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David O. Carson
General Counsel
Copyright GC/I&R
PO Box 70400
Southwest Station
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Dear Mr. Carson:

This letter is a response to the request for written comments from interested parties concerning adverse effects on noninfringing uses of copyrighted works resulting from section 1201(a)(1) of the Copyright Act going into effect on October 28, 2000. My comments will focus specifically on the class of works consisting of visual and audio performances protected by encryption-based access control mechanisms such as CSS.

I am employed as a Senior Research Scientist in the Computer Science Department at Carnegie Mellon University in Pittsburgh, Pennsylvania. As a member of the research faculty, my duties include both research and the teaching of graduate and undergraduate students. In my lectures, I make frequent use of copyrighted materials such as graphs or diagrams from books and journals. I am able to do so under the fair use provisions of existing copyright law. In the future, I plan to also make use of still images or short video clips from copyrighted motion pictures. For example, a lecture on interfacing computers to living things would be enhanced by showing some video stills from the movie *The Matrix*. To do this, I plan to capture an image from the movie, save it to a hard drive, and import it into the PowerPoint file containing the slides for the lecture. This activity is exactly what was intended by the inclusion of educational activities in the fair use doctrine. But under 1201(a)(1) it will be impossible to accomplish legally.

To my knowledge, no commercially available DVD player supports capturing of still images or brief video clips in digital form for any purpose, including fair use. The obvious solution to this problem is to write a software player that does provide these capabilities. Such players are in fact under development in the Linux community. However, without the motion picture industry's consent, the use of such a player to read a CSS-encrypted disk would be a violation under 1201(a)(1). If motion pictures are not exempted from the provisions of 1201(a)(1), the industry will have succeeded in making fair use -- by which I mean any noninfringing use without the copyright holder's prior consent -- impossible. A professor of drama or cinematography would obviously depend much more heavily on access to movie excerpts and would be more seriously impacted than a computer scientist such as myself.

An alternative way to show a still from a DVD movie would be to cue up the movie itself in a DVD player and freeze-frame the image prior to the start of the lecture. However, this approach is unworkable if one needs to annotate a still image or embed it in a larger context, or make use of clips and stills from multiple disks in a 50 minute lecture.

While it is true that movies available on DVD today are also available on VHS videotape, which has weaker copy protection, this will not remain true indefinitely. I believe it is likely that prior to October of 2003, at least some motion pictures will be released only on DVD, or with the VHS version significantly delayed.

In its solicitation of comments, the Copyright Office referred to password codes on software programs and scrambling systems on cable TV programs as examples of access control mechanisms covered under this section. The crucial difference between these systems and the CSS protection scheme is that the former are only intended to prevent access to goods that have not been paid for. In contrast, the motion picture industry is using its CSS licensing authority to impose entirely new controls on how legally purchased content may be accessed *after* it has been paid for. This use of the anticircumvention provision in ways not intended by Congress harms the public by inhibiting fair use.

Another example of the motion picture industry's use of its CSS licensing authority to impose unacceptable restrictions on the behavior of DVD players is the enforcement of region codes. Players sold in the United States will play an unlimited number of DVDs only if those DVDs are in region 1. Disks from Europe and Asia are given different region codes precisely because the industry wants to prohibit consumers from accessing that content, even after they have lawfully purchased it. I can think of no more fundamental right of fair use of a DVD movie than the right to play it after one has paid for it. This level of control goes far beyond what is necessary merely to prevent illegal copying. But since the industry has been able to use CSS licensing and the anticircumvention provisions of 1201(a)(1) to grant itself absolute control over the behavior of DVD players, American consumers have no recourse. In other countries where more enlightened policies prevail, DVD players do not enforce region codes. New Zealand and Germany have been pointed out as examples, although I have no direct knowledge of the situation there. If true, these countries will enjoy a competitive advantage over the United States with regard to open access to information.

In summary: at present, the motion picture industry has not found a way to prevent illegal copying without also preventing noninfringing copying that is permitted under fair use. Rather than searching for a solution to this problem, it is busily engaged in trying to eliminate additional types of fair use, such as the right to play a DVD in the US that was lawfully purchased overseas. This behavior is offensive to American consumers and should not be abetted by the federal government. For as long as this situation persists, motion pictures and sound recordings protected by encryption-based access control mechanisms such as CSS should be declared exempt classes of works with regard to 1201(a)(1).

Sincerely,

Dr. David S. Touretzky