

Electronic Frontier Foundation

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Mr. David O. Carson
Office of the General Counsel
Copyright Office GC/I&R
P.O. Box 70400
Southwest Station
Washington, D.C. 20024
Sent via email: 1201@loc.gov

RE: REPLY COMMENTS -- Exemption to DMCA's Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies

Mr. Carson:

The Electronic Frontier Foundation (EFF) appreciates the opportunity to submit reply comments to aid the Copyright Office in its task of determining additional classes of works to exempt from the Digital Millennium Copyright Act's circumvention ban. Congress acknowledged the adverse impact likely upon individual rights from the Act's general ban on circumvention, and instructed the Copyright Office to exempt further classes in addition to the few exceptions listed in the statute in order to achieve balance among interests in the digital environment.

Because the DMCA only permits exemption under a narrow set of circumstances, it tips copyright's traditional balance overwhelmingly in favor of copyright holders at the expense of free expression, fair use, and innovation. Rather than outlaw reverse engineering generally and then selecting a few specific circumstances in which to permit the activity, Congress should have outlawed illegal activity while leaving legal reverse engineering intact to remain a primary driver in the emerging information economy.

Digital Equivalent of First Sale Rule – “First Access” Rule

In order to restore the delicate balance to copyright law in a digital environment, traditional principles such as the First Sale Rule must be granted digital equivalents. Under copyright law's First Sale Doctrine, copyright holders' right to control what happens to a particular copy of a work are cut-off once the author has first placed the work into the stream of commerce. The wisdom behind this prohibition against perpetual control over a particular work by the author continues despite technology's advancement to a state promising such perfect control over all works. To grant

copyright holders the right to control all uses of works treads dangerously upon First Amendment principles and will certainly upset copyright's balance.

Because the DMCA grants copyright holders a new right to control access to digital works, this right must be similarly limited by a "First Access Rule" that prohibits copyright holders from governing each and every lawful access, use, and enjoyment of the work once initial access has been authorized. Congress never intended, nor would the Constitution permit copyright holders to be granted such a broad and sweeping right to control all experiencing of creative expression. The access right granted to copyright holders in the DMCA must be limited to the first lawful accessing of a work and not each subsequent lawful accessing and use of that work.

For example, when a DVD is lawfully purchased, it is implied that the purchaser is authorized to access the file contained within the physical media in order to view it on whatever platform that person uses. A copyright holder should not be granted the right to control the consumer's lawful experience with the DVD. Allowing copyright holders to tie hardware and software together to control the experiencing of the work as in the case of copy protection for DVDs, eviscerates copyright law's First Sale Rule and years of careful judicial endorsement for this limitation to the copyright holders exclusive bundle of rights. Balance requires limitations to the perfect control desired for by the copyright industries. Cutting off the copyright holder's right to control the lawful purchaser's accessing of a particular work after the initial authorization is granted ensures that balance can be maintained and all interests are protected by the DMCA. Therefore, the Copyright Office should define the DMCA's access right narrowly, restricted by a First Access Rule.

Right to Make Digital Fair Use

All classes of works should be exempt from the Act's general circumvention ban when the purpose for the circumvention is to make a fair use or engage in another non-infringing uses. Because technology enables copyright holders to dictate and architect the parameters for the public's use and enjoyment of a particular work, the need to protect society's interests in access and using the work should be given considerable attention. Infringing uses of works can be punished under existing theories of copyright law; so allowing circumvention for the purpose of engaging in a non-infringing fair use would prove harmless to the copyright holder, while it preserves the public's interest and right to use the copyrighted expression.

Claims by the copyright industry that such broad additional rights should be created to combat its alleged vulnerability in a digital environment overlook the fact that technology enables copyright holders with greater protection over their works than traditional space ever did. Authors have never had the ability to program a book to delete itself after a particular date or prohibit the printing or copying of any particular page within it.

Indeed, *technology provides authors with far greater power over their works than the law has been willing to grant them.* The power of perfect control over use has never

granted to an author by copyright law. Fair use is part of copyright law's intended design. This new power can easily be abused without substantial limitations placed upon it to ensure that individuals' rights are preserved as well. Therefore, the Copyright Office should recognize a broad exemption for all classes of works where the circumvention was engaged to make a fair use of the work. Fair use rights are as important in the digital environment as they are in traditional space and necessary to achieve balance in the law.

Response to Copyright Industry Comments

Comments supplied by the copyright industry recommending no limitations be placed on the DMCA's circumvention ban undermine Congress' express intent in instructing the Copyright Office to rectify the danger and adverse impact it foresaw at the Act's inception. Particularly, comments supplied by Time Warner, Sony, and the MPAA refuse to acknowledge the potential dangers inherent in granting such broad rights to control creative expression.

Additionally claims suggesting that copyright holders are unwilling to distribute their works in electronic form in the absence of strong technological protection measures ignore the numerous authors and composers who are currently taking advantage of the popular and nonrestrictive MP3 format to achieve super distribution of their works and reach new audiences. Many new business models are being created that do not rely upon the traditional property model, and the imposition of protection measures "required" by the traditional copyright industry interfere with the emerging models that rely upon super distribution

Time Warner's (commonly mis-used) example that fair use would not permit someone to break into a book store to steal a book is a misleading and irrelevant example. If a person has already paid for the right to view an e-book or DVD when they purchased it, she is not breaking into a third-party's property in order to access it, as Time Warner's example asserts. Rather, she may need to break through a protection measure in order to view that e-book or DVD on her particular operating system. A person reverse engineering a DVD that she purchased (her property) is not at all analogous to the breaking and entering into a third-party's store to access the work – one is clearly fair use the other is clearly theft.

Time Warner also points to the Content Scrambling System (CSS) used to prevent DVDs from playing on unsanctioned players. Time admits that the strategy for CSS protection is to restrict use and exercise control even after access is authorized: "Other technological measures, such as CSS, carry certain obligations to restrict copying and further distribution of content once access is authorized." (Time Warner Comment, page 3). But granting such absolute protection is dangerous and not within the ambit of copyright's objective. CSS and other schemes which attempt to grant copyright holders the right to dictate the terms of fair use to the public, hardly seem very fair or supportable by copyright law principles.

Time also admits that DVDs are a unique medium and their introduction, “provided much information that could not be included in VHS tapes.” (Time Warner Comment, page 4). Considering the uniqueness and unavailability of the works in other formats, an inability to circumvent DVDs to make fair use of them renders the privilege meaningless, despite the DMCA’s explicit language and commitment to support fair use rights in an electronic environment. Time assures that no “proper uses” will be hampered, but what Time considers “proper” is not the same as what a federal judge would consider fair and thus legal. Granting the copyright industry the right to determine what uses are “proper” and therefore authorized, grants extremely broad and unprecedented rights over access and use of information.

Sony’s comment warns that any rulemaking exemption to the DMCA’s prohibition against circumvention will jeopardize the US’s obligations under the WIPO treaty. However, US copyright law provided for adequate protection for copyrighted works prior to its adoption of the WIPO treaty using traditional copyright infringement legal theories. In actuality, the US had granted among the strongest protection for intellectual property in the world prior to WIPO. Recognizing the need for additional exemptions will allow the US to maintain strong and adequate protection of IP globally, but lead the world in recognizing the need for balance and to protect free expression, fair use, and continue to fuel innovation.

In summary, the Copyright Office should heed the advice of the library associations, the cryptographers, the non-proprietary software developers, academics, and the civil liberties groups and construe the DMCA narrowly to provide adequate protections for the interests (other than the copyright industry) represented in the copyright bargain. Therefore, all classes of works must be exempt from the general circumvention prohibition when the purpose for the circumvention is to engage in a lawful fair use of a work. The copyright holder’s right of access must also be limited by a First Access Rule guided by the wisdom of copyright’s traditional First Sale Rule. Copyright’s design in a digital world must continue to balance the competing interests between authors, publishers, and the public fairly and in light of copyright’s stated objectives to promote the progress of arts and useful sciences.

Respectfully submitted,
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