

DMCA Section 1201(a)(1) Hearing: Stanford, CA May 18-19, 2000

Testimony of Dean Marks on behalf of Time Warner Inc. and the Motion Picture Association of America

Thank you for the opportunity to testify at this hearing. My name is Dean Marks and I am Senior Counsel, Intellectual Property for Time Warner and appear here today on behalf of Time Warner and the Motion Picture Association of America. I would like to make a few general statements and then discuss in a bit more detail the issue of DVD and the CSS protection technology.

As a preliminary matter, much has been written and said in the context of this inquiry that seems to pit content owners against consumers over the issue of fair use. My company and fellow content providers not only support the fair use doctrine, but we rely on it every day. In creating and publishing our movies or music, we frequently rely on the protections that fair use provides, for example, to comment or to parody.

From what I have read and heard during the course of this inquiry, no concrete evidence has been adduced that any user has been prevented from making non-infringing uses of a work due to the presence of technological protection measures. Some librarians have expressed discomfort over the terms of certain content licenses, but this is an issue separate and apart from whether exceptions to the legal protection of technical measures should be adopted. Moreover, the potential harms that have been described are hypothetical and speculative. Contrast this with the very real evidence of threats to the rights of copyright owners that arise in today's digital and Internet environments. On May 10, the New York Times published an article entitled "The Concept of Copyright Fights for Internet Survival". The article describes several new software programs, most notably Freenet, that have been developed and are used to deprive copyright owners of the ability to exercise their rights in the distribution of their works. As stated in the article, the developers of such programs "express the hope that the clash over copyright enforcement in cyberspace will produce a world in which all information is freely shared."

These very real threats to the rights of copyright owners led not only the U.S. Congress, but also the world community in the WIPO treaties, to determine that technical protection measures used by copyright owners must

be entitled to legal protection against circumvention. In considering the possibility of any exception to the Section 1201(a) prohibition, the Register of Copyrights and the Librarian of Congress must weigh the lack of evidence of harm to non-infringing uses with the substantial evidence of harm to copyright owners that will result from a weakening of the legal protections afforded to technical measures.

Furthermore, an underlying assumption of many of the remarks made in the course of this inquiry is that technological protection measures will be used to “take” works away from users or to deny access. I strongly believe that this assumption is fundamentally flawed. Technological protection measures actually facilitate the making of works available to consumers. DVD is a concrete example. My company would not have released its motion pictures on the DVD format if DVD did not incorporate technical protection measures. The DVD format has permitted users to view and own copies of motion pictures in a new and desirable digital format. Further, DVD has allowed users for the first time to play high quality copies of motion pictures on their personal computers. These new uses of motion picture content have been made economically possible due to the development and implementation of technical measures, including access controls. To now argue that these technical protection measures should be subject to circumvention because DVDs may not be playable on all personal computers misses the point that if the integrity of technological measures are not legally protected, content owners will be reluctant to make their works available in these new formats in the first place. A clear real-life example is DVD-Audio. Due to the recent compromise of CSS and the fact that technical protection for DVD-Audio had been developed and premised on CSS, music companies have delayed indefinitely the launch of the DVD-Audio format. The result is that consumers have been deprived of a new music format. Thus, circumvention of technical measures, whether sanctioned through this process or accomplished in violation of the law, can seriously diminish the general public benefit.

Moreover, I would like to pick up on a point made by Frederick Weingarten this morning. I agree with Mr. Weingarten that the development and implementation of technical protection measures can be a “win-win” situation for both content owners and users. For example, technical protection measures are under development that would permit users to make a copy of certain pay television programs that are otherwise protected by encryption and other technical measures. In the context of the copy

protection work underway in the Secure Digital Music Initiative, all participating parties have agreed that consumers who purchase music protected by technical measures should be able to engage in certain levels of copying for private use. Thus, the development and implementation of technical measures that inhibit massive unauthorized copying and distribution but permit limited consumer copying opportunities will actually facilitate: (i) the making available of works to more consumers in more formats, and (ii) consumers' ability to make non-infringing uses. These technologies may also make it easier for content owners to make their works available to libraries in digital format and, in turn, for libraries to make these works available to their users without undue risk of economic harm to the owners due to unauthorized reproduction, transmission and re-distribution. The development and implementation of technical measures are in their infancy in the digital world, particularly with respect to the Internet. We should give some breathing room for these measures to be developed and implemented before we seek to undercut their legal protections.

Prior witnesses, including Paul Hughes from Adobe and Bernard Sorkin from Time Warner have mentioned that content providers must be mindful of the desires of consumers. We are in the business of selling our content to the public and we cannot survive as an industry if we do not widely distribute our works to consumers. Because of this imperative, it is highly unlikely that we will employ technical measures that will be seriously detrimental to the ability of our customers to make non-infringing uses. But this is only part of the answer. As a practical matter, content owners cannot unilaterally develop and implement technical measures of their own choosing. Why? Sound recordings and audiovisual works can only be enjoyed by the use of receiving and playback devices, such as television sets, CD or record players, videocassette players, personal computers, etc. Content owners therefore cannot apply technical measures to their works that will cause all receiving and playback devices to be unable to receive or play the works. If we were to do so, then we would be out of business. Equally important, the goal of protecting works cannot be achieved if receiving, playback and recording devices do not recognize and respond to copy protection technologies, but simply ignore them. So to work properly, copy protection technologies must be bilateral—the technologies applied by content owners need to function with consumer electronics and computer devices. This bilateral requirement means that protection measures are not simply a matter of technological innovation, nor are these measures subject to all the potential demands of content owners. Rather, copy protection

technologies, such as the CSS system for DVD, require a high level of consensus among the content industry and the consumer electronics and computer industries. This consensus requirement means that access control and copy protection structures and the use of technical measures are heavily negotiated across industries. Because the consumer electronics and computer industries have strong vested interests in ensuring that their devices permit users wide latitude to use copyrighted works, the copy protection structures and technologies that are in fact being developed and implemented in the area of audiovisual and musical works fully recognize user concerns.

Finally, this inquiry is not a one-shot deal. At the moment, it seems clear that there has been no evidence presented of any adverse effect and hence it is premature for any exceptions to Section 1201(a) to be enacted. The fears expressed that the DMCA and the anti-circumvention provisions will harm users or fair use have not materialized and may never come to pass. If any of the “parade of horrors” that have been described by some of the witnesses materialize in the future, then the Register and the Librarian will have the opportunity to consider appropriate remedies in future rulemaking procedures. At the moment, however, this exercise appears to be a case of attempting to devise a solution in search of a problem.

Linux – DVD question:

In several of the comments received by the Copyright Office, reference was made to DVDs and the alleged inability of users of the Linux operating system to play DVDs on their computers. Much confusion, I would even say misconception and misinformation, surrounds the issue of DVD and Linux. First, there is no legal or technical barrier to building an open source interface between the Linux operating system and a CSS compliant application that will play DVDs encrypted with CSS on the Linux system. Second, the CSS technology and manufacture’s license necessary to build any CSS compliant application or device is available on a non-discriminatory basis. The current license requires a one-time fee of \$10,000. It is expected in the future that an annual fee of \$5000 will also be assessed. These payments are administrative fees; the license itself is royalty-free. None of the technical or legal conditions of the CSS license prevent implementation in the Linux environment. Indeed, two CSS licensees have in fact developed CSS implementations for the Linux operating system, one

hardware based and one software based. Both implementations are available on the market.

It is true that most software applications that permit the playback of DVDs are designed for the Windows operating system. But this is simply because of market driven decisions on the part of software developers who seek to develop and sell applications for the prevailing operating system. Neither movie studios nor the licensors of the CSS technology have sought to prevent the development of applications in other platforms, such as Linux. Indeed, the film studios have a strong interest in the development of as many CSS licensed and compliant playback devices as possible, be they consumer electronic players, DVD drives for computers, software programs, or other platforms, such as the recently introduced SonyPlaystation2. The greater the number and variety of CSS compliant playback devices available in the market, the greater the demand will be (hopefully) for DVDs that carry our content.

Some consumers who have been unable to play DVDs on their Linux operating system have argued that they should be permitted to circumvent the CSS encryption technology in order to gain access to the content of the DVDs that they have purchased. I want to make clear from the outset that my discussion of that particular argument in this hearing is separate from the ongoing litigation in the Reimerdes case, commonly known as the De-CSS case. That case involves violations of Section 1201(a)(2)—the prohibitions concerning circumvention devices, products or services and therefore is not directly relevant to the issue at hand in this hearing, namely Section 1201(a)(1) and the prohibition on circumvention conduct. Because the Reimerdes litigation is ongoing and my company is a plaintiff in that litigation, it is inappropriate for me to discuss that case. With respect to the argument for an exemption on the prohibition of circumvention conduct for purposes of playing DVD discs on the Linux platform, I respond as follows:

First, as the number of Linux users grows, the market will naturally fill the demand for CSS compliant applications that will play DVDs on Linux. As mentioned above, two companies already offer DVD playback applications for the Linux operating system. Hence, adoption of a circumvention exemption is neither justified nor necessary.

Second, a consumer who purchases a copy of a work but does not have the proper equipment to play back the work does not, in my view,

entitle the consumer to circumvent access control protection measures. For example, a consumer who purchased a subscription to HBO soon after its launch but did not own a television set that could accommodate a cable set top box necessary to descramble the encrypted HBO signal would not have been entitled to circumvent the encryption. Encrypted television signals are protected by various sections of the Communications Act. None of these sections provide for exceptions for users to decrypt signals without the authorization of the broadcaster. We have all been living with this legal regime for more than a decade with no difficulties legal or otherwise. Mindful of this longstanding precedent in realm of encrypted broadcasts, no exemption to the prohibition of circumvention of access control technology appears justified merely to accommodate users who lack playback equipment that is readily available in the market.

Third, copyright owners are applying technical protection measures today not simply to ensure proper payment for access to a work, but also to manage the exponentially increasing risks of subsequent unauthorized reproduction and re-distribution posed by the digital environment. The danger of permitting circumvention to facilitate an individual's access to a work is that such circumvention will also likely undermine protections against unauthorized copying and transmission, such as Internet retransmission. Once circumvention is permitted, there is no practical manner—and likely no technical way—to ensure that subsequent uses of the work will be non-infringing.

For example, if circumvention of CSS were allowed solely to permit access to content on DVDs to Linux users for home viewing, such circumvention would likely involve a copy of the content being made in the hard drive of the Linux user's computer. Once a copy is readily available on the hard drive, it is easily subject to massive replication and distribution for unlimited purposes. Such risks are not speculative. Napster, iCrave, Gnutella, MyMP3 and Freenet all stand as very real examples of the ease with which works protected by copyright are subject to enormous unauthorized copying and redistribution once such works reside on the hard drive of a user's computer. These very real risks and dangers militate against allowing exceptions to the prohibition on circumvention conduct. If any cases of adverse impact on non-infringing uses of works are demonstrated in the future, then that would be the time to discuss alternative remedies. An exception to the prohibition on circumvention conduct should be considered only as a remedy of last resort.