

February 7, 2000

David O. Carson, Esq.
General Counsel
Copyright GC/I&R
Southwest Station
Washington, DC 20024

Re: Section 1201(a)(1) of The Digital Millennium Copyright Act (Docket #7M99-7)

Dear Mr. Carson:

I am grateful for the opportunity of submitting comments on behalf of Time Warner Inc. in response to the Notice of Inquiry announced in the Federal Register Volume 64, No. 102.

Time Warner is, as I am sure you know, one of the leading companies engaged in the production and distribution of copyrighted works including motion pictures, phonorecords, books, magazines and printed music. As such, it is vitally interested in adequate and effective protection of copyrights. In that connection, Time Warner devotes significant resources to fighting unauthorized uses of its copyrighted works in the United States and abroad and has strongly supported the enactment of The Digital Millennium Copyright Act (DMCA) which, among other things, makes it unlawful to defeat technological protections used by copyright owners to protect their works against unauthorized access.

Time Warner is also vitally interested in the healthy maintenance of the "fair use doctrine". Time Warner's ability to rely on it makes possible Time Warner's creation and dissemination of news reports and factual and non-factual textual, audio, video and audio/visual works.

Congress modified the prohibition set forth in Section 1201(a)(1) in order to ensure that the public would have continued ability to engage in non-infringing uses of copyrighted works, and to avail itself of the fair use defense. In that connection, the Library of Congress is required to determine whether users of particular "classes" of copyrighted works are likely to be adversely affected in

their ability so to act by the prohibition against defeating protections. The Notice of Inquiry to which this letter is responsive seeks to determine whether there are such “classes” of works

In considering this issue generally, and more particularly, the questions posed by the Copyright Office in its Notice of Inquiry, we must, I submit, keep in mind the serious problems to copyright presented by the development of digitization. For all of the benefits, social, economic and educational that digitization can provide, it also poses grave dangers to copyright and to all of the businesses and individuals whose livelihoods depend on copyright protection. This is because digitization makes it possible to reproduce copyrighted works in unlimited quantities with no degradation of quality and to transmit copyrighted works all over the world – all very quickly and at trivial expense. Hence, the critical necessity for effective protection both technological and legal against unauthorized uses of copyrighted works and for effective prohibition against circumventing such protections.

Will such protections and prohibitions adversely affect users as described above? Certainly, at present and for the foreseeable future, the answer is “no”.

For one thing, Section 1201(a)(1) prohibits circumvention of technological measures that effectively control *access* to copyrighted works. The Copyright Office, in its summary of the DMCA, said that the section “...does not prohibit the act of circumventing a technological protection measure that prevents copying. By contrast, since the fair use doctrine is not a defense to the act of gaining unauthorized access to a work, the act of circumventing a technological measure in order to gain access is prohibited”. To put it in less technical terms, 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.

Secondly, it is not the case that access control measures “adversely affect” users in their “ability to make non-infringing uses”. Such measures may require users to pay for access to a work; the users, however, are not prevented from making non-infringing uses or uses as to which fair use would be a defense. Time Warner (and other creators and distributors of copyrighted works) does not apply technological protections to its digitized works in order to prevent the distribution of those works to the public; it is, after all, through such distribution that Time Warner carries on its business. The technological and legal measures are intended to protect the copyrighted works against *unauthorized* uses. Anyone wanting to make “fair use” of a copyrighted work need only follow the same steps as he or she would in the absence of technological protections: buy or rent a copy, subscribe to a transmission thereof or borrow a copy from a library.

In this light, I cannot point to any “class” of works (assuming one can be defined) or particular works the availability of which for non-infringing uses or for uses as to which the fair use defense would be available has been adversely affected or to any adverse impact on criticism, comment, news reporting, teaching, scholarship or research. Nevertheless, I submit that if circumvention of access control measures is permitted for users of a particular “class” of works, the purpose and efficacy of access control measures for such works will be defeated at least in the current state of technology. It would be exceedingly difficult – if not impossible – to limit the permitted circumvention to uses that are not infringing or defensible under the fair use doctrine as distinct from uses that are neither and are consumptive and even commercial. It would also be exceedingly difficult – if not impossible – to limit any permitted circumvention to a “particular class of works” as distinct from the “category of works of authorship” within which that “class” falls.

As to the specific questions set forth in a Notice of Inquiry,

1. The technological measures existing today that effectively control access to copyrighted works include scrambling/encryption technologies applied to cable and satellite signals and the Content Scramble System (CSS) applied to DVDs.
2. Some technological measures impose no further controls on use once access is authorized. For example, the encryption technologies currently used on satellite and cable signals generally do not restrict use (such as copying) once access is authorized and the signal is decrypted. Other technological measures, such as CSS, carry certain obligations to restrict copying and further distribution of content once access is authorized. For example, playback devices that are authorized to decrypt and play DVD discs protected by CSS are generally prohibited from sending the decrypted digital content out of a digital output. This is to prevent unauthorized digital copying and re-distribution. The effects of these measures need to be judged in light of many factors. These include: (i) the substantial risks posed by unauthorized digital copying (i.e. perfect copies through endless generations with a few keystrokes of a PC), (ii) the usefulness of measures in encouraging distribution of works on new platforms and in new media (e.g. for computer use or for making available over the Internet), and (iii) the availability of the same works in other formats that may not be subject to technical measures. It is difficult to see how these “effects” would be useful in determining whether to exempt any “classes of works” from the anti-circumvention provisions or in determining what constitutes a “class of works”.

3. As pointed out above, the application of access control technologies has not affected the availability of works to persons who want to be lawful users. Indeed, the use of measures that control access to works has increased the availability and variety of works to persons who are or desire to be lawful users. For example, the business of pay television is predicated on the assumption (shown to be correct) that viewers would be willing to pay a fee in order to have access to programs uninterrupted by commercials and including subject matter that free television would not exhibit. To assure payment of this programming service and to protect the economic rights of copyright owners, cable television companies, programmers, and satellite broadcasters, some method of limiting program access to subscribers was required. This led to the development of video encryption and scrambling. As another example, in the case of DVD, the protection offered by the CSS system persuaded many studios to release their pictures on this physical format that, for the first time, allowed for playback by personal computers and provided much information that could not be included in VHS tapes.
4. I am aware of no works or classes of works that have, because of the implementation of technical protection measures, become unavailable to persons who desire to be lawful users.
5. I am aware of no works or classes of works that have, because of the implementation of technical protection measures, become less available to persons who desire to be lawful users. On the contrary, the implementation of such measures has, as explained in our response to question 3 above, made works more available.
6. Currently, films released on encrypted subscription television services and DVDs are generally also released in other formats, such as prints and tapes for theaters, VHS (video) and free television, to which access control measures have not been applied. These later formats can serve as viable substitutes for the encrypted formats. Considerations such as timing of release, quality of picture and sound, viewing with or without commercial interruptions, fee versus free, etc. often lead consumers to prefer one format over another for certain films.
7. So far as I know, the only works that are available only electronically and only in formats to which such technological measures have been applied are HBO original programs that are available only on HBO.
8. I am aware of no negative effects that the use of technical access control measures has had on the availability of works for nonprofit archival purposes.

9. The use of technological measures that effectively control access to copyrighted works has not created problems with respect to the preservation of such works. It has, rather, in the case, for example, of the Time Inc. Photo Collection, greatly improved preservation of such works because it has allowed for digital storage under controlled conditions and in a safe and secure environment.
10. I am aware of no negative effects that the use of technical access control measures has had on the availability for nonprofit educational uses of works protected by such measures.
11. Assuming that some works are to be exempted from the circumvention prohibition (an assumption with which I do not agree), I know of no way of defining “classes” of works for that purpose. If, for example, the use to which a work is put is used as the basis for such a classification (as the question suggests) exempting those examples of the works used illustratively in the question would in all likelihood result in all other examples of such works to *de facto* lose their protection. Moreover, even if that were not the result, removing protection from a “class of works” would open the door to unauthorized uses of other works within the same category of authorship and even beyond that category.
12. The use of technological control measures has, to my knowledge, not had any impact on the ability of persons to engage in criticism, comment, news reporting, teaching, scholarship or research. Such measures have not restricted those activities nor, for the reasons said above are they likely to do so.
13. The use of technological control measures has, to my knowledge, not had any impact on the ability of persons to engage in non-infringing uses or any uses for which the fair use defense would be available or in any activity permitted by exemptions prescribed by law.
14. To my knowledge, there are no such works or “classes” of works.
15. To my knowledge, there are no such works or “classes” of works.
16. For the reasons stated above, defining “classes” of works is neither feasible nor appropriate. More specifically, if the criteria exemplified in this question were used to define (in part or otherwise) “classes of works”, there would be no way of maintaining protection for other works in the same “categories of authorship” or of limiting protection to works used as in the examples. Any such attempt at defining a “class” for exemption would be an “Open Sesame” to wide spread and uncontrollable piracy. Moreover, as stated above, there is

no basis for the view that any proper uses are or will be prevented by the use of technological protections. Before there is any movement in the direction of exempting certain works or “classes” of works from the prohibition against circumvention, those who support such exemption should come forward with proof that users who desire to make non-infringing uses or avail themselves of the fair use defense are prevented from doing so by the technological protections.

17. For the reasons stated above, defining “classes” of works is neither feasible nor appropriate. More specifically, if the criteria exemplified in this question were used to define (in part or otherwise) “classes of works”, there would be no way of maintaining protection for other works in the same “categories of authorship” or of limiting protection to works used as in the examples. Any such attempt at defining a “class” for exemption would be an “Open Sesame” to wide spread and uncontrollable piracy. Moreover, as stated above, there is no basis for the view that any proper uses are or will be prevented by the use of technological protections. Before there is any movement in the direction of exempting certain works or “classes” of works from the prohibition against circumvention, those who support such exemption should come forward with proof that users who desire to make non-infringing uses or avail themselves of the fair use defense are prevented from doing so by the technological protections.
18. Technological measures that effectively control access to copyrighted works can be and indeed have been circumvented in at least one case by computer “hackers” who developed and posted on the Internet a program called DeCSS which de-encrypted DVDs. Also, such technological measures have been circumvented by “hackers” who produced “pirate” smart cards that could de-encrypt pay television broadcasts. Unfortunately, no technological protection, however effective, is completely inviolable, hence the need for effective legal enforcement.
19. I know of no impact on the price of copyrighted works caused by such circumvention. One can reasonably predict, however, that if circumvention is permitted on a broad scale, there will be a negative impact on price or a reduction or elimination of works released in the market (see answer to question 20).
20. Such circumvention would probably have resulted in a reduction (if not elimination) of the number of motion pictures released on DVD. The entry of a preliminary injunction by the United States District Court in New York City avoided that impact. Another glaring example is that DVD/audio, a high

density, high quality new format for a recorded music has been delayed for an indeterminate time because of the “hack” of the CSS.

21. I know of no other impact on the marketing of copyrighted works attributable to such circumvention.
22. As stated above, I am unable to define a “class” of copyrighted works and, accordingly, I cannot suggest how the effect of circumvention would vary with the “class” of work. Indeed, as I stated above, if an exemption from protection were to be accorded to a “class of works” (assuming one could be defined) such exemption would, as a practical matter, “spill over” to other similar works even though not in the same “class”.
23. As I stated above, we should not attempt to devise such a definition. Any such definition and any exemption predicated thereon would in today’s context, be based on no more than sheer speculation, an extremely unsound basis for the destruction of copyright protection. A much sounder approach would be for proponents of exemption to demonstrate that particular works have been rendered unavailable to them for non-infringing uses or “fair use” by the technological protection measures.
24. No such adverse effects have been identified to my knowledge.
25. I believe that the use of effective technological protective measures will result in making copyrighted works more widely available because concerns about the dangers from digitization referred to above would have been ameliorated, if not eliminated. Please, in addition, see the answer to question 3.
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27. I believe that all of the relevant factors have been addressed in the prior answers. Should any other factors, questions or contentions be raised in any other comments or reply comments, Time Warner would appreciate the opportunity of responding to them.
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29. Time Warner would appreciate the opportunity of testifying at any hearing conducted by the Copyright Office as well as the opportunity of reviewing other comments and reply comments submitted to the Copyright Office.

Respectfully yours,

Bernard R. Sorkin
Senior Counsel

BRS:sib