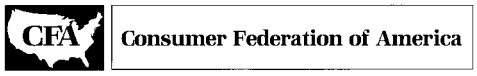

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON COMMERCE, TRADE, AND CONSUMER PROTECTION

HEARING ON

H.R. 107
THE DIGITAL MEDIA CONSUMERS' RIGHTS ACT OF 2003

STATEMENT OF
GIGI B. SOHN, PRESIDENT
PUBLIC KNOWLEDGE

CHRIS MURRAY, LEGISLATIVE COUNSEL
CONSUMERS UNION

CONSUMER FEDERATION OF AMERICA

MAY 12, 2004
2123 RAYBURN HOUSE OFFICE BUILDING
10:00 AM

Chairman Stearns, ranking member Schakowsky, and distinguished members of the subcommittee, this testimony is being submitted on behalf of Public Knowledge, Consumers Union, and the Consumer Federation of America. We want to thank the subcommittee for giving us this opportunity to give a consumer perspective on the Digital Media Consumers' Rights Act of 2003 (H.R. 107). We thank Rep. Boucher and Rep. Doolittle for introducing H.R. 107 and Chairman Barton for co-sponsoring the bill. We strongly support H.R. 107 because we believe it is a narrowly tailored bill that corrects some of the major imbalances in our copyright law that were unintentionally created by the Digital Millennium Copyright Act of 1998 (DMCA).

The digital transition represents an extraordinary technological advance for consumers. Improved audio and video quality through digital broadcasts and recording, combined with new integration of consumer electronics devices mean that consumers will be able to experience news, information and entertainment in ways as never before. In this new digital society, content is mobile and easily transferable to a whole range of devices, especially those within one's own personal network. We are moving toward a world of seamless interoperable systems where our content - our movies, music, documents, photographs - can be called up at anytime, anywhere.

The American consumer is driving the digital transition. But protection of consumers' rights is essential to this transition both as a matter of principle and as a matter of encouraging a market climate that supports technological innovation and economic vibrancy. H.R. 107 provides an opportunity to make needed changes to the DMCA in ways that preserve the rights of consumers.

INTRODUCTION

When Congress was considering the DMCA during the 105th Congress, many nonprofit, consumer, and industry groups, including some of the groups that are testifying today, testified before this committee in opposition to the Act. At that time, these groups said that no drastic changes to our copyright framework were necessary to protect the rights of copyright holders. They further argued that new legislation such as the DMCA could limit a citizen's access to information and stifle legal uses of content. In addition, they argued that the DMCA would constrain creativity and the ability to innovate and, worse, would put a price tag on non-infringing legal uses of digital content.

The Commerce Committee and the Congress heard these arguments, and attempted to preserve some of the core principles underlying copyright law in the plain text of the DMCA. First, Congress sought to protect fair use in 17 U.S.C. §1201(c), stating that nothing in the DMCA "shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title." Second, and critically, in 17 U.S.C. §1201(a)(1)(C), Congress provided for the copyright office to conduct a "triennial review" to ensure that people seeking to make non-infringing uses of copyrighted works were not prohibited from doing so by the restrictions on circumvention of so-called "access controls" placed on digital copyrighted works.

Almost six years later and contrary to the express intent of Congress, these protections have been virtually ignored. The DMCA has gone from being a law that was intended to protect digital copyright material against unlawful infringement to one that chills free speech, stifles research and innovation, harms competition in markets having nothing to do with copyright, places undue burdens on law abiding consumers, and

protects particular business models at the expense of fair use and other lawful uses of copyrighted works.

There are several reasons why the DMCA has morphed into a law that almost categorically prohibits fair use. First, the line between what is a "copy control," which can be circumvented under the DMCA, and what is an "access control," which cannot, has been blurred to the point of meaninglessness. Is the Content Scrambling System (CSS) on a DVD an access control or a copy control? How about the FCC's newly adopted broadcast flag?

Second, the U.S. Copyright Office has defied the express will of Congress that the triennial review process be a "fail-safe mechanism"[1] that would "ensure that access [to digital copyrighted materials] for lawful purposes is not unjustifiably diminished."[2] In the six years since the DMCA was passed, the Copyright Office has conducted two triennial reviews, consisting of hundreds of exemption requests and thousands of pages of written submissions and oral testimony, and has granted only four, extremely narrow exemptions. The small number and miniscule scope of the exemptions can be attributed largely to the Copyright Office-created burden of proof, which has no basis in the plain language of the DMCA. Indeed, the Assistant Secretary of Commerce for Communications and Information, who is tasked with assisting the Register with the rulemaking, has both times raised concerns with the Copyright Office's excessively narrow interpretation of the statute.

Fortunately, many of these problems can be corrected by the narrowly tailored legislation that is the subject of today's hearing. H.R. 107, the Digital Media Consumer

[1] Report of the House Committee on Commerce on the Digital Millennium Copyright Act of 1998, H.R. Rep. No. 105-551, at 36 (1998) [hereinafter Report of House Comm. on Commerce].
[2] *Id.*

Right Act (DMCRA), can play a central rule in this refinement of the DMCA by ensuring that fair use principles apply to Section 1201 of the Copyright Act. Moreover, the bill would ensure that consumers will have the information they need when deciding whether to purchase copy protected compact discs.

I. H.R. 107 IS A NARROWLY TAILORED BILL THAT REINSTATES AND CLARIFIES THE INTENT OF CONGRESS TO PRESERVE FAIR USE IN THE DIGITAL MILLENIUM COPYRIGHT ACT.

As discussed below the DMCA, as currently applied and interpreted is having a detrimental effect on free speech, consumers' rights, fair use, and innovation. Moreover, the Copyright Office's triennial rulemaking process, has not functioned as the safeguard it was intended to be. Fortunately, Congress now has a bill before it that addresses these issues – H.R. 107 – "The Digital Media Consumer's Rights Act of 2003" (DMCRA).

First, the DMCRA's labeling provision will ensure that consumers are fully aware of the limitations and restrictions they may encounter when purchasing copy-protected compact discs (CDs). Currently, manufacturers of copy-protected CDs are not obligated to place notices on packaging. Unbeknownst to many consumers, copy-protected CDs may not play on personal computers and other non-compatible CD players due to copy protection technologies. The DMCRA does not prohibit the sale of copy-protected CDs; instead it requires that the Federal Trade Commission provide guidelines so that these CDs have adequate labels notifying purchasers of possible limitations of their use of purchased digital media. This approach will enable consumers to make informed purchasing decisions and eliminate the confusion created by seemingly "defective" CDs that do not play on all devices.

Labeling will become increasingly important as copy-protected CDs and other digital media become more common as a means to prohibit and limit unwanted use and unauthorized distribution of music, movies, and other digital content. The DMCRA ensures that new CD formats do not enter the marketplace without providing consumers notice of their limitations. The market may or may not accept CDs with more limited functionality, but it is imperative that consumers receive complete and accurate information regarding the CDs they may purchase. No consumer should purchase a CD only to be surprised that it does not play on his or her computer or CD player. The DMCRA will create an informed marketplace where competition among new CD formats can prosper without consumer confusion.

Even more important than the Act's labeling requirement is the DMCRA's fair use exemption, which will ensure that legal, non-infringing uses of digital copyrighted works are not prohibited by the DMCA. Furthermore, the DMCRA encourages scientific research into technological protections. It ensures that activities solely for the purpose of research into technological protection measures are permitted.

This committee will inevitably be told that to permit a fair use exemption to Section 1201(a) is to undermine the effectiveness of the entire DMCA. This is simply not true. One of this bill's virtues is that it does not weaken the effectiveness of technological controls. Instead, it ensures that the controls function solely as intended – to stop illegal activity and infringement. Infringers will still face the same penalties, but the DMCRA enables people who have legally obtained access to digital content to exercise legal uses without fear of criminal punishment.

II. CONGRESS INTENDED TO PRESERVE FAIR USE WHEN IT PASSED THE DMCA.

As this Subcommittee knows, information is a building block of democracy, which is why the public's ability to access information was built into our Constitution. Specifically, as a means of encouraging innovation and the widespread dissemination of information, the Constitution allows Congress to grant a limited monopoly to a creator. Nevertheless, this power granted to Congress is aimed primarily at benefiting the general public; "[t]he copyright law, like the patent statutes, makes reward to the owner a secondary consideration."[3] Congress, of course, was well aware of this when drafting the Digital Millennium Copyright Act (DMCA), and it is also clear that the DMCA's drafters intended to protect fair use

As noted above, Congress heard from a number of interested parties, including the consumer electronics industry, libraries, and consumer advocates, about the DMCA's potential effect on the doctrine of fair use. When the final report was written, the Commerce Committee expressed a deep understanding of fair use's impact on education, research, and free speech:

> The principle of fair use involves a balancing process, whereby the exclusive interests of copyright owners are balanced against the competing needs of users of information…Fair use, thus, provides the basis for many of the most important day-to-day activities in libraries, as well as in scholarship and education. It also is critical to advancing the personal interests of consumers.[4]

The Commerce Committee also recognized the role fair use would play with respect to digital commerce:

> [Fair use] is no less vital to American industries, which lead the world in technological innovation. As more and more industries migrate to electronic

[3] *Sony Corporation v. Universal City Studios, Inc.,* 464 U.S. 417, 429 (1984)
[4] Report of House Comm. on Commerce at 25.

commerce, fair use becomes critical to promoting a robust electronic marketplace.[5]

Thus, the Committee was keenly aware that access to information is the centerpiece of a well-functioning marketplace, and expressed concern that the DMCA's potential to create a legal framework for the lock-down of information in a "pay-per-use society" could contravene that goal.[6] To alleviate this concern, Congress placed two express directives in the DMCA: that nothing in the law "shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title;"[7] and it established a triennial rulemaking procedure requiring the Copyright Office to examine the DMCA's adverse effects on the lawful use of digital copyrighted works.

III. CONTRARY TO THE EXPRESS INTENT OF CONGRESS, THE DMCA IS BEING USED TO PROHIBIT THE EXERCISE OF MANY FAIR USES OF DIGITAL CONTENT.

Although the DMCA was designed to protect digital content from acts of copyright infringement, it has also had a negative impact on legitimate and legal uses of content, in spite of Congress's efforts to build balance into the Act. Digital content should provide more flexible consumer use, but the rise of overly restrictive content protection measures, coupled with the unintended consequences of the DMCA, has lead to the erosion of rights and personal uses consumers have come to expect with digital media. Consumers Union foresaw this outcome in its testimony in 1998 when it warned:

> It would be ironic if the great popularization of access to information, which is the promise of the electronic age, will be short-changed by legislation that purports to promote this promise, but in reality puts a monopoly stranglehold on information.[8]

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[5] *Id*. at 26.
[6] *Id*. "…The Committee on Commerce felt compelled to address these risks, including the risk that enactment of the bill could establish the legal framework that would inexorably create a 'pay-per-use' society." *Id*.
[7] 17 U.S.C. § 1201(c)(1).
[8] *Id.*, citing Letter from Consumer's Union to House Committee on Commerce (June 4, 1998).

Digital technology makes content more available and flexible for the public to use; the application and interpretation of the DMCA has effectively prohibited the exercise of many uses of digital content, however, including those lawful uses Congress intended to preserve. In our opinion, the primary reason for this is the complete lack of any real distinction in the DMCA between so-called "copy controls" and so-called "access controls." Under the DMCA, a user of digital content can circumvent copy control mechanisms without penalty, but circumvention of an access control mechanism is illegal. But the reality is that there is no difference between the two mechanisms, and if you ask a content creator, he or she will inevitably claim that their technological protection measure is the more highly protected access control. In any event, even if a technological protection measure is technically a copy control mechanism, the Section 1201(a)(2) prohibition on the manufacture, importation and trafficking in devices that would allow such circumvention for all intents and purposes renders the ability to make fair uses of digital content unattainable to all but the most sophisticated users.

Below are some specific examples of how the incoherent distinction between copy controls and access controls, as well as other novel interpretations of the DMCA, have eroded and will continue to erode fair use protections:

A. The DVD

The DVD format has been a great success for both the content and consumer electronic industries.[9] However, a consumer can do far less with this digital format as compared to analog formats, despite digital formats' potentially greater flexibility. This

[9] *See Video Games: Technology Titans Battle Over Format Of DVD Successor*, Wall St. J., at A1 (Mar. 15, 2004).

is not because of a technical limitation of the DVD. The situation is attributable instead to controls placed on consumers by content providers, and the DMCA has been interpreted as prohibiting consumers from getting around the controls, even in pursuit of lawful uses of the underlying copyrighted work.

The content on a DVD is protected by CSS – the Content Scrambling System – that two federal courts have ruled is both an "access control" and a copy control under the DMCA.[10] Moreover, only authorized DVD players are permitted legal access to a DVD's content under the law. Thus, a consumer who gains access to her legally purchased DVD with her own software tools has violated the DMCA – even if the reason is for non-commercial purposes, including personal use or fair uses.

What this means is that if a consumer wants to make a backup of her favorite movie so she can watch it while traveling without fear that the disc will get scratched or lost, the consumer would be prohibited by the DMCA from doing so. If a student is creating a multimedia presentation and needs to digitally "cut and paste" from DVDs, she would be legally prohibited because of the DMCA.[11] Both backing-up and taking a digital excerpt from a DVD for the purposes of critique and comment are traditional fair uses, but are prohibited under the DMCA.[12]

Other non-infringing uses are being eroded as well:

- Many users are prevented from fast-forwarding through DVD advertisements;

[10] *321 Studios v. MGM Studios, Inc., et. al.*, 307 F.Supp.2d 1085 (N.D. Cal. 2004); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2nd Cir.2001).
[11] This also has implications on software tools, discussed below.
[12] The tools that give consumers the ability to circumvent a DVD's access control measures have existed since shortly after the video format was created. Today, these tools are widely available on the Internet; many computer applications use the code to make fair uses of DVD content – none of which is likely legal under the DMCA. Despite this ability to "break" access controls and / or copy protection, the sales and profits of DVDs continue to increase yearly. This should signify to Congress that fair uses and content industry profits can live side-by-side.

- DVDs are region coded – so a DVD bought on a European vacation will not play when the consumer gets home;

- DVDs cannot legally be played at all on increasingly popular computer platforms.

Again, none of these is a technical limitation of the DVD. None is associated with infringement. Instead, they are controls placed on consumers by the content providers, and the DMCA arguably makes it illegal to get around the controls.

B. Tools that Enable Non-infringing Uses

The DMCA not only detrimentally affects the consumer who wants to make a fair use of digital content, but it also harms those entrepreneurial small businesses who capitalize on the market for software tools designed for noninfringing uses.

In February of this year, a United States District Court enjoined 321 Studios from selling the most popular DVD back-up software because, the court found, it violates the DMCA.[13] While the court acknowledged that the exercise of fair use is made difficult by the DMCA, if not outright impossible in regards to protected digital media, it stated that the legal use of purchased copyright materials was not a defense to 321 Studios violation of the DMCA.[14]

According to the decision in *321 Studios*,[15] even if the act of making a backup copy is lawful, it is nevertheless illegal under the DMCA to provide a tool to conduct a

[13] *321 Studios v. MGM Studios, Inc., et. al.*, 307 F.Supp. 2d 1085 (N.D. Cal. 2004)
[14] *Id*.
[15] *See also Universal City Studios, Inc. v. Reimerdes,* 111 F.Supp.2d 346 (S.D.N.Y.2000); *Universal City Studios, Inc. v. Corley,* 273 F.3d 429 (2nd Cir.2001); *United States v. Elcom Ltd.,* 203 F.Supp.2d 1111 (N.D.Cal.2002).

legal act. This case illustrates how the DMCA, by outlawing the tools of fair use, limits the consumer's ability to make a fair use.[16]

C. Copy Protected CDs

Copy-protected CDs use technology designed to prevent the ripping or copying function of a personal computer in the hopes of preventing unauthorized file trading. However, when these CDs are inserted into certain modern CD drives, they often fail to play entirely.[17] The purchaser of these products is left with a CD that is inaccessible and unplayable on one or more playback devices. In fact, an executive with one of the companies who produces copy protected CDs admitted that perfect protection and perfect playability can never be achieved.[18]

Copy-protected CDs already appear to be commonplace in many parts of Europe and Asia and the protection technology vendors have announced that their technologies have already been included in tens of millions of CDs.[19] Although announcements of copy-protected titles have fallen off in the U.S., no major record label has renounced the

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[16] The content industry's response to making backup copies of scratched or otherwise damaged disks – that the consumer must purchase a new one – is breathtakingly anticonsumer. "Jack Valenti, head of the Motion Picture Association of America, has suggested that consumers have no legitimate need for such software, telling The Associated Press in November, 'If you buy a DVD you have a copy. If you want a backup copy you buy another one." DVD-copy program tweaked after court order, CNN.com, Feb. 23, 2004, *available* http://www.cnn.com/2004/TECH/ptech/02/23/dvd.suit.ap/index.html.

[17] Bryan Chaffin, *Apple Addresses Problems With Copy-Protected CDs In AppleCare Support Article,* Macobserver (May 10, 2002) (describing instructions issued by Apple Computer to address copy-protected CDs that were not playable on Macintosh computers), *at* www.macobserver.com/article/2002/05/10.10.shtml; Chris Oakes, *Copy Protected CDs Taken Back,* Wired News, Feb. 3, 2000 (3 to 4 percent of German customers returned protected CDs introduced by BMG after they would not play in various CD players), *at* www.wired.com/news/technology/0,1282,33921,00.html.

[18] *See* John Borland, *Labels Loosening Up on CD Copy Locks*, CNET News, Sept. 3, 2002, at http://news.com.com/2100-1023-956069.html.

[19] *See* Midbar Tech Press Release, Aug. 26, 2002 (stating that over 30 million CDs protected by Cactus Data Shield have been distributed, including over 10 million in Japan), at http://www.midbartech.com/pr/26082002.html; Jon Iverson, *A Universal CD Problem?,* Stereophile, Feb. 11, 2002 (reporting that Sony has announced distribution of 11 million key2audio-protected CDs in Europe), at http://www.stereophile.com/shownews.cgi?1261.

use of protection technologies on music CDs in the U.S. market. It is safe to assume that additional titles will be released in the U.S. market and that the protection technologies used will result in malfunctions that deny access to consumers on at least some players that would otherwise have access to the audio tracks.

Because most consumers are as yet unaware that this technology even exists, we can only imagine the outrage that will ensue once most consumers discover that they are unable to create mix-discs from their favorite legally purchased albums, or that they are unable to transfer music from their CD to their iPod. Unfortunately the DMCA does not focus on the few bad actors who break copy-protected CDs to infringe copyright over peer-to-peer file trading networks. Instead, the law makes it illegal to provide the tools that permit consumers to playback CDs on their device of choice.

D. The Broadcast Flag

The broadcast-flag scheme is a content protection mechanism for digital broadcast television originally proposed by Hollywood and recently adopted by the Federal Communications Commission.[20] The broadcast-flag scheme currently does not prohibit all copying of over the air digital television, but it does promote technologies that will inhibit current and future fair use. Technologies pending approval before the FCC restrict a range of non-infringing uses.[21] Sidestepping these use restrictions, even when doing so is non-infringing, is illegal or practically impossible under the DMCA.[22] This

[20] In the Matter of Digital Broadcast Content Protection, MB Docket 02-230, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 03-273, (Nov. 4, 2003).
[21] *See e.g.*, In the Matter of Digital Output Protection Technology and Recording Method Certifications, Certification Applications, MB Dockets 04-60, 04-61, 04-62, 04-64 (Mar. 17, 2004).
[22] Evidence of this can be found the affirmative response of Fritz Attaway of the MPAA, when asked if the broadcast flag was an effective technology measure under the DMCA:

means that current uses of broadcast content with analog technology will likely be limited in the digital world under the broadcast flag reinforced by the DMCA.

E. Closing the "Analog Hole"

When faced with digital content that does not allow fair use, the courts and Copyright Office have asserted that access to analog content suffices as a viable alternative.[23] However, it is impractical and insufficient to hold out analog technology as the only method for making fair uses of digital content, particularly as the availability of analog formats continues to diminish.

For example, digital DVD is replacing analog VHS tape, and movie studios increasingly are refusing to provide their content in multiple formats. Additionally, there is an industry push to close the so-called "analog hole." This is evidenced by the creation of an industry "Analog Reconversion Discussion Group" and industry requests for government-mandated "selectable output control," which would allow copyright holders to embed signals in digital content that would prevent certain outputs, including analog outputs, from functioning normally.

"Audience: Since the ATSC broadcast live descriptor is not encrypted, but just signals that this is to be projected content, is the first person who shows how to avoid the descriptor going to be guilty of a Digital Millennium Copyright Act violation for affording access to an effectively protected work?
Fritz Attaway: I certainly hope so. If that should happen, I would expect a DMCA lawsuit against that person and I would hope and indeed even expect that the courts would find that person guilty of violating the DMCA, because I think that the broadcast flag, now that it has been implemented in FCC regulations, is an effective technological measure. Standing alone, just that bit in the broadcast stream, without any underlying FCC requirement that devices respond to that flag, is not an effective measure. But now that the Commission has adopted the regulations, I think it is. I think the DMCA is applicable and we'll find out, no doubt, when this gets to the courts." The Progress & Freedom Foundation, Copyright Protection and the Broadcast Flag, *available at* http://www.pff.org/publications/ip/pop10.26broadcastflagseminar.pdf.

[23] *See* Library of Congress, Copyright Office, Recommendation of the Register of Copyrights in RM 2002-4; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, at 116 (Oct. 27, 2003) [hereinafter Copyright Office Rec.], *available at* http://www.copyright.gov/1201/docs/registers-recommendation.pdf.

For the consumer, this means that fair use will end with analog distribution formats. In an all-digital world, there will be no way to legally exercise fair use. Because the software and hardware tools for fair use will be prohibited, access to the content will be prohibited as well. [24]

F. Aftermarket Products

The DMCA has also been abused by companies seeking to gain a market advantage with regard to products that have nothing to do with intellectual property or copyright infringement. As has been well documented, the strict language of the DMCA enabled a manufacturer of garage door openers and a printer manufacturer to make a claim against competitive interoperable replacement parts for their products.[25]

IV. THE TRIENNIAL REVIEW IS AN INADEQUATE SAFEGUARD FOR NON-INFRINGING USES OF COPYRIGHTED WORKS.

Because Congress was concerned about the potential unintended consequences of the DMCA and its impact on non-infringing uses of digital content, it gave the Register of Copyrights and the Librarian of Congress the primary responsibility to assess whether the implementation of access control measures diminished the ability of individuals to use copyrighted works in ways that are otherwise lawful.[26] In response to some criticisms of the DMCA, it has been argued that the proper venue for remedying imbalances in, and the application of, the DMCA should be Copyright Office's triennial review rulemaking process. Unfortunately, in the two times it has been conducted since

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[24] Teachers, librarians, and others seeking to take excerpts from DVDs for fair use purposes have been told that the way to do so is to hold a camcorder up to a TV screen. *See* Copyright Office Rec., at 116. However, several pending state laws could make that act illegal as well. *See* State Legislative Status Report, Consumer Electronic Association, www.ce.org/members_only/public_policy/slsr/slsr_report.asp#HOME_RECORDING_RIGHTS.

[25] *Chamberlain Group, Inc. v. Skylink Technologies, Inc*., 292 F.Supp.2d 1040 (N.D.Ill., 2003); *Lexmark Intern., Inc. v. Static Control Components, Inc*., 253 F.Supp.2d 943 (E.D.Ky., 2003).

[26] Report of House Comm. on Commerce at 37.

the DMCA was passed, this rulemaking proceeding has largely failed to protect noninfringing uses. Instead, just four narrow exemptions have been granted despite hundreds of legitimate requests and thousands of pages of written submissions and oral testimony.

The reason for this stinginess has been the Copyright Office's constricted interpretation of the standard one must meet to acquire an exemption. As discussed below, that interpretation is contrary to the plain language of Sections 1201(a)(1)(C) and 1201 (a)(1)(D) of the DMCA.

A. The Copyright Office's Burden of Proof for an Exemption Contravenes the Express Language of the DMCA.

When the Copyright Office established its rules for the triennial rulemaking, it developed a standard for the burden of proof that petitioners must meet to demonstrate their "diminished ability to use copyrighted works."[27] That standard clearly departs from the expressed intent of Congress. Any reasonable reading of the plain language of the DMCA shows that the burden of proof that the Copyright Office has set for obtaining an exemption is too high for the process to amount to an adequate safeguard of lawful uses.

The plain language of Section 1201(a)(1)(C) of the DMCA requires that when engaging in the triennial rulemaking, that the Librarian of Congress must determine:

> …whether persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition under subparagraph (A) in their ability to make noninfringing uses under this title of a particular class of copyrighted works. In conducting such rulemaking, the Librarian shall examine -
>
> (i) the availability for use of copyrighted works;

[27] Report of House Comm. on Commerce at 37.

> (ii) the availability for use of works for nonprofit archival, preservation, and educational purposes;
>
> (iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research;
>
> (iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and
>
> (v) such other factors as the Librarian considers appropriate.[28]

Despite this clear and detailed directive, the Copyright Office has required that proponents of an exemption show by a preponderance of the evidence that there has been or is likely to be a "substantial" adverse affect on a non-infringing use. Moreover, the proponent of an exemption must satisfy this burden with "actual instances of verifiable problems occurring in the marketplace," and "first hand knowledge of such problems."

This burden of proof is nowhere in the plain language of the Act. Indeed, the former Assistant Secretary of Commerce, which is mandated by Section 1201(a)(1)(C) to consult with the Register on the triennial rulemaking, protested to the Register that

> … the standard set forth in the Notice of Inquiry (the "NOI") imposes a significantly heightened burden on proponents of an exemption, and is therefore inconsistent with the opportunity that Congress intended to afford the user community.
>
> As a threshold matter, the plain language of the statute does not support incorporation of the qualifier "substantial" to define the level of harm to be demonstrated by such proponents….The term "substantial," however, does not appear in the text of Section 1201(a)(1) of the Act. The NOI's arguably more stringent requirement thus appears to add a significant new term to the express language of the statute. Given the clarity of Section 1201(a), no basis exists to justify insertion of a material modifier into its text.[29]

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[28] 17 U.S.C. § 1201 (a)(1)(C).

[29] Letter from Nancy J. Victory, Assistant Secretary of Commerce to Ms. Marybeth Peters Register of Copyrights, (Aug. 11,2003), *available at* www.ntia.doc.gov/ntiahome/occ/dmca/dmca2003/dmcaletter_08112003.html (footnotes omitted).

While *de minimis* or isolated harms may not be enough to meet the burden of proof, there clearly is a zone between speculative statements of *de minimis* harms on the one hand and "actual instances of verifiable problems" by those with "first hand knowledge" on the other. But the Copyright Office recognizes no such zone.

Finally, the Copyright Office sets an unattainable standard for showing "future harms." Proponents of an exemption must provide "evidence either that actual harm exists or that it is 'likely' to occur in the ensuing 3-year period," by showing "actual instances of verifiable problems occurring in the marketplace" in order to "to satisfy the burden with respect to actual harm." Moreover, "a compelling case will be based on first-hand knowledge of such problems."[30] But common sense dictates that it is impossible for anyone to have "first-hand knowledge" of a future event. And nowhere in the statute does it indicate that Congress intended the standard for future harms should be higher than that for present harms.

The then-Assistant Secretary of Commerce expressed similar concerns to the Register of Copyrights:

> [T]he NOI's requirement to provide "actual," "first-hand" instances of problems is not articulated in the plain language of Section 1201(a)(1) of the Act. Moreover, as drafted, this requirement cannot logically be applied prospectively, as the refinement would mandate "first-hand knowledge" of *future* problems in order to sustain a "compelling case" for an exemption. Given these concerns, NTIA believes that the NOI's "refinement" should be abandoned and a standard more consistent with the statutory language should be adopted.
>
> Crafting the proper standard for the burden of proof is equally important when examining possible future harms as contemplated by the statute. Section 1201(a)(1) of the DMCA does not ground a finding of "likely adverse impacts" in a showing of "extraordinary circumstances in which the evidence of likelihood is highly specific, strong and persuasive," as the NOI seems to suggest. Rather, Congressional intent would appear to impose no more of a showing for "likely adverse effects" than for "actual adverse effects." Although NTIA agrees that

[30] Notice of Inquiry, Exemption to Prohibition on Circumvention on Copyright Systems for Access Control Technologies, Copyright Office, Library of Congress, 67 Fed. Reg. at 63579 (Oct. 15, 2002).

> mere conjecture is insufficient to support a finding of "likely adverse effect," the NOI's implied supplemental and exacting requirements are contrary to the language of the statutory provision.[31]

We agree. The Copyright Office has created a burden of proof for the 1201(a)(1)(C) exemption that ensures, and will continue to ensure, that few, if any exemptions are ever granted, and that those that are granted are extremely narrow.

B. The Copyright Office Has Construed the Term "Class of Works" Too Narrowly

In the two triennial rulemakings since the DMCA was passed, numerous proponents for exemptions have asked the Copyright Office, when determining the "class of copyrighted" works to be exempted under Section 1201(a)(1)(D) to also consider the *types of uses* that are made with the copyrighted work. Indeed, such an examination is fully consistent with the plain language of that Section, which states in its entirety:

> (D) The Librarian shall publish any class of copyrighted works for which the Librarian has determined, pursuant to the rulemaking conducted under subparagraph (C), that noninfringing uses by persons who are users of a copyrighted work are, or are likely to be, adversely affected, and the prohibition contained in subparagraph (A) shall not apply to such users with respect to such class of works for the ensuing 3-year period.[32]

Despite this language, which explicitly refers to "noninfringing uses," and the complete absence of any other Congressional intent that the types of uses of copyrighted works be absent from the exemption process, the Copyright Office has steadfastly refused to consider them, stating that "it is not permissible to classify a work by reference to the type of user or use…"[33] This narrow interpretation of Section 1201(a)(1)(D) makes little

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[31] Letter from Nancy J. Victory, Assistant Secretary of Commerce to Ms. Marybeth Peters Register of Copyrights, (Aug. 11, 2003), *available at* www.ntia.doc.gov/ntiahome/occ/dmca/dmca2003/dmcaletter_08112003.html (footnotes omitted).
[32] 17 U.S.C. § 1201 (a)(1)(D).
[33] Copyright Office Rec., at 13.

sense in light of the fact that the Copyright Office asks proponents of an exemption to make "first-hand" actual experience a top priority.

We believe that the approach that is more consistent with Congressional intent is that suggested by the former Assistant Secretary of Commerce in his September 29, 2000 letter commenting on the first triennial rulemaking – that "the definition of classes of works is not bounded by limitations imposed by Section 102(a) of the Copyright Act, but incorporates an examination of 'noninfringing uses' of the copyrighted materials."[34]

C. The Copyright Office's Reliance on Analog Conversions to Satisfy Fair Use Principles is Impractical and Doomed to Obsolesence.

The Copyright Office has consistently argued in denying Section 1201(a)(1) exemption requests that a device's analog outputs are the best avenues for fair use.[35] This essentially requires a consumer to take digital content, translate it to analog, and then convert the analog version back to a digital format, to make any lawful digital fair use under the DMCA. Requiring citizens to engage in this cumbersome series of conversions in order to exercise their fair is no way to ensure that those rights remain vital and

[34] Former Assistant Secretary of Commerce Nancy Victory voiced the same concerns in her letter to the Register of Copyrights. There, she stated that "NTIA believes that it would be beneficial to further define the scope or boundaries of the "class of works" so that targeted exemptions can be crafted that would not only provide specific guidance to both content creator and use, but also remedy the particular harm to noninfringing uses identified in the rulemaking. For example, in some circumstances, the intended use of the work or the attributes of the user are critical to a determination whether to allow circumvention of a technological access control." Letter from Nancy J. Victory, Assistant Secretary of Commerce to Ms. Marybeth Peters
Register of Copyrights, (Aug. 11,2003), *available at*
www.ntia.doc.gov/ntiahome/occ/dmca/dmca2003/dmcaletter_08112003.html.

[35] "Because users have means of making analog copies of the material on DVDs without circumventing access controls (and of redigitizing those analog copies), there is no need to permit them to circumvent. The desire to make a digital-to-digital copy, while understandable, does not support an exemption in this case. Existing case law is clear that fair use does not guarantee copying by the optimum method or in the identical format of the original." Copyright Office; Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 68 Fed. Reg. 62,016 (Oct. 31, 2003).

accessible to ordinary people. Moreover, as discussed above at pp. 12-13, efforts to close the so-called analog hole may make this "solution" impossible in the near future.

D. The Copyright Office Has Favored Particular Business Models Over Fair Use in Denying Exemption Requests.

Contrary to the express intent of Congress, the triennial rulemaking proceeding has become one that primarily functions to protect particular business models. In the most recent rulemaking, there are a number of instances in which the Copyright Office has apparently favored those business models over fair use principles. For example, faced with a request to exempt the use of ancillary audiovisual works on DVDs the Copyright Office found that

> On balance, an exemption, which would permit circumvention of CSS, could have an adverse effect on the availability of such works on DVDs to the public, since the motion picture industry's willingness to make audiovisual works available in digital form on DVDs is based in part on the confidence it has that CSS will protect it against massive infringement.[36]

Similar instances of the Copyright Office favoring the DVD as a business model over fair use include its decision to deny an exemption to permit consumers to circumventing DVD region coding, despite recognizing that the technology is neither a copy control or an access control, but a mere marketing tool.[37] It also denied an exemption to permit viewers to fast-forward through DVD movie previews and advertisements.[38]

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[36] *Id*.
[37] "When DVD was being considered, the decision was made to incorporate regional coding in order to provide the motion picture companies the ability to maintain that regional marketing practice." Library of Congress, Copyright Office, Rulemaking Hearing, May 2, 2003, Panel 1 Witnesses, 130-1, (Statement of Fritz Attaway, Motion Picture Association of America) *available at* www.copyright.gov/1201/2003/hearings/transcript-may2.pdf.
[38] Copyright Office Rec., at 109.

Perhaps the most egregious example of how the Copyright Office has used the DMCA to protect business models involved a the request for an exemption for a class of works "consisting of motion pictures on DVDs tethered to particular operating system, e.g., the Windows or Macintosh environment,"[39] to permit consumers to view legally purchased content on his computer platform of choice -- specifically platforms that use the increasingly popular Linux and other "open source" operating systems.

While the Register of Copyrights conceded that the proponents of an exemption had successfully identified a "particular class of works" and identified an access control that prevents noninfringing uses, the Register denied the request, stating that

> While it is unfortunate that persons wishing to play CSS-protected DVDs on computers have few options, the fact remains that that they have the same options that other consumers have. The Register concludes, as she concluded three years ago, that the harm to such persons is *de minimis*, amounting to no more than an inconvenience.[40]

The message to Linux and other open source users is clear: buy a device that is compliant with the current DVD business model and proprietary, closed computer operating systems. The Register's decision ensures that newer, innovative, but less popular technological devices that are not so compliant will not succeed in the marketplace, because they cannot be used for lawful purposes. As discussed above at p. 6, this is exactly what Congress, and in particular the Commerce Committee, feared when it provided for the triennial review – Congress did not want the DMCA to be used to slow or prohibit technological innovation.[41]

[39] Copyright Office Rec., at 142.
[40] Copyright Office Rec., at 145.
[41] *See* Report of House Comm. on Commerce at 26.

These examples illustrate the extent to which the Copyright office's stewardship of the DMCA needs further guidance from Congress. H.R. 107 would alleviate many of these concerns by eliminating the need for exemptions for fair uses of digital content.

CONCLUSION

We would like to again thank the subcommittee for providing us the opportunity to testify on this important bill. We are encouraged that this Committee is addressing consumer rights and fair uses in digital media. It is vital for consumers, the public interest, and future digital markets that Congress protects lawful and legitimate uses of copyright works. Passage of the DMCRA will ensure that fair use, consumer notice, and the legitimate tools that enable non-infringing use are not forgotten in the digital world.