

June 23, 2003

David O. Carson  
General Counsel  
Copyright GC/I&R  
P.O. Box 70400  
Southwest Station  
Washington, D.C. 22024

Re: SIIA Post-Hearing Comments Filed Pursuant to Copyright Office Request

Dear Mr. Carson:

The Software & Information Industry Association ("SIIA") would like take this opportunity to thank the Copyright Office for conducting the hearings on section 1201(a)(1) last month in Washington, D.C. and for allowing SIIA to testify and submit these post-hearing comments relating to the submission by Joseph Montoro of Spectrum Software ("Montoro Submission").

The Montoro Submission is both offensive and self-serving. The basic premise assumes that dongle vendors like SIIA members, Rainbow Technologies, Inc. and Aladdin Knowledge Systems, and their software publisher customers are in the business of providing faulty, defective, non-supported technology that they foist on users and then fail to support. Dongles, tokens, and similar technologies have proved their worth in protecting literally billions of dollars' worth of software in an effective, easy-to-use model. The fact that technical issues arise should not negate the ability of a developer or publisher to protect his or her intellectual property and to ensure that they get paid accordingly for the use of that software.

At the May 2<sup>nd</sup> hearing Mr. Montoro's testimony gave the impression that his 93 page submission contained numerous examples and other supportive evidence justifying the need to renew the existing exemption for malfunctioning, damaged or obsolete access control mechanisms. To the contrary, the Montoro Submission does nothing of the sort. Rather the Montoro Submission actually shows that most problems associated with dongles are *not* caused by malfunctioning or damaged dongles and in any event, dongle vendors are responsive and diligent in addressing such problems. In this respect, the Montoro Submission supports the points SIIA (and others) have made in written comments and oral testimony that – at the very least: (1) the exemption must be significantly narrowed to address the specific problems identified and supported by the evidence, and (2) any person or organization seeking to qualify

for the malfunctioning, damaged or obsolete exemption must first notify the copyright owner or software or hardware company that owns the rights to the access-control measure and give them the opportunity to cure the problem.

The length of the Montoro Submission is certainly substantial. However, the submission should not be judged by the number of pages submitted but rather by the content on those pages. With the exception of the INS example at the beginning of the submission and fifteen pages of e-mails at the end of the submission (which are addressed below) the submission consists of mere web pages and other documentation from software companies that provide dongles or similar access control mechanisms. Whatever points Mr. Montoro intends to make by providing copies of these web pages and documents, he fails to achieve. These documents provide no evidence supportive of the existing exemption. In fact, these documents support the points SIIA and others have made in written comments and oral testimony in opposition to renewal of the malfunctioning, damaged or obsolete exemption. To demonstrate this, we have provided below a description of the positions taken by SIIA in our written comments and oral testimony followed by a list of the web pages and other documents in the Montoro Submission that support the assertion.

First, SIIA has urged the Copyright Office to require, as a threshold requirement, that any person or organization seeking to qualify for the malfunctioning, damaged or obsolete exemption must first notify the copyright owner or the access control measure vendor to determine whether the software or hardware is in fact “malfunctioning” or “damaged” or whether the access control measure is not operating correctly for some other reason.

Who should determine whether an access control measure is malfunctioning or damaged? This decision certainly should not be left to the sole discretion of the user. As the web pages contained in the submission demonstrate, in most cases in which the user thinks the software is “malfunctioning” it actually is not. The copyright owner of the software protected by the access control measure and the vendor of the access control measure are the entities best suited to make a conclusive determination as to whether an access-control measure is malfunctioning or damaged. To the extent the Copyright Office extends any exemption to malfunctioning or damaged access control mechanisms, it is therefore essential that the exemption require the user (or an agent of the user) to notify at least one of these entities to determine whether the software is malfunctioning or damaged.

The web pages provided in the Montoro Submission illustrate the many reasons a dongle or related access control mechanism may not operate properly. Significantly, most of the problems identified have nothing to do with a malfunctioning or damaged dongle, but might cause the user to think the dongle is malfunctioning or damaged. User error, system incompatibility, incorrect installation are just a few examples. In fact, a brief examination of the Montoro Submission demonstrates that most problems thought to be due to a defective dongles are actually caused by other problems. Below is a nonexhaustive list of these problems culled from the Montoro Submission:

- Many of the websites note that an alleged dongle problem is often a problem with something else. For example, see page 19 of the submission, in which Erdas states: “Problems that are often reported as a faulty hardware key are often caused by

something else, and may not be a hardware key problem at all” and page 66 Raychem states “since the dongle sits in a strategic position on the computer, it may be blamed for problems caused by other components of a specific PC configuration.”

- Five reasons why the key is not found are: the drivers might not be install or drivers corrupted, parallel port settings are not compatible or not working correctly with our drivers, parallel port is not working correctly, key is defective, and problems with the implementation of the protected application. Only the fourth factor relates to malfunctioning or damaged dongle. See page 31 of the submission.
- Several dongle venders note that a major cause of problems result from hardware keys not securely attached to the port. See page 30 of the submission, for example.
- Several dongle venders note that plugging a hardware key in while the drivers are not installed. See page 32 of the submission, for example.
- Many websites identified incompatibility as a major source of problems: See (1) page 32, in which Rainbow states “[o]ur SuperPro USB keys will only work under Windows 9x, ME, 2000 and XP operating systems, we don’t support NT.” (2) page 52: “The USB driver that installs with Trapwise 3.0-3.1 is for Windows NT only; it is not compatible with Windows 2000. If the USB driver is installed on Windows 2000, it conflicts with the correct drivers and causes the dongle (hardware key) to be non-functional.” (3) page 66, in which Raychem states: “These dongles normally work well, but, like any other PC peripheral, they might not operate on certain PC configurations due to faulty equipment or improper installation.” (4) Page 68, in which Raychem states: “with certain Toshiba laptop computers it may be necessary to change the parallel port setting from ECP to BiDi to avoid a problem with the dongle.”
- The architecture of some servers may not provide a parallel port, which means a dongle cannot be inserted into the hardware. See page 35, a letter from Stratus Technologies.
- Many companies provide detailed flow charts, tests and FAQs on their websites to help users determine whether the problem is caused by a damaged or malfunctioning dongle or is caused by something else. See pages 19 (please note that the Montoro Submission does not include a copy of the flowchart. We encourage you to view the flowchart on the webs site at: [http://support.erdas.com/tech\\_notes/hardware\\_keys/bad\\_hardware\\_keys.html](http://support.erdas.com/tech_notes/hardware_keys/bad_hardware_keys.html)). Also see pages 49, 54 and 75.
- USB dongles and hubs may solve many dongle related problems. See page 61 of the submission and SIIA’s testimony, for example.

Second, SIIA has urged the Copyright Office to require that the user contact the software publisher or dongle vender to determine if the problem is due to a malfunctioning or damaged

dongle and, if so, and give them the opportunity to cure the problem. The Montoro Submission is replete with examples of dongle vendors who help their customers determine what is causing the problem(s) with the dongle and to work with them to promptly resolve the problem. For instance see:

- Many companies provide detailed flow charts, tests and FAQs on their websites to help users determine whether the problem is caused by a damaged or malfunctioning dongle or is caused by something else. See pages 19, 21, 25, 26, 28-34, 49, 54-56 and 75.
- If the dongle is damaged or malfunctioning many dongle providers will replace the dongle for free. See page 19 (“ERDAS will do one free System ID Change of the license file for a system ID based on CPU ID, Ethernet card address, or disk serial number for IMAGINE 8.5 users.”) and 49 (“If your dongle has in fact become damaged, we can usually ship a replacement to the user by UPS ground at no charge.”)

With few exceptions, the focus should be on making sure that companies support their products rather than granting an exemption upon which companies like Spectrum Software are able to profit by allowing others to bypass legitimate security features and technologies. The bottom line in this situation is that there are already laws, guidelines, legal precedents, and sufficient remedies for most consumers if they have a defective product or a technical glitch.

Requiring users to contact the copyright owner or dongle vendor and give them the opportunity to cure the problem, will ensure that they are aware of the problem and can take steps to fix the problem. It will also give the copyright owner and dongle vendor the opportunity to notify other users of the problem and provide them with the appropriate technical solution. As evidenced by the web pages included in the Montoro Submission, clearly dongle vendors are trying to do this. Their continued ability to learn about and cure problems with their dongles and to notify users of such is threatened by the existing 1201(a)(1) exemption. The existing 1201(a)(1) exemption encourages users to go to a third party, like Spectrum Software, without ever contacting the software publisher or dongle vendor or even accessing their websites. As a result, users, dongle vendors and copyright owners who incorporate such dongles into their products are adversely affected by the existing exemption.

As to the INS example at the beginning of the submission and the e-mails at the end, virtually all of these relate to the “obsolete” part of the exemption, and not to the damaged or malfunctioning part of the exemption. As we have said before, so long as a definition of “obsolete” is provided in the exemption issued by the Librarian and that definition makes clear that “obsolete” refers to dongles that are no longer supported, we do not oppose such an exemption.

At the end of the Montoro Submission there are fifteen “examples” of dongles that are allegedly malfunctioning, damaged or obsolete. Including the INS example at the beginning of the Submission, the total number of examples is sixteen. Eight of these sixteen examples (or 50%)

fall into the category of dongles that are obsolete (*i.e.*, no longer supported).<sup>1</sup> Three of the examples are not damaged, malfunctioned or obsolete or do not contain enough information to determine what the “problem” is or whether there is a problem at all.<sup>2</sup> In two cases, the vendor replaced the damaged dongle or otherwise cured the problem.<sup>3</sup> Therefore, of the sixteen cases only three deal with *allegations* of malfunctioning or damaged dongle.<sup>4</sup> Such numbers hardly meet the evidentiary burden necessary to warrant application of the existing exemption to malfunctioning and damaged access control mechanisms.

It may be true that half of the e-mails submitted in the Montoro Submission involve a customer who was not able to get support for a hardware token or dongle because the company was out of business (*i.e.*, obsolete); however, most software manufacturers are not out of business and do support their products. Allowing a blanket exception to the DMCA which permits circumvention of potentially all dongles (and other access control mechanisms) just because a handful of companies that produced dongles are no longer in business, does not just run afoul of the evidentiary burden established by the statute -- its bad policy.

The “evidence” contained in the Montoro Submission and other submissions does not justify renewal of the existing malfunctioning, damaged or obsolete exemption in its present form. The existing exemption is much too broad. First, it covers all “access control mechanisms,” when in fact the only evidence supplied in the Montoro Submission relates to dongles and other types of hardware locks. To the extent any exemption is warranted it should be limited to dongles, or at best, hardware locks.

Second, the existing exemption covers malfunctioning and damaged access control mechanisms, even though the Montoro Submission and other submissions provide only negligible evidence of *legitimately* malfunctioning or damaged dongles. To the extent the existing exemption is warranted it should be limited to apply only to obsolete (*i.e.*, unsupported) dongles.

Third, the existing exemption covers all literary works even though the Montoro Submission and other submissions only address malfunctioning, damaged or obsolete access control mechanisms used to protect computer programs. To the extent the existing exemption is warranted it should be limited in its application to computer programs.

Fourth, as explained in more detail above, the Montoro Submission demonstrates the need to require any circumventor under this exemption to first notify the dongle vendor or copyright owner of the alleged problem with the dongle and then give that entity an opportunity to cure the problem. In our written comments and testimony we suggested that this requirement be incorporated through threshold conditions delineated in the rule. While we think this approach is not inconsistent with Section 1201, if the Copyright Office concludes otherwise we believe that

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<sup>1</sup> See pages 15, 79, 80, 84, 85, 87, 88, and 91. In most cases, the e-mail sender merely claims the dongle to be obsolete but provides no further information for us to verify the claims.

<sup>2</sup> See pages 81, 86, and 93.

<sup>3</sup> See pages 82 and 92.

<sup>4</sup> See pages 83, 89 and 90.

there are other ways (albeit less desirable) to incorporate this requirement into the exemption without reference to characteristics relating to the use of the work or the user of the work. For example, in defining what it means to be “obsolete” there must be some reference to the dongle being unsupported. Of course, to make that determination the user must attempt to contact the software publisher or dongle vendor, so that too must be incorporated into the definition. Similarly, no dongle can be verified as “malfunctioning” or “damaged” until other possible causes for the dongle not permitting legitimate access are ruled out by the publisher or vendor and the publisher or vendor cannot or will not fix the problem.

Unless the existing exemption is terminated or radically narrowed, it will continued to be abused by Spectrum Software and others. As evidenced by the e-mails contained in the Montoro Submission Spectrum Software has been supplying circumvention tools to users even though the users’ dongle is *not* malfunctioning, damaged or obsolete. For example, in the e-mail on page 82, a user reports that the company who provided their software replaced dongles that had continually failed with Rainbow's Superpro -- and that the Rainbow dongle, despite an implied heavy usage, had only failed once in two years. The user goes on to say that given the economy, he wondered if the vendor would be in business and wanted to insure against not being able to obtain a replacement dongle in the future (should the need arise). This case does not qualify as a malfunctioning or damaged dongle under the exemption since the software publisher has replaced the defective dongle with a fully functioning dongle. It also does not qualify as “obsolete,” because the user merely questions whether Rainbow will be in business in the future because of the “economy.” Nevertheless, in Mr. Montoro’s own judgment – without consulting the software provider or Rainbow – he thought this user qualified for the exemption. What is most astonishing is that Mr. Montoro apparently supplied this user with software to circumvent the dongle even though he clearly *knew* that the user possessed a workable dongle and that Rainbow was in no danger of going out of business (as proven by pages 39-45 of his Submission).

Even more shocking is the fact that Mr. Montoro submitted this supposed “evidence” in the mistaken belief that it would bolster his efforts to get the existing exemption renewed. If Mr. Montoro thought this e-mail was good evidence of the need for the exemption, it is disturbing to think about all the e-mails that he chose not to include in the Submission because he didn’t think they were supportive. Either Mr. Montoro does not understand the scope of the existing exemption or he has chosen to intentionally ignore it. Either way his submission of the e-mail on Page 82 (and other e-mails) is concrete evidence that the existing exemption is being rampantly abused by Spectrum Software and others.

As further evidence of Spectrum Software’s abuse of the exemption we attach a string of e-mails between Mr. Montoro and a user of software that is protected by a Rainbow dongle. This user contacted Mr. Montoro in response to information gleaned from Mr. Montoro’s website. In the course of their e-mail discussions, the user learned that Mr. Montoro was willing to provide means to circumvent the protection scheme even though there were no defects in the dongles and the dongles were not obsolete. In the e-mails, Mr. Montoro tells the user that his software is legal. These examples prove that Mr. Montoro and others who are using the exemption as an excuse for piracy. These are the only examples we have written documented on, but we know of

countless other examples where Spectrum Software is providing its circumvention software to users whose dongles are not malfunctioning, damaged or obsolete.

Unfortunately, regardless of the language in the exemption, Mr. Montoro and others providing similar “services” are going to do whatever they want to do, and use the exemption as a shield. No doubt, dongle vendors are free to sue Mr. Montoro and others who attempt to overreach. But the Copyright Office has the ability to prevent such overreaching and the needless lawsuits that are sure to follow, by not renewing the exemption or, at the very least, significantly narrowing the exemption and explicitly defining when the exemption applies, as SIIA has delineated above.

In closing, once again we would like to thank the Librarian and the Copyright Office for conducting this rulemaking and for providing us with a forum to express our views on this very important issue.

Sincerely,

A handwritten signature in black ink that reads "Ken Wasch". The signature is written in a cursive, flowing style.

Ken Wasch  
President  
Software & Information Industry Association