Mr. David O. Carson
General Counsel
Copyright GC/I&R
PO Box 70400
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Washington, DC 20024

March 31, 2000

REPLY COMMENT ON ANTI-CIRCUMVENTION PROVISIONS OF THE DIGITAL MILLENNIUM COPYRIGHT ACT (ENACTED AS H.R. 2281, OCTOBER 28, 1998)

Dear Mr. Carson:

I am writing in response to the request issued by the Library of Congress for comments on the recently enacted revisions to Title 17 U.S.C., specifically Section 1201 (also known as the Digital Millennium Copyright Act, or DMCA). Before going further, I would like to express my sincere thanks for the opportunity to contribute my perspective to this discussion. I hope you will find the following comments useful as you prepare your recommendations.

My thoughts on the DMCA follow in two parts. In the first part, I comment briefly on two issues discussed by Messrs. Attaway and Sorkin in their responses to the original Notice of Inquiry on behalf of the Motion Picture Association of America (MPAA) and Time Warner, Inc., respectively. It is worth noting that while these comments are presented in the specific context of Digital Versatile Disks (DVDs), they are generally applicable to all forms of digital media. In the second part, I offer what I hope is a unique viewpoint on this discussion, based on my personal experience as both a consumer and creator of copyrighted materials. Please note that I am writing to you as an individual, speaking for myself only and not on behalf any company or organization.

I. Specific comments on MPAA and Time Warner responses

The assertion that access control increases availability (Attaway, p. 2, par. 2) is patently false. Indeed, the access control measures implemented on DVDs create restrictions that do not, and should not, exist with any other medium. As a simple example, consider that I may legally travel to Europe and purchase a French textbook for study upon my return home. In many cases, the motivation for such a purchase is that the book may be difficult to find or simply unavailable in the United States. The access control scheme implemented on DVDs, on the other hand, makes this impossible. The "region coding" on all titles purchased in Europe *guarantees that I will be unable to play those titles when I return home*, even though I am the legal owner of those titles and guilty of no copyright violations whatsoever. In light of this observation, Mr. Attaway's claim that access control technology "has already greatly increased the availability of a wide range of copyrighted materials to members of the public" is simply untrue. The use of regional access controls may very well result in some benefit to the motion picture industry, but that benefit should not be provided by the government if it occurs at the expense of basic consumer rights.

A far more fundamental fallacy – one which appears almost verbatim in the two letters mentioned above – is any interpretation of the DMCA which characterizes as "unauthorized users" those individuals who circumvent technical measures to access works they legitimately own through first purchase. It is precisely this legal misinterpretation which is being used by the MPAA in their well-publicized legal actions against defendants in New York and Connecticut during the past several months. Mr. Sorkin reasons, for example, that "a fair use defense might allow a user to quote a passage from a book but it does not follow that the user is allowed to break into a bookstore and steal a book." (Sorkin, p. 2, par. 3) In the case of a DVD legally purchased by a consumer, *this analogy makes no sense whatsoever*. Taken to its logical conclusion, it suggests that the consumer can only read a book *he already owns* under certain conditions, and that the right to specify those conditions rests with the author of the book (or whoever owns the copyright). This is completely unreasonable – no author should have such broad rights as to be able to specify the manner in

which his work is read, viewed or otherwise consumed. This applies whether the work in question is a book, painting, song, movie or anything else.

In addition, the DMCA impinges upon fair use in a second, more subtle way. When a consumer buys a DVD title, he is never informed that playback of the content is limited to any particular class of "approved" devices. In fact, upon its inception the DVD medium was deliberately passed off as adhering to the commonly accepted business model of audio compact discs, which are nearly identical to DVDs in form and method of use but employ no access control technology. Thus a reasonable person would expect that, as with CDs, his legal purchase (or rental or loan) of a DVD should entitle him to view that title in any manner of his choosing, subject to the well-established limitations (on making copies for others, public performance and so on) prescribed in existing copyright law. But the access control measures used on DVDs limit the consumer's playback options to devices licensed by the DVD Copyright Control Association (DVD-CCA), and this limitation takes place despite the fact that the licensing agreement is never so much as implied – let alone stated in writing – at the time of the purchase. It is worth noting that in the four years since the DVD medium was introduced to the public, no content producer has *ever* explicitly documented the licensing agreement implicit in the purchase of a DVD title in a clear and up-front fashion. Had any producer done so, I submit that consumers would have soundly rejected the DVD format for its restrictive limitations. The recent failure of a competing licensed-access technology, Divx (see http://www.fool.com/portfolios/rulemaker/2000/rulemaker000127.htm), amply demonstrates this point.

In summary, recent events have demonstrated that the DMCA prohibition on circumvention in may be abused so as to grant a copyright *owner* rights that should never be granted in the first place, while simultaneously (and unfairly) abridging the rights of the *consumer* of the copyrighted work. Ironically, the potential for such abuse was recognized by none other than the chairman of the House committee that drafted the DMCA. In his remarks just before the Act was signed into law, Commerce Committee Chairman Hon. Tom Bliley stated (105th Congressional Record, p. E2136; emphasis added):

> [G]iven the unfortunate proclivity of some in our society to file spurious lawsuits, I don't want there to be any misunderstanding about the scope of this legislation, *especially the very limited scope of the device provisions in Title I and the very broad scope of the exceptions to section 1201 (a)(1)*.

Furthermore, Rep. Bliley stated that the Committee's goal in crafting the wording of Section 1201(a)(1) was

> [t]o ensure that persons (including institutions) will continue to be able to get access to copyrighted works in the future. Given the overall concern of the Committee that the Administration's original proposal created the potential for the development of a `pay-per-use' society, we felt strongly about the need to establish a mechanism that would ensure that libraries, universities, and consumers generally would continue to be able to exercise their fair use rights and the other exceptions that have ensured access to works. Like many of my colleagues in the House, I feel it will be particularly important for this provision to be interpreted to allow individuals and institutions the greatest access to the greatest number of works, so that they will be able to continue exercising their traditional fair use and other rights to information.

Unfortunately, the very abuse Rep. Bliley describes is not only possible but actually happening now that the Act has become law. The proper remedy – the one which ensures that the law is upheld in spirit as well as in letter – is to apply the exceptions described in Section 1201(a)(1) using the "broad scope" mentioned above, that is, *to all classes of copyrighted works* in the context of what would traditionally be considered fair use.

II. A different perspective

Legal and technical arguments aside, I would also like to present my personal perspective on this matter as both a creator and consumer of copyrighted materials. For the past six years, I have worked as a

professional freelance photographer, shooting assignments for both commercial and editorial clients. Like other copyright creators, I have a vested interest in making sure that my rights are not violated or abused by those to whom I sell my work. In particular, my images are just as susceptible to unauthorized digital reproduction as any other audio-visual content (audio recordings on compact discs, movies on DVDs, and so on). In fact, it is far easier to copy or distribute a handful of images than an audio or video piece due to the significantly smaller file sizes involved.

With those considerations in mind, I provide all of my clients with specific terms for publication and other uses of my images. For business reasons, I rarely transfer copyright and ownership of images outright. (In photography, such a "buy-out" arrangement is generally reserved for staff photographers, not freelancers.) Instead, I typically license images to my clients on a non-exclusive basis for either one-time or multiple use. Note that this is nearly identical to the arrangement used by DVD content producers. The important difference is that I state my licensing terms explicitly, in writing, before any transaction takes place.

As you may well imagine, this process is fraught with the possibility of copyright abuse, either in the form of image exchange with (or publication by) unlicensed users, unauthorized republication by licensed users (in the case of a one-time use agreement), or both. On several occasions, I have had to remind licensees of the terms of their contracts after finding that they had violated some of them. In one instance, I was forced to take legal action to enforce my copyright against a client who willfully and repeatedly abused the licensing terms upon which we had previously agreed.

Nevertheless, my licensing agreements are strictly confined to the *public* reproduction and use of my images. As such, *they are covered by existing copyright law*. On the other hand, that law does not allow me, the copyright owner, to specify the terms under which licensees use my images in *private*. Indeed, any such provision would be unacceptably invasive: it would allow me to sell you a print and then stipulate the manner in which you could legally hang that picture in your home, as well as the type of illumination or the color of the picture frame.

This is truly a disturbing thought.

III. Conclusion

This last observation leads me back to the big picture (pardon the pun). As a producer of copyrighted works, I agree that copyright laws unquestionably afford me certain essential protections. I also agree that, as a practical matter, it is occasionally necessary to revise those laws to account for the realities of the Digital Age. But under no circumstances should revisions be made at the expense of basic, existing rights. In the case of the DMCA, the casualty of the revisions is fair use. In the spirit of the law, as described in Rep. Bliley's remarks above, I respectfully urge you to recommend that the exemptions described in Section 1201(a)(1) be extended to *all classes of copyrighted works* in the context of what would traditionally be considered fair use.

Respectfully submitted,

Alexander M. Mitelman (by email)

Ps. After many undoubtedly tedious days of reading all the comments and replies on the DMCA, I thought you might enjoy reading http://www.brunching.com/features/feature-copyfire.html. -AM