitution**

The Constitution provides that Congress= authority to enact copyright laws is A[t]o promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.@ (U.S. Const., art. I, cl. 8.) The Constitution=s specific limitations and ultimate purpose have been repeatedly emphasized by the Supreme Court. In *Fogerty*, 510 U.S. at 526-27, the Supreme Court summarized some of these points as follows:

> We have often recognized the monopoly privileges that Congress has authorized, while Aintended to motivate the creative activity of authors and inventors by the provision of a special reward,@ are limited in nature and must ultimately serve the public good. *Sony Corp. of Am. v. Universal City Studios,* Inc., 464 U.S. 417, 429 (1984). For example, in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975), we discussed the policies underlying the 1909 Copyright Act as follows:
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> > AThe limited scope of the copyright holder=s statutory monopoly . . . reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an >author=s= creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.@ (Footnotes omitted.)
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> We reiterated this theme in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 349-50 (1991), where we said:
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> > AThe primary objective of copyright is not to reward the labor of authors, but >to promote the Progress of Science and useful Arts.= To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.@ (Citations omitted.)
>
> Because copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible.

The *Fogerty* opinion supports the proposition that, in the event that a technological protection measure is used to extend the copyright beyond its lawful boundaries, Aa successful [circumvention] of a copyright [technological protection measure] may further the policies of the Copyright Act every bit as much as a successful prosecution of an infringement claim by the holder of a copyright.@ *Id.* at 527.

**United States Copyright Act, In General**

The Copyright Act furthers these purposes by giving copyright owners only a limited monopoly for a limited time. Significantly, the Copyright Act specifically extinguishes the copyright owner=s right to control distribution of a copy or phonorecord lawfully made under the Act once the copyright owner has transferred title to another (the so-called Afirst sale@ doctrine).[3] Section 109. Thus, for example, if an access control technology were used to prevent the exhaustion, by law, of the distribution right (such as by requiring library patrons to register, pay a fee, or divulge personal information before being granted access to a copy or phonorecord borrowed from the library, or by requiring a similar procedure to enable a friend to access a copy or phonorecord transferred by gift) then the access control technology would become a tool for circumventing the rule of law rather than protecting any right granted by law.

It is in light of these principles that the Supreme Court has not hesitated to condemn practices such as Ablock booking@ or similar leveraging of the copyright to acquire market strength relating

[3] In the case of sound recordings and computer programs, the exhaustion of the distribution right is not total, as it does permit the copyright owner to control whether the owner may rent a copy or phonorecord.

to a product or service beyond the copyright. *See, e.g., United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488 (1942); *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917).

**Treaty**

The United States is a signatory of two WIPO (World Intellectual Property Organization) treaties that have a direct bearing on the issue of how copyright misuse should limit any rule prohibiting circumvention of access control technologies. First, the Performances and Phonograms Treaty of December 20, 1996, Article 18, requires parties to provide:

> adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law.

(Emphasis added.) It is noteworthy that Article 18 only requires adequate legal protection where the technological measures are used Ain connection with the exercise of their rights under this Treaty@ and used to restrict acts not authorized by the performers or producers of phonograms Aor permitted by law.@ That is, Article 18 does not require that the United States provide legal protection against circumvention of technological measures used to restrict acts permitted by law.

Second, the WIPO Copyright Treaty of December 20, 1996, Article 12, creates certain obligations concerning rights management information (that is, Ainformation which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public@ (emphasis added)). There certainly can be no doubt that the

current access control technologies that incorporate Adigital rights management@ systems containing Arules@ governing use of a work constitute a form of Arights management information.@ However, the agreed statement of the Diplomatic Conference that adopted the treaty states, with reference to Article 12, that AContracting Parties will not rely on this Article [12] to devise or implement rights management systems that would have the effect of imposing formalities which are not permitted under the Berne Convention or this Treaty, prohibiting the free movement of goods or impeding the enjoyment of rights under this Treaty.@ Thus, to the degree that the U.S. Copyright Act is interpreted as restricting a copy or phonorecord owner=s right of subsequent distribution (*i.e.*, the right to enjoy the exhaustion of the copyright owner=s distribution right) in the name of technologically requiring adherence to private usage rules imposed in derogation of the first sale doctrine, such interpretation would run afoul of Article 12.

**The Digital Millennium Copyright Act (ADMCA@)**

To comply with the demands of Article 18 of the WIPO Performances and Phonograms Treaty, Congress enacted certain provisions of the DMCA to prohibit the circumvention of Aa technological measure that effectively controls access to a work protected under [the Copyright Act].@ Section 1201(a)(1)(A). However, this prohibition does not apply to users of Aa copyrighted work which is in a particular class of works,@ as determined in this proceeding, if the person is (or is likely to be within the next three years) Aadversely affected by virtue of such prohibition in their ability to make noninfringing uses of that particular class of works.@ Section 1201(a)(1)(B).

**Classes of Works**

NARM has been an active participant in the debate on the scope and proper limitations on so-called Adigital rights@ being protected by access control technologies through its participation in

the Secure Digital Music Initiative (ASDMI@) and the circulation of its draft *NARM Baseline Principles for Online Commerce In Music* (Attachment A hereto, and a Awork in progress@ in which NARM has invited comment). NARM has not heretofore filed comments or testified in this proceeding, and will limit its post-hearing comments to matters addressed at the May 2000 hearings or identified in the Reply Comments filed by March 31, 2000.

1. The First Sale Doctrine Already Applies to Digital Copies and Phonorecords.

The Electronic Frontier Foundation=s (AEFF@) Reply Comments argue for the creation of a Afirst access rule@ that would parallel the so-called Afirst sale doctrine@ embodied in Section 109. Although NARM supports the ultimate objectives being advanced by the EFF, the existing first sale doctrine (Section 109) already applies to Acopies or phonorecords,@ which, by definition, include digital copies or phonorecords without regard to where or how they were created. We therefore do not see the need to create a separate online Aequivalent@ to the first sale doctrine because the first sale doctrine already applies with full force and effect to digital media.

The term Afirst sale@ is a misnomer, owing its inaccuracy to its common law heritage, having derived from our longstanding public policy disfavoring restrictions on the alienability of property after it has been sold. As currently codified with respect to copyright in Section 109, the first sale doctrine is no longer dependent upon a sale, but only upon Aownership@ of a Acopy or phonorecord@ that was lawfully made under the Copyright Act.[4] It is clear from the definition of the terms Acopy@ and Aphonorecord@ that digital media embodied in a tangible medium of expression constitutes either

[4] ANotwithstanding the provisions of [the distribution right in] section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord. . . .@ Section 109(a).

a Acopy@[5] or a Aphonorecord.@[6] Indeed, in the case of sound recordings, existing law makes it crystal clear that a phonorecord can be made out of any tangible object: A>Sound recordings= are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.@ Section 101. Thus, the distribution right is exhausted with respect to sound recordings (or phonorecords) not only with respect to the listed material objects, but also flash memory cards, microchips, recordable (and home recorded) CDs, and even computer hard drives. Of course, this does not mean that the owner of the material object can make copies without the copyright owner=s consent. Rather, it means that if copy or phonorecord was Alawfully made,@ the holder of the distribution right cannot lawfully prevent the owner of the material object from selling the material object, loaning it to a friend (or

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[5] A>Copies= are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. . . .@ Section 101.

[6] A>Phonorecords= are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. . . .@ Section 101. (NOTE: For simplicity, the term Acopies@ may be used in this comment in its general usage sense to refer collectively to Acopies@ and Aphonorecords@ as defined by Section 101.)

a library patron), or giving it away. And, because a Asale@ is not required, any argument that a Alicense to make a copy@ falls outside of Section 109 is simply baseless.

To take an extreme but forceful example, a person who owns a computer hard drive with hundreds of sound recordings Alawfully made@ through licensed digital downloads is free to sell that hard drive without the consent of the copyright owner. All the more so, a person who lawfully makes a CD recording at home through a digital download is authorized, under Section 109, to sell it to the highest bidder, loan it, trade it or give it away, and the copyright owner is powerless B under the Copyright Act B to prevent it.[7]

[7] It warrants noting that copies of a sound recording (phonorecords) made under a Apersonal use@ exception would lose the protection of that exception if either the original copy or the copy made for personal use were subsequently sold or transferred to another person.

Because Congress saw fit to exhaust the copyright owner=s right to restrict the distribution of a lawfully made copy or phonorecord once it is owned by another, any use of access control technology to circumvent the will of Congress and effectively Arevive@ a right that the law extinguished must be considered copyright misuse. In the same vein, if a technological control measure effectively renders a sound recording unplayable if the owner transfers title to another, such measure is being used to frustrate the Congressional will (to say nothing of the understanding of the Contracting Parties with respect to Article 12 of the WIPO Copyright Treaty) and technologically prohibit a transfer that the copyright owner has no lawful right to prohibit.[8] Therefore, any class of works for which a technological control measure effectively controls access to the work, such as to either prevent further distribution or (more likely) render further distribution fruitless, should be exempted from the prohibition on circumvention.

2. Some Supposed Benefits of DMCA Are, In Reality, Restrictions

Along the same lines of these misunderstandings concerning the first sale doctrine are efforts to recast new business models made possible by unlimited technological control over the retailer

[8] In this regard, NARM takes exception to the argument made in the Joint Reply Comments of American Film Marketing Association *et al.*, at 5-6, that the Copyright Office=s determination should be limited to Aaccess controls@ (Section 1201(a)) to the exclusion of any consideration of so-called Acopy controls@ (Section 1201(b)). This is a distinction without a difference. If the transferee of an owner of a lawfully made phonorecord cannot enjoy the music on it due to lack of access, it is little consolation that circumvention of technological measures that control something other than access may lawfully be circumvented. The phonorecord becomes a worthless piece of plastic (or other tangible material) in the hands of someone to whom access is denied despite having lawfully obtained title to it. If the usage controls cannot even be accessed (much less circumvented) without first gaining access through an access control, it is disingenuous to argue that the Copyright Office should ignore the question of whether usage controls prevent the lawful use (or further lawful distribution) of the work on the theory that the DMCA does not prohibit usage control circumvention. Moreover, certain Ausage@ controls may be nothing more than the denial of Aaccess@ for certain uses.

and/or consumer as Abenefits@ that offer new opportunities. Take, for example, the testimony of Cary Sherman, Senior Vice President and General Counsel of the Recording Industry Association of America, during the hearing held May 3, 2000:

> One good example of such a completely new experience is a Atry before you buy@ program. This would give a consumer access to music for free for a limited time while the consumer decides whether to purchase a permanent copy. This new consumer experience is made possible by delivering a protected digital version of a recording. What is important for this proceeding is that this business model would be impossible if the Librarian were to authorize consumers to hack SDMI-compliant security systems to keep promotional copies without paying for permanent retention.

Transcript at 10-11. The first fallacy of this example is that the Atry before you buy@ experience is not Acompletely new@ at all. Perhaps Mr. Sherman is too young to recall the early days of sound recordings, when store clerks played a vinyl LP or single in the listening booth as part of the routine service of allowing customers to try before buying. That model has survived to this day, first by giving music retailers an in-store play exception to the prohibition on unauthorized performances, then by installing listening stations throughout retail music establishments. Today, on the Internet, 30-second free streaming samples have become the industry norm. Indeed, even the current SDMI model does not require participants to check for secured content during the first 30 seconds of any given sound track.

Second, this supposed promotional copy Abenefit@ rests on a fundamentally flawed legal basis. It is simply not accurate to state that Athis business model would be impossible if the Librarian were to authorize consumers to hack SDMI-compliant security systems to keep promotional copies without paying for permanent retention.@ Already, the major record companies give away promotional copies of sound recordings for promotional purposes (and apparently may do so without any obligation to pay royalties to the artists). Those promotional copies are distributed on a

permanent basis, with no effort ever made to collect them or render them inoperable after a certain amount of time. Consumers may already be given access to digital samples through streaming or 30-second samples, without any need to provide them with a complete sound track coupled with a technological time-out. Indeed, about the only reason for such a business model is not to further the purposes of copyright law in the least, but to instead control the distribution of a product despite the existence of Section 109.

The model described by RIAA would appear to serve no other purpose than to encourage wide distribution of sound recordings at little or no initial cost to consumers (and little or no revenue at all to retailers), and then, once the sound recording is distributed, require payment and customer identification directly to the record company in order for the consumer to Ause@ the sound recording. Copyright law, however, provides that the Aowner@ of a lawfully made sound recording is not beholden to the record company for further permission because the record company=s distribution right does not extend that far. Accordingly, should a copyright owner use access control technology to lock out the owner of a lawfully made copy from access to the sound recording after a certain amount of time, the owner of the sound recording should be free to circumvent such a lockout because the copyright owner does not have authority to control such use.[9]

In short, the Copyright Office should examine purported benefits of the use of access control technology strictly from the standpoint of their ability to protect the existing copyright and further the purposes of copyright law as set forth in the Constitution. If there are any consumer benefits that derive from the development of new business models based on the imposition of restrictions on

[9] This is <u>not</u> to say that consumers should be permitted to circumvent an access control technology designed to prevent listening until there has been some verification that the user is in fact the lawful owner (or a person authorized by the owner) of the sound recording.

current lawful use by retailers and consumers, coupled with the circumvention of statutory limitations imposed on the rights of copyright owners, it should be left up to Congress to determine whether the Copyright Act should be amended to provide those benefits. In other words, the focus of this proceeding should remain on whether there are classes of works for which the circumvention prohibition should not apply because of the harm to existing rights of consumers and retailers, and not whether such harm should be ignored because the copyright owner is able to verbalize some additional non-negotiated societal benefit through the use of technology to acquire Arights@ not recognized (or specifically exhausted) under current law.

3. The Right of Consumer Anonymity Is Implicit in Copyright Law

The *NARM Baseline Principles for Online Commerce In Music* (Attachment A) place substantial emphasis on the protection of consumer privacy, confidentiality, and even anonymity. As noted in the *Principles*, there is a big difference between a system in which retailers are free to choose whether to demand customer identification before selling a product (in which case a consumer can choose to patronize the retailer who offers greater options), and a system in which the copyright owner, who has a statutory monopoly over a given work, demands consumer identification as a condition of being granted access to a work, even by downstream consumers who purchase the sound recordings through retailers, and offers no alternative avenues in which anonymity can be maintained.

Before copyright laws were created, authors were free to enter into agreements with consumers containing all manner of restrictions on what the owner of a copy could do with a work, and could obviously demand to know the name and address of each person to whom a copy was provided. Indeed, without copyright law, the only way an author could effectively prevent

unauthorized copying would be to enter into an agreement with each and every person who was given a copy, obligating that person to refrain from making copies or from transferring the work to anyone not bound by a similar agreement. Obviously, because such a system would be extremely cumbersome and virtually impossible to enforce on a mass market level, authors would have very little incentive to create new works which could be distributed freely and copied without any compensation to the author. The genius of copyright law is that the government offers to, in effect, establish a social contract in which laws replace contracts as the method of providing an economic incentive to create and distribute works of authorship. Under such a system, the author no longer needs to know who has a lawfully made copy of the author=s work because the law B and not a contract B prevents the owners of those copies from making unauthorized copies. Access control technologies can be useful in making it more difficult for owners of lawfully made copies to violate the law, but they have no place in imposing upon consumers the burdens of contracts of adhesion and the loss of the benefits they enjoy under a system of public law rather than private contract. (For a more in-depth discussion of the trade-off between self-help and public law and the potential imbalance where technology can be used to give the copyright owner the benefit of the law plus the ability to use the copyright monopoly to impose adhesion contract-type terms, see Lawrence Lessig, *Code and Other Laws of Cyberspace* 122-41 (1999).)

Stated more simply, nothing in the Copyright Act authorizes a copyright owner to obtain the identity of every owner of a lawfully made copy, and much less require the owners of copies or phonorecords to report their identities to the copyright owner as a precondition to reading, viewing, listening to or transferring ownership in the copy or phonorecord they own. That is why retailers are currently free to sell to whomever they please on a completely anonymous basis, and consumers are

free to make further disposition of the copy or phonorecord without being accountable to anyone. It would have run counter to the Constitutional foundations of copyright law for Congress to require otherwise. To be sure, individual owners of lawfully made copies (be they retailers or consumers) have no copyright interest protected by law, and therefore remain free to condition their subsequent transfers of copies and phonorecords on any terms they desire. In contrast, Congress specifically limited copyright both in duration and in scope, in exchange for creating a system to facilitate the remuneration necessary for the author to continue to create and disseminate the author=s creative works. Members of the Acontent@ community have been advocating a system of having their cake and eating it too. They wish to enjoy the benefits of technology to extend their control over the distribution of copies and phonorecords of their creative works, while not giving up the copyright protections intended for the sole purpose of obviating the need for such control.

Fortunately, the courts have been consistent in denying to authors the benefits of copyright law when they abuse the benefit of their respective monopolies to further private interests that fall outside of the scope of their monopolies. The judicial doctrine has come to generally be referred to as Acopyright misuse.@

**The Copyright Misuse Doctrine and Its Applicability to the Abuse of Access Control Technologies**

In 1917, the Supreme Court determined that the owner of an intellectual property monopoly B in that case a patented motion picture film projector B could not lawfully use a Alicensing@ mechanism to obligate purchasers of the machine to use it solely with motion pictures containing another patent which the company also owned. *Motion Picture Patents Co.*, 243 U.S. 502. The offensive conduct in that seminal patent misuse case bears a high resemblance to the available uses of technology to gain additional non-copyright control over copyrighted works Awithout statutory

warrant@ by extending the copyright monopoly so as to control the consumer=s use of a CD long after the copyright owner=s distribution right has expired, and to create a monopoly in the retail sale of sound recordings through digital distribution. *Id*. at 518. The current threat is a more severe restriction than that of *Motion Picture Patents Co.*, which sought to accomplish its objectives using a mere Anotice@ posted on each patented film projector. Here, technology can be used to prohibit all access to a work except on the terms selected by the copyright owner instead of the terms set forth by law.

> A restriction which would give to the plaintiff such a potential power for evil over an industry which must be recognized as an important element in the amusement life of the nation, under the conclusions we have stated in this opinion, is plainly void, because wholly without the scope and purpose of our [copyright] laws, and because, if sustained, it would be gravely injurious to that public interest, which we have seen is more a favorite of the law than is the promotion of private fortunes.

*Id*. at 519.

This position was followed in *Carbice Corp. of America v. American Patents Development Corp.*, 283 U.S. 27 (1931) (owner of a patented package that used solid carbon dioxide could not obligate licensees to use its own solid carbon dioxide). In *Carbice*, the court noted that the law had already risen to prevent the unwarranted extension of other limited monopolies, such as trademarks and trade names. *Id*. at 35, n. 5 (characterizing this limitation as being Ainherent@ in the monopoly grant).

In *Morton Salt,* 314 U.S. 488, the Seventh Circuit had approved of the use of the patent monopoly in a machine for depositing salt tablets to force licensees to use only salt tablets manufactured by the patent holder, reasoning that, under ' 3 of the Clayton Act, Ait did not appear that the use of its patent substantially lessened competition or tended to create a monopoly in salt tablets.@ *Id*. at 490. The Supreme Court reversed on grounds of patent misuse, and concluded that,

having done so, it was unnecessary to decide whether the Clayton Act had also been violated. *Id.* at 494.

> [t]he public policy which includes inventions within the granted monopoly excludes from it all that is not embraced in the invention. It equally forbids the use of the patent to secure an exclusive right or limited monopoly not granted by the Patent Office and which it is contrary to public policy to grant.

*Id*. at 492.

This line of reasoning is not limited to patent and trademark law. *Morton Salt* itself noted with approval the application of this doctrine to copyrights. *Id*. at 494. In *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948), the Supreme Court further explained the limitations on copyright power in the context of Ablock booking@ B Athe practice of licensing, or offering for license, one feature or group of features on condition that the exhibitor will also license another feature or group of features released by the distributors during a given period.@ 334 U.S. at 156. The Supreme Court approved of the lower court=s restriction against such practice as well as the lower court=s reasoning, which was based not only on the illegality of the restraint itself, but also for reasons based squarely upon the Constitution and the Copyright Act.

> The District Court held it illegal for that reason and for the reason that it Aadds to the monopoly of a single copyrighted picture that of another copyrighted picture which must be taken and exhibited in order to secure the first.@ That enlargement of the monopoly of the copyright was condemned below in reliance on the principle which forbids the owner of a patent to condition its use on the purchase or use of patented or unpatented materials.

*Id.* at 157 (quoting the lower court, citations omitted). The Supreme Court noted that, like patent law, the exclusive right granted under the Copyright Act does not include any privilege to Aadd to the monopoly of the copyright in violation of the principle of the patent cases involving tying clauses.@ *Id.* at 158. Here, the Copyright Office should be mindful to the limitation on using the

copyright monopoly as leverage to enlarge the copyright owner=s limited monopoly through use of technology which cannot lawfully be circumvented by the victim.

The Constitution provides that Congress shall have power to Apromote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.@ United States Const., art. I, cl. 8. The purpose is clear B the objective of copyright law is to promote the progress of science and useful arts, and any benefit to be derived by copyright owners is for that purpose. AThe sole interest of the United States and the primary object of conferring the [copyright] monopoly lie in the general benefits derived by the public from the labors of authors.@ *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (quoted with approval in *Paramount Pictures*, 334 U.S. at 158). The copyright reward is intended to induce authors to release to the public the products of their creative genius, *Paramount Pictures*, 334 U.S. at 158, or, in the case of most record companies, the products of the creative genius of the recording artists signed to their various record labels.

Congress Ahas never accorded the copyright owner complete control over all possible uses of his work,@ but has instead limited the holder to the enumerated statutory rights in ' 106. *Sony Corp. of Am.*, 464 U.S. at 432. The purpose of Congress in conferring the limited copyright is for the purpose of protecting those enumerated rights in furtherance of the Constitution=s purpose. To use that monopoly power, however limited, for the purpose of gaining control over distribution of a work after the distribution right has been terminated by law is an abuse of that copyright. AA copyright owner may not enforce its copyright to . . . use it in any manner violative of the public policy embodied in the grant of a copyright.@ *Tricom, Inc. v. Electronic Data Systems Corp.*, 902 F. Supp. 741 (E.D. Mich. 1995) (citations omitted).

Based upon these firm principles, the doctrine of copyright misuse has developed not only as a violation of antitrust law, but also as an affirmative defense against copyright infringement when the copyright holder, by means of an over-reaching license or other method of control, tries Ato secure an exclusive right or limited monopoly not granted by the [Copyright] Office and which is contrary to public policy to grant.@ *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 976 (4th Cir. 1990), quoting from *Morton Salt*, 314 U.S. at 491. Moreover, copyright misuse is such a violation of public policy that courts will not require that the person against whom the misuse is directed be a party to the litigation. A[T]he fact that appellants here were not parties to one of Lasercomb=s standard license agreements is inapposite to their copyright misuse defense.@ *Lasercomb*, 911 F.2d at 979. Thus, even if the retailer or consumer is not a party to an agreement to limit use or further distribution of a copy or phonorecord, the retailer or consumer would enjoy the defense of copyright misuse were a copyright holder to sue for infringement.

Where access control technology is used to restrict access to a work in such a manner as to constitute copyright misuse, any infringement of the copyright is defensible under the doctrine of copyright misuse. Since the prohibition on circumvention of effective access control technologies applies only to such technologies used to prevent access to a copyrighted work, *a fortiori* if the copyright itself is unenforceable because of the copyright owner=s misuse of copyright, circumvention of the access control technology over an unenforceable copyright cannot be actionable. **The class of works comprised of those works for which a copyright owner is using access control technology to extend its copyright monopoly beyond the limitations imposed by copyright law must be exempted from the prohibition on circumvention.**

NARM members, who have long advocated for strong anti-piracy laws, are directly injured when, in their businesses of selling copyrighted sound recordings, they must compete with pirates who have made illegal copies. But the retailers= desire to assist copyright owners in fighting piracy through the use of law and access control technologies ends where the copyright monopoly ends. Retailers are currently free to sell lawfully made sound recordings to the customers of their own choice, and on the terms and conditions of their own choice. Where access control technologies are used to take away that lawful choice, retailers should not only be free to circumvent, but encouraged to circumvent access control technologies that force them to violate their own privacy policies, divulge the identities of their customers to third parties, or otherwise pass on unlawful restrictions on the lawful distribution of lawfully made copies or phonorecords.

**The Benefits of This Approach**

As mentioned in the opening summary, by drawing the line at copyright misuse, the decision whether to place a given work into the class for which circumvention is permitted under this approach is left largely in the hands of the copyright holder. The copyright holder may choose to employ access control technologies to protect a work no further than the perimeter of the copyright in that work. Should the copyright holder place more faith in technology than in the law, and desire to employ access control technology to extend its monopoly power beyond the limits imposed by law, it should not lay claim to the aid of the law in prosecuting those who frustrate such unlawful objectives. Thus, this approach will encourage vigorous use of access control technologies in the aid of copyright protections, while also creating a strong incentive not to cross the line into an abuse of those technologies to enlarge the copyright monopoly power.

Unlike a usage-based approach, which may depend upon the subjective intent of the person circumventing the access control technology, and unlike a content-based approach, which would require the copyright office to make valuation distinctions between forms of speech equally protected by the First Amendment, this approach also has the benefit of allowing the Copyright Office to do what it does best B to interpret copyright law. The determination of what constitutes misuse of copyright for which circumvention should be permissible can, for the bold actor, be left to the courts to decide, whether as a defense to a copyright infringement action or a declaratory judgment action to determine whether, in fact, the access control technology is being employed so as to misuse the copyright. Over a short period of time, however, the Copyright Office can, by rule, lend clear guidance to copyright holders and copy owners alike on the question of whether a work falls into such class.

Although a definitive position on where the line should be drawn is not within the scope of this comment nor within the expertise of NARM, we respectfully suggest attention to some rather simple and straightforward applications of this approach, all of which are well-founded in existing statutory or case law.

1. Extension of copyright beyond its term: The Copyright Act grants a monopoly for Alimited times,@ as required by the Constitution. In the event that a copyright holder employs access control technologies to prevent a work which is in the public domain from being accessed, the circumvention of such technology should be permitted.

2. Extension of the distribution right after it has been exhausted: When, by virtue of Section 109, the distribution right in a copy or phonorecord is exhausted, in the event that the copyright holder employs access control technologies to prevent such exhaustion, the circumvention of such technology should be permitted, but only to the extent necessary to remove the restrictions placed upon the Section 109 rights of the owner of the copy or phonorecord.

3. Bundling of copyrighted works with other products, services or unrelated conditions: When the copyright monopoly is used in conjunction with access control

> technologies to require purchasers of a copy or phonorecord of a copyrighted work to accept an unwanted product or service as a condition of owning and enjoying such copy or phonorecord, or to extract personal information concerning lawful owners or users of a lawfully made copy or phonorecord, or to invade the privacy of a lawful owner or user of a lawfully made copy or phonorecord, then the circumvention of such technologies should be permitted, but only to the extent necessary to remove the unlawful conditions. Of course, this would not prevent a copyright holder from offering, as an option, a copyrighted work bundled with additional products, requirements or conditions, where the freedom to reject such conditions is protected. For example, purchasers of sound recordings via download may be willing to give up certain rights or private information in exchange for better customer service, but this should be an option, and not a requirement.

These are just some areas in which, after applying well-established copyright misuse principles to define a general class of works for which circumvention should be permitted in order to prevent copyright misuse and its concomitant abuse of monopoly power, the Copyright Office could develop guidelines for determining when copyright misuse occurs through access control technologies and the limitations, if any, on the extent to which such technologies may be circumvented to restore the copyright to its lawful limits.

Respectfully submitted,

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ATTACHMENT A

*The Internet offers the music industry a tremendous opportunity to sell more music than ever before; but it also poses tremendous challenges. As the industry struggles to make sense of the different technologies, the different software strategies, and the different economic models, various voices are demanding to be heard. The one voice not currently represented at any of the discussions of e-commerce of music is the one voice without whom the business of music has no business: the music consumer. And the one voice whose input appears to be undervalued is the voice with the most direct contact with the consumer: the music retailer. With this in mind, NARM has drafted a position paper which seeks to articulate the concerns of consumers and retailers about this newest configuration of music, the digital download. We do not present this document as a final position paper, but rather as a work in progress which will continue to evolve as we learn more about how the different technologies, software strategies, and economic models work. But we urge the industry to view each of these variables through the prism of the consumer without whom music will exist as art, but not commerce. We welcome your feedback.*

*Pamela Horovitz*
*NARM President*

## NARM BASELINE PRINCIPLES FOR ONLINE COMMERCE IN MUSIC

Consumers have traditionally enjoyed certain rights and developed certain expectations concerning their music shopping experiences. The development of Internet-based electronic commerce business models, efforts to increase security against intellectual property piracy, and the increasing phenomena of treating individualized consumer data as a commodity, potentially pose a serious threat to these consumer rights and expectations and, consequently, may threaten to seriously erode consumer confidence in electronic commerce and consumer satisfaction with the retail music buying experience.

Although many business models may succeed or fail in a competitive environment, the chaotic market shakeout for these models is taking place with valued customers B consumers who may be lost or marginalized by a repeated negative experience with test market failures. Consequently, retailers who may be in a position to

implement the best consumer-based models may suffer irreparable harm to their own customer bases, not because of any weakness of their own, but as a result of unethical industry practices, restrictive trading policies and the use of short-sighted business strategies that devalue the consumer, the product, and the online shopping method.

To encourage the highest standards for interfacing with consumers and the least restraint on retail competition, the National Association of Recording Merchandisers has developed the following baseline principles for online commerce in music. It is NARM=s intention that these principles primarily guide those who are developing the tools or industry standards for online commerce, and particularly the digital delivery of music.

**Narrow Anti-Piracy Focus**

NARM strongly supports aggressive efforts to fight piracy of sound recordings, but the anti-piracy objectives of cooperative efforts among competitors, such as SDMI, should be the sole objectives, with care taken to avoid any agreements or standards that go beyond the prevention and detection of copyright infringement, or the identification of the sound recording (including its authors and copyright owners). Digital rights management systems should be used solely to manage and protect copyrights, and not serve as technological means of circumventing the restrictions imposed upon copyright owners under law, such as by technologically extending the copyright term or preventing the extinguishment of the distribution right.

**Consumer=s Right to Anonymity**

Consumers are increasingly aware that the online shopping experience is often punctuated by a request for personal information that is not essential to the transaction. Divulging personal information is becoming a *de facto* method of payment for goods or services. Consequently, consumers who prefer anonymity will tend to avoid the online shopping environment completely unless they are given choices among those who are competing to meet their demands for anonymity. Retailers should be free to compete with each other in meeting such consumer demands. Any technology standard to be deployed on an industry-wide basis, and any technology solution to be implemented by any sole-source content provider, must not interfere with the retailer=s option of competitively providing consumer anonymity.

**Consumer=s Right to Privacy and Confidentiality**

For similar reasons, consumers are increasingly concerned with the protection of their privacy when confidential information is provided to a merchant. Moreover, government regulations are now in place or being proposed throughout the world to protect consumer privacy. There is an increasing risk of liability for reputable retailers with strong privacy policies in the event that confidential information is passed on to third parties by way of automated electronic transactions. There is also an increasing chance that retailers who object to privacy-breaching requirements placed upon them by content providers will be placed at a competitive disadvantage if the option of obtaining the same content without such restrictions is not available. Any technology standard to be deployed on an industry-wide basis, and any technology solution to be implemented by any sole-source content provider, must not interfere with the retailer=s ability to protect consumer privacy and confidential information, whether from disclosure inconsistent with the retailer=s own privacy policy or inconsistent with the law of the retailer=s jurisdiction.

**Consumer=s Right of Transferability**

Consumers expect that when they purchase or otherwise lawfully obtain copies of sound recordings they are free to purchase them as gifts, loan them to friends, take them to parties, or give away their collections. Copy protection systems should not interfere with the ability to continue such practices. The first sale doctrine, which extinguishes the copyright owner=s distribution right following the first sale of a sound recording, should not be circumvented by using technology to give the copyright owner a continuous right to control the further lawful transfer of lawfully made and acquired phonorecords or copies. Moreover, any technology designed to identify pirated product by tracing its source must avoid creating any risk that law-abiding consumers who lawfully acquire a phonorecord or copy will be caught up in an investigation of piracy on the part of a downstream user.

**Antitrust Concerns**

There is an increasing danger that technology solutions selected by sole-source content providers or implemented by agreement on an industry-wide basis will create or protect certain business models by default, removing the ability of merchants to bargain competitively for rights more favorable to them or to their customers. Indeed, just as an agreement in unreasonable restraint of trade is unlawful, any agreement to implement a technology that automatically forecloses all but the selected business strategies runs the risk that if the selected strategy is in restraint of trade, an agreement to protect such strategy would be actionable.

**Copyrights Must Not Be Misused**

There is an alarming trend among technology developers to view Digital Rights Management (ADRM@) not as the management of intellectual property rights conferred by law (such as to prevent unauthorized performances or copies), but as a way to manage a complex variety of new Arights@ created by technology rather than any bargained for agreement with the consumer _ rights which are antagonistic to the consumer and to copyright law. No DRM system applicable to sole-source product, and no system developed or protected through the SDMI or similar standard-setting process or agreement among competitors, should go beyond the minimum necessary to prevent and detect infringement of lawfully created copyrights. Unless those entities that are downstream from the copyright owner are given the option to reject such additional restrictions, any system that attempts to circumvent the limitations on the monopoly right conferred by applicable copyright laws should be condemned as a misuse of copyright law and as an unfair business practice.

NARM is the principal trade association representing retailers and distributors of sound recordings in the United States. Its members are engaged in the distribution and retail sale of digital music in pre-recorded format and through digital distribution.