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June 23, 2000

Mr. Robert Kasunic, Esq.
Office of the General Counsel
Copyright Office, Library of Congress
LM-403, James Madison Memorial Building
101 Independence Av., S.E
Washington DC

Re: Post Hearing Comments on 1201

Dear Mr. Kasunic,

I'd like to thank you for the opportunity to appear at the public hearing and also to all the board members that made a small town software developer feel comfortable in an unusual environment.

My fear, and my motivation for testifying in Washington was to find out if companies would say that any protection method they use is intended to control access and is not a copy protection method and that was exactly what I heard. Without the copyright office's rulemaking on exemptions, section 1201 b will have no weight whatsoever after October 28th, for every manufacturer will claim theirs is an access control measure.

MR. WEISGRAU There was a time when you bought a Microsoft program that you had to go through some contortions in order to install it, and it would blow up or something if you installed it twice, and they've taken all of that off. I don't see anything happening anywhere that would lead one to believe that access controls are going to be put up in such a way that they're going to have this damaging effect.

However with no exemptions this is exactly what we will see. If you will recall my testimony, I provided examples of companies that will not replace a lost or stolen copy protection device and the difficulties users experience with multiple dongles on a laptop as well as a child's game called the Interactive Pooh using a security device.

I have read the testimony of the other witnesses and the question and answer sessions as well. How strange it is that those that oppose an exemption to 1201 a 1, all say in their prepared statements, that there are no adverse impacts that these access control methods cause. Some gave the reason that it is because the section is not yet in effect. But in the question and answer sessions when confronted with real world examples, the same witnesses used some of the most creative phrasing I've ever heard in attempting to avoid answering the question directly. When

they were finally up against the wall, no matter what real world example was put to them they simply answered, “there should be no exemption” or “ the problems were not caused by access technologies”. “MR. WEISGRAU: Yeah.– when he said (Quoting Arnie), "We cannot demonstrate adverse effect," and then five minutes later he’s on the record and says, "And this adverse effect to the extent that it does exist is caused by licensing, not access problems."

Companies are trying to twist and bend section 1201 a1 of the DMCA into their own vehicle for license enforcement when they are really copy protection issues. Mr. Simon of the BSA “one of our problems is large corporate end-user piracy. A company will buy a single copy of a product, then load it on multiple machines. In those circumstances we think that we have a much more powerful cause of action based on 1201(a)(1)(A). …… you want as many causes of action as you can come up with. Mr. Hughes of the Business Software Alliance and Adobe Systems when asked what is a dongle responded by saying as I understand them -- I'm not an engineer, but it's an access control measure. Yet his descriptions clearly indicate it is used as a copy control device “a company may buy a couple copies of a given product or license a couple copies, and then install it on more than one machine.” He continues… so we want to keep Photoshop from being pirated” It should be noted here that Photoshop is protected only by a serial number, a case of first access, which is what their real understanding of 1201a is about, stopping “pirate serial numbers that enable access to products by those who have not licensed legitimate copies of programs.” This is also my belief of what Congress intended 1201a to address.

The same copy protection issue arises with DVD. Dean Marks appeared on behalf of Time Warner and the Motion Picture Association of America. In his view “a consumer who purchases a copy of a work but does not have the proper equipment to play back the work does not, in my view, entitle the consumer to circumvent access control protection measures.”

MR. CARSON: …… why is it a problem for an individual user who wants to be able to watch that DVD on his own computer, which happens to run a Linux operating system, to do what he has to do so that he can view it?
MR. MARKS: The problem with that is that it's not simply a matter of the encryption and protection on the DVD disk guaranteeing the payment by that individual user for the copy of the disk (a first access issue). **The whole purpose of the encryption in the first place is because it carries with it certain copy control applications.”(Emphasis added)**

When pressed by Mr. Carson, Mr. Marks tries to take the easy way out.
MR. MARKS: Okay. I'm a little uncomfortable about talking about DCSS because of the ongoing litigation.

MR. CARSON: Well, let me tell you that you better get comfortable because this is a rulemaking that could affect DCSS. MR. CARSON isn't this access control measure -- CSS that you're talking about -- a measure that is really designed as its end, not to control access but to control the use, by channeling you to that device whose purpose is to control use?

One witness from the SIIA tried, on first attempt, to convince us that manufacturers escrowed not only software code but also the actual dongle for each application sold.

MR. KUPFERSCHMID There are numerous third party companies that offer to escrow software and hardware locks
MR. CARSON: Is that a typical practice?
MR. KUPFERSCHMID: For dongles, I really don't know.

It is obvious that congress wanted to distinguish access control methods from copy protection methods as indicated in the summary of the DMCA from the copyright office (http://lcweb.loc.gov/copyright/legislation/dmca.pdf). This was done so the public will have the continued ability to make fair use of copyrighted works. This should apply to both software programs that use dongles and to DVD, MP3 or any media where fair use is an issue. The particular class of works that an exemption needs to be based on is a particular use, and that is a fair use.

Sincerely,

Joseph V. Montoro