

The U.S. Copyright Office's Role in Regulating DRM: the §1201 Rulemaking



David O. Carson



Copyright, Digital Rights Management
Technology and Consumer Protection
Berkeley, California
March 9, 2007

Anticircumvention Rulemaking

§ 1201(a)(1)(A) Circumvention of copyright protection systems:

- No person shall circumvent a technological measure that effectively controls access to a work protected under this title....

Anticircumvention Rulemaking

§1201 (a)(1)(B)

The prohibition contained in subparagraph (A) shall not apply to persons who are users of a copyrighted work which is in a particular class of works, if such persons are, or are likely to be in the succeeding 3-year period, adversely affected by virtue of such prohibition in their ability to make noninfringing uses of that particular class of works under this title, as determined under subparagraph (C).

Anticircumvention Rulemaking

§1201(a)(1)(C):

During the 2-year period described in subparagraph (A), and during each succeeding 3-year period, the Librarian of Congress, upon the recommendation of the Register of Copyrights, who shall consult with the Assistant Secretary for Communications and Information of the Department of Commerce and report and comment on his or her views in making such recommendation, shall make the determination in a rulemaking proceeding on the record for purposes of subparagraph (B) of 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.

Anticircumvention Rulemaking

In conducting such rulemaking, the Librarian shall examine -

- (i) the availability for use of copyrighted works;
- (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.

§1201(a)(1) Rulemaking

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.

§1201(a)(1)(D)

Anticircumvention Rulemaking

- Notice of Inquiry, October 3, 2005
- 74 initial comments received December 1st
- 35 reply comments received February 2nd
- 4 days of hearings:
 - in Palo Alto, CA on March 23
 - in Washington, DC on March 29, 31, and April 3
 - 18 witnesses
- Post-hearing Questions to Witnesses

“Class of Works”

What is a “particular class of works”?

- Can a “class of works” be defined by reference to the status of the user (e.g., an academic researcher), or by reference to the type of use (e.g., fair use)?
- *Conclusion (2000 and 2003): A “class” of works must be based on attributes of the works themselves, and not by reference to external criteria such as the intended use or users of the works*
- Section 102 categories of works, or some subsets of those categories, must be the starting point in determining what a “class” is.
 - Such a classification would begin by reference to attributes of the works themselves, but could then be narrowed by reference to the medium on which the works are distributed, or even to the access control measure applied to them. (2000 Decision)

“Class of Work”

- Legislative history (House Commerce Comm.):
 - “assess users' ability to make lawful uses of works ‘within each particular class of copyrighted works specified in the rulemaking.’ The Committee intends that the “particular class of copyrighted works” be a narrow and focused subset of the broad categories of works of authorship than [sic] is identified in section 102 of the Copyright Act.”

Exempted Classes

Audiovisual works included in the educational library of a college or university's film or media studies department, when circumvention is accomplished for the purpose of making compilations of portions of those works for educational use in the classroom by media studies or film professors.

Anticircumvention Rulemaking

In conducting such rulemaking, the Librarian shall examine -

- (i) the availability for use of copyrighted works;
- (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.

§1201(a)(1) Rulemaking

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.

§1201(a)(1)(D)

Exempted Classes

Computer programs in the form of firmware that enable wireless telephone handsets to connect to a wireless telephone communication network, when circumvention is accomplished for the sole purpose of lawfully connecting to a wireless telephone communication network.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 06-cv-22942-GRAHAM

TRACFONE WIRELESS, INC.,

Plaintiff,

vs.

JAMES H. BILLINGTON, Librarian of
Congress, and

MARYBETH PETERS, Register of
Copyrights,

Defendants

Exempted Classes

Computer programs protected by dongles that prevent access due to malfunction or damage and which are obsolete. A dongle shall be considered obsolete if it is no longer manufactured or if a replacement or repair is no longer reasonably available in the commercial marketplace.

Exempted Classes

Computer programs and video games distributed in formats that have become obsolete and that require the original media or hardware as a condition of access, when circumvention is accomplished for the purpose of preservation or archival reproduction of published digital works by a library or archive. A format shall be considered obsolete if the machine or system necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.

Exempted Classes

Computer programs protected by dongles that prevent access due to malfunction or damage and which are obsolete. A dongle shall be considered obsolete if it is no longer manufactured or if a replacement or repair is no longer reasonably available in the commercial marketplace.

Exempted Classes

Literary works distributed in ebook format when all existing ebook editions of the work (including digital text editions made available by authorized entities) contain access controls that prevent the enabling either of the book's read-aloud function or of screen readers that render the text into a specialized format.

Anticircumvention Rulemaking

<http://www.copyright.gov/1201/>

110TH CONGRESS
1ST SESSION

H. R. 1201

To amend title 17, United States Code, to promote innovation, to encourage the introduction of new technology, to enhance library preservation efforts, and to protect the fair use rights of consumers, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 27, 2007

Mr. BOUCHER (for himself, Mr. DOOLITTLE, and Ms. ZOE LOFGREN of California) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 17, United States Code, to promote innovation, to encourage the introduction of new technology, to enhance library preservation efforts, and to protect the fair use rights of consumers, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 SECTION 1. SHORT TITLE.

4 This Act may be cited as the “Freedom and Innova-
5 tion Revitalizing U.S. Entrepreneurship Act of 2007”.