Reply comments for DMCA rulemaking

I appreciate the opportunity to express my reply comments to the Copyright Office. As part of this rulemaking process to determine which classes of works might be exempted from the prohibitions in 1201, many people, including myself, have suggested that all classes should be exempt. I realize that would, in effect, overturn the law via rulemaking, which I doubt Congress intended. But there must have been some concern about how this rule would affect users of copyrighted works, enough to ask the Librarian to determine possible adverse effects. My "all classes should be exempt" position was, I'll admit, an over-reaction to the way the law is already being applied. In these comments, I will suggest an alternative.

I believe that the copyright law changes prompted by the DMCA have raised the attention of the public, particularly persons in the field of computers, because of a misunderstanding regarding congressional intent. I have studied this issue closely for several months because I see this law being applied in ways that I don't think were intended, in ways that will ultimatley affect me. Interpretation of 1201 varies greatly, it mostly seems to depend on your point of view as a user of works versus as a creator of works. There are parts of 1201 that are worded such that it can reasonably be understood more than one way, and it is becoming a growing issue.

As a hobbyist musician, I understand and support the goal of protecting the rights of a copyright holder. I support the use of technological protection measures in the course of preserving rights granted to copyright holders. The statement , in 1201(a)(1)(A), "No person shall circumvent a technological measure that effectively controls access to a work protected under this title" seems like a good way to put it. It was correctly pointed out earlier in this process, that various measures have been in use for many years, both hardware and software, without too much of an adverse effect.

As an end user, however, my reaction to 1201 is sharp. Why? Because the new provisions are being interpreted as not tied to an act of infringement. An act of circumvention is seen as an indication of ill-will and separately punishable without the need for any accompanying wrongdoing. The same is being assumed for possession of the tools, and for allowing others to obtain the tools. I believe that this is a harmful and inconsistent interpretation, and not likely the intention of Congress.

I assert that one plausible reason that previous protection measures did not have serious adverse effects on non-infringing users is that they were easily, and legally, defeatable. Archival of protected floppy disks, for instance, requires a non-standard copy utility, but such tools have been legally available in the marketplace. I support the right of the copyright holder to apply such protection measures, but I can't support a blanket prohibition on the act of circumvention, especially when no infringment has occurred. The way 1201 is being applied, ***any*** act of circumvention is prohibited, even though it, as stated in 1201(a)(1)(B), "shall not apply to persons ... adversely affected ... in their ability to make noninfringing uses ." In the so-called "DeCSS" case in New York, this law is being applied where no infringement has occurred, which is clearly having an adverse affect on non-infringing users, if not uses.

As a professional electronics engineer, I am concerned that a legal "hands off" or a “you can’t think this way” label applied to parts of programs, devices, or circuit schematics is an undue limitation imposed by the 1201 restrictions. Am I not allowed to study and discuss these methods or make my own equivalent methods? The "may not offer" provisions are being applied in ways that will limit discussion of functionality if there is a question of liability. Further, new product designs which may also have a circumvention capability are likely to run afoul of 1201. Adverse conditions to the engineering community are numerous, which is why I initially suggested to just exempt practically everything. There must be a way to achieve protection for the rights of copyright holders while not creating the far-reaching implications of a ban on a certain uses of technology.

In an attempt to understand the issues better, I have read most of the copyright law, news articles, chat bases, and court transcripts that pertain to this issue, searching for a position to balance the interests of all parties. As a result, I respectfully suggest that 1201(a)(1)(A) be worded, or at least interpreted in the courts, such that "and then infringes" is added. This simple addition would calm most of my concerns, and, I believe, the concerns of many others, because most of the vagueness is then removed. Although the rulemaking process was not empowered to reword the law, I believe that the report to Congress is an appropriate vehicle to suggest legislative changes, so it would not be improper to request clarification in that way.

At the risk of sounding extremist, I would like to offer an illustration of my thinking. While reading the opinions of others on this matter, I heard a facetious suggestion that, since strong encryption and decryption technology qualifies as a munition, our constitutional right to bear arms should allow one to possess tools of circumvention. I thought that to be a bit silly, but it brought to my mind what I believe was the intent of Congress when enacting 1201. Could it be seen as the intellectual property equivalent of the use of a weapon during the commission of a crime? It would be consistent, I suggest, with the existing laws for theft of physical property.

In the physical world, the use of a weapon during the theft of property increases the penalty imposed. It is important to note that possession of weapons themselves are specifically not prohibited, nor are many uses of weapons. I suggest that the same applies to the non-physical world of intellectual property. As circumvention methods also serve useful non-infringing purposes, I would like to point out a parallel. I believe that 1201 probably was intended to pertain only when infringement has occurred. In my opinion, rules to limit the study, creation, possession, and use of circumvention tools are otherwise problematic unless they are tied to actual acts of infringement. Just as possession of a weapon does not imply participation in a crime, neither does possession of circumvention tools imply participation in an infringing act. It cannot be assumed that an act of circumvention is followed by an act of infringement. I have a belief that it doesn't matter ***what you know***, but it does matter ***what you do*** with what you know.

I do not advocate theft of service, and I do not expect access to copyrighted works for no charge. It has been difficult, at times, to explain why I disagree with 1201 without sounding as if I support such things. It is circumvention as a crime all by itself that creates a problem in my mind. Although this may not be the most appropriate forum, my suggestion to balance the interests of copyright holders against the interests of end-users is this: Don't prohibit circumvention generally, nor is there a need to exempt any classes of works. Instead, to be consistent with law in the physical world, interpret violation of 1201 as being when a circumvention tool was used in the commission of an act of infringement.

Thank you,

Mickey McGown
mickeym@mindspring.com