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Proposed class of copyrighted works to be exempted: Electronic books.

Summary:

The class of work covered by this comment is electronic books, which are electronic representations of literary works, optionally also containing pictorial works (illustrations). They are intended for display on a computer or a dedicated electronic reading device. These works are commonly sold in "secure" formats, which are protected from access except through a tool provided by a software author. The tool is, by design, very limiting in the access it provides. This results in a number of problems for the owners of copies of electronic books. They may be unable to access the book when they upgrade their hardware or software. They may wish to do research on the book using textual analysis tools that the tool prevents from operating. They may be visually impaired or blind, and the tool may interfere with their accessibility programs or devices.

Argument:

The most common problem average users of secure electronic books have is upgrades. By nature, the measures restricting access to these books restrict them to a limited number of machines. Gemstar and Adobe limit each book to one machine, whereas Microsoft Reader allows up to 8 machines to access a book. This is not as generous as it might appear on Microsoft's part as changes such as adding or reformatting a hard drive or installing a new operating system can make Reader decide that an "old machine" has become a "new machine". Once users have exhausted the number of machines allowed by the software maker, they cannot use their existing secure electronic books on any more machines. If the older machines are no longer available to them, perhaps because they were sold or because the "new machines" were really old machines which were modified, they can no longer access their books at all without circumventing the access control measures.

This problem also exists with handhelds and dedicated portable reading devices. Users of such devices will often want to replace them with newer models which have more memory, better screens, or any of a variety of other improvements. But because of the access controls, they may be unable to use their old electronic books on their new devices. This means that in order to access all their books, users must keep all of their old devices available, or re-buy their entire library for each new device. This is analogous to readers having to replace their entire paper library each time they got a new set of bookshelves, or to store the old books and bookshelves in the basement in case they needed them.

One particular class of users who will be adversely impacted by the access control restrictions on secure electronic books are researchers who wish to use the books in a

manner other than simply reading them. The access controls do not allow direct access to the text of the books by other programs, or they would be ineffective. However, researchers using programs to do textual analysis such as creating concordances, or analyzing similarities between works to determine which writers influenced (or even plagiarized) each other require direct access to the text. They need to circumvent the access controls on the electronic book to do so.

This same property of the access controls also affects blind and visually impaired users who use screen-reader software. The access controls on books for dedicated reading devices do not allow any other devices to access those books, which makes them completely inaccessible to screen-reader or other accessibility software. The access controls on books for general purpose computers also do not allow screen readers access to the text. Microsoft and Adobe have included automatic text-to-speech software in their software, but there is a catch. According to the American Council of the Blind:

As some may know, Microsoft has developed the Microsoft Reader to allow folks to read electronic books. While this has been a good thing for most people, it has not been accessible until now. We were advised that Microsoft Reader version 2.2 now voices the books but...

Well, of course there is a rub. Microsoft says that the publishers would not go along with the notion of high security books (best sellers) being accessible to the software. Like the Adobe problem of locking out access for security purposes where there is a concern that books would be pirated, we are now faced with second class access.

(<http://www.acb.org/newsnotes/nn011005.html>)

Because of the properties of the access control, blind people are denied access entirely. To remedy this, the access controls must be circumvented to allow screen-reader software access to the electronic books.

While most electronic books are available in paper-book form, which is by nature unprotected, some are not. Publishers such as Rosetta Books and Embiid Publishing publish some books which are no longer in print, and hence may be difficult to find in paper-book form. Other publishers such as Double Dragon Ebooks publish some books which are exclusively available in electronic form. Further, paper books are not readily accessible to the blind either. And researchers wishing to do textual analysis will find their work greatly impaired by the need to either literally retype the book (which might be a Section 106 violation in any case) or to do their analyses by hand.

Some publishers have argued that these access controls are necessary to allow these books to be published in electronic form at all, for fear of piracy. According to this argument, either secure electronic books will be published, or none at all, and if

circumvention of access controls is allowed, secure electronic books cannot be trusted either. However, indications are that this is simply not the case. The market for unprotected electronic books is quite strong. Baen Books publishes nearly their entire output in unprotected electronic form at <http://www.webscriptions.net>. The royalties to their authors are greater for an electronic copy than a paper copy. And they have not seen a reduction in sales of paper copies as a result of making the electronic copies available, which argues against fears of piracy. Perhaps even more tellingly, the electronic publisher Fictionwise publishes in both secure and unprotected formats, and the unprotected ones sell better. According to Steve Pendergrast, one of the co-founders of Fictionwise:

Actually, we have twice as many encrypted ebooks now as unencrypted. The unencrypted still outsell the encrypted by a wide margin.

Indeed, works by the same author sell four or five times more copies if they are unencrypted (we have cases like new books by [Robert] Silverberg are encrypted while the older titles are not. The older titles that are unencrypted far outsell the new encrypted titles).

So, yes, we are fairly certain it's the encryption that sabotages the sales.

Also, encrypted ebooks cause several times as many support issues as unencrypted (thus driving up labor costs) so profit margins are quite low on them.

(<http://webnews.sff.net/read?cmd=read&group=sff.publishing.embiid&art=1465>)

Thus circumvention of technological measures is unlikely to adversely affect the market for electronic books. In fact, it is the technological measures themselves which adversely affect that market. Allowing circumvention may even increase the market for secure electronic books by opening the market up to the blind.

Allowing circumvention of access controls on electronic books will allow owners of the books to retain access despite changing hardware and software, will allow researchers to use powerful electronic tools on them, and will allow the blind to make use of them. Adverse effects of allowing circumvention are negligible. For these reasons, I request that the Librarian add electronic books to the classes of works exempted from the prohibitions of section 1201(a)(1).