

Before the Copyright Office
Library of Congress

In the Matter of Rulemaking)
)
Exemption to Prohibition on) Docket No. RM 2002-4
Circumvention of Copyright Protection Systems)
For Access Control Technologies)

Comments of the Library Associations

These comments are submitted in response to the Copyright Office’s Notice of Inquiry dated October 15, 2002 (the “Notice”) on behalf of five major library associations, the American Association of Law Libraries, the American Library Association, the Association of Research Libraries, the Medical Library Association, and the Special Libraries Association (the “Libraries”). These associations represent the interests of tens of thousands of libraries, librarians and institutions, as well as their public and private patrons. The Notice requests written comments from all interested parties in order to elicit evidence on whether noninfringing uses of certain classes of works are, or are likely to be, adversely affected by section 1201(a)(1) of the Copyright Act, which prohibits the circumvention of measures that effectively control access to copyrighted works.

Based on the content of the Notice, the Libraries’ proposals herein are quite limited. In our frank assessment, the section 1201 regulatory scheme, as implemented by the Register of Copyrights and the Librarian of Congress, offers little promise of meaningful relief from the genuinely adverse effects of the statutory prohibition on circumvention of technological measures that effectively control access to copyrighted

works. Therefore, we offer only modest proposals, because more appropriately ambitious exemptions designed to address the growing imbalance between copyright holders and the public with respect to access to copyrighted works were rejected by the Register of Copyrights in the first rulemaking. The Copyright Office has made clear that those proposed exemptions will not be reconsidered within the framework of the section 1201 rulemaking.

Introduction

The section 1201(a) rulemaking was conceived as a “safety value” to monitor the effects of the statutory prohibition on circumvention of access controls and to ensure that the balance copyright law achieves between owners and users is equitably preserved. Report of the House Committee on Commerce on the Digital Millennium Copyright Act of 1998, H.R. Rep. No. 105-551 [hereinafter “Commerce Comm. Report”], pt. 2, at 35 (1998). However, as implemented, the mechanism is flawed in structure and operation. In her 2000 Report to the Librarian of Congress, the Register of Copyrights noted that the language of section 1201 contained material ambiguities. 65 Fed. Reg. 64556, 64559 (2000) (codified at 37 C.F.R. pt. 201). In particular, the determination “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 ... in their ability to make noninfringing uses ... of a particular class of copyrighted works” is a contorted concept that has defied clear explication and thus interpretation. *Id.* at 64559-64562. Nevertheless, the Register rejected the Libraries’ user-based analysis for determining a particular class of copyrighted works, *Id.* at 64560, and also strained to preclude a “user-oriented” analysis urged by the Assistant Secretary for Communications and Information. *Id.* at 64562. In

its current Notice of Rulemaking, the Copyright Office makes clear it does not intend to revisit these conclusions. 67 Fed. Reg. 63578, 63580 (2002)

The Copyright Office has also reaffirmed its position regarding the burden of proof and the obligation of proponents of an exemption to provide evidence either that actual harm exists or that it is “likely” to occur in the ensuing 3-year period. *Id.* at 63579. According to the Register, “actual instances of verifiable problems occurring in the marketplace are necessary to satisfy the burden with respect to actual harm and a compelling case will be based on first-hand knowledge of such problems.” *Id.* Nowhere in the statute is such a requirement articulated. This approach—the requirement of a showing of actual harm from situations which have not yet arisen, but which are likely to arise in the ensuing three years—renders the statutory scheme hopeless for earnest advocates of legitimate exemptions. Further, since any action to circumvent without statutory permission or an exemption exposes an individual not only to civil, but also criminal liability, *see U.S. v. Elcom Ltd.*, 203 F. Supp. 2d 1111 (N.D. Ca. 2002) (denying motion to dismiss on constitutional grounds the criminal indictment of an individual accused of violating section 1201(a)), a regulatory scheme so flawed in structure should not stand. Unfortunately, the Librarian’s well-intentioned suggestions in 2000 that statutory reform should be adopted have gone unheeded. *See* 67 Fed. Reg. 63578, 63580.

In her 2000 Report, the Register of Copyrights stated that many of the complaints aired in the initial rulemaking proceeding related primarily to licensing practices rather than technological measures that control access to works. 65 Fed. Reg. 64556, 64563 (2000) (codified at 37 C.F.R. pt. 201). At the same time, the Register acknowledged that it may be appropriate to consider harm emanating from licensing in determining whether

users of works have been adversely affected by the prohibition on circumvention in their ability to make noninfringing uses of those works. *Id.* “If for example, licensing practices with respect to particular works make it prohibitively burdensome or expensive for users, such as libraries or educational institutions, to negotiate terms that will permit the noninfringing uses, and if the effect of such practices is to diminish unjustifiably access for lawful purposes, exemptions for such classes may be justified.” *Id.* (citing Commerce Comm. Report, at 36). According to the Register, “if copyright owners flatly refuse to negotiate licensing terms that users need in order to engage in noninfringing uses, an exemption may be justified.” *Id.* Such a standard—under which an exemption would be deemed appropriate only where copyright owners have “flatly refused” or caused an “unjustifiable” diminution in access for lawful purposes by making it “prohibitively burdensome or expensive” for users to negotiate adequate licensing terms—sets the bar for relief at an unreasonable and unrealistic level.

In the 2000 proceeding, the Register of Copyrights also chose to ignore the critical difference between digital and non-digital formats in evaluating harm caused by lack of access to one format or the other. As many parties in that proceeding explained, and as has become increasingly evident, the fact that a digital work has a non-digital parallel (in print or VHS format), does not mean that the print/VHS user is not adversely affected by lack of access to the digital format. DVD’s are often packaged with additional content to justify a new sale, and digital works can be extracted, manipulated and reconstituted in a manner quite different from print versions. In short, the substance and quality of noninfringing use that may be made by print and VHS

users can be dramatically inferior to the digital user's experience. Yet, for purposes of this 1201 Rulemaking, such differences are deemed immaterial by the Register.

In sum, the Libraries are concerned that technological access controls, both in conjunction with and apart from licensing terms, are being implemented in a manner that adversely and inappropriately impacts the ability of individuals to make noninfringing uses of all classes of copyrighted works in digital media. We are further concerned that the so-called "fail safe mechanism" of this regulatory proceeding offers little promise of meaningful relief. We reiterate that our willingness to participate in this public comment process is tempered by these concerns. Nevertheless, we offer the following modest proposals.

I. The Exemptions Granted in 2000 Should be Renewed Absent a Showing that the Problems Addressed have been Corrected by the Marketplace.

A. Classes of Works for which Exemption is Requested

Literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage, or obsolescence.

Compilations consisting of lists of websites blocked by filtering software applications.

B. Summary of Argument

Absent evidence that the problems which originally warranted the exemptions have been corrected by the marketplace, the exemption issued in 2000 for "literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage, or obsolescence" and the exemption for "compilations consisting of lists of websites blocked by filtering

software applications" should be extended into the three-year period from October 28, 2003 to October 28, 2006.

C. Argument

The library community supports renewal of the two exemptions granted in the August 2000 Order issued by the Librarian of Congress. See 65 Fed. Reg. 64556, 64574 (2000) (codified at 37 C.F.R. pt. 201). We know of no specific evidence suggesting that persons have or have not been adversely affected by the section 1201 prohibition in their ability to make noninfringing uses of literary works, including computer programs and databases, which are protected by access control mechanisms that fail to permit access because of malfunction, damage, or obsolescence. Similarly, we know of no specific evidence suggesting that persons have or have not been adversely affected in their ability to make noninfringing uses of compilations consisting of lists of websites blocked by filtering software applications. However, it is unclear how “instances of verifiable problems occurring in the marketplace” can be demonstrated given that exemptions to permit circumvention with respect to these two classes have been in force since the effective date of the section 1201(a) prohibition. Absent evidence that the problems which originally warranted the exemptions have been corrected by the marketplace, it seems reasonable to presume that the adverse affects which were deemed likely to occur between October 23, 2000 and October 23, 2003 are no less likely to occur during the three-year period between October 23, 2003 and October 23, 2006. Accordingly, the Libraries believe that the exemption for “literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage, or obsolescence” and the exemption for “compilations consisting

of lists of websites blocked by filtering software applications" should be extended into the next three-year period, for the reasons cited by the Register of Copyrights in the 2000 Report, unless new evidence conclusively establishes that the need for such exemptions has expired because the problems addressed have been corrected by the marketplace.

II. An Exemption Should Be Granted for “Literary Works, including eBooks, which are protected by technological measures that block or inhibit perception via a ‘screen reader’ or similar text-to-speech or text-to-braille device utilized by a Person with a Visual or Print Disability.”

A. Class of Works for which Exemption is Requested

Literary works, including eBooks, which are protected by technological measures that fail to permit access, via a “screen reader” or similar text-to-speech or text-to-braille device, by an otherwise authorized person with a visual or print disability.

B. Summary of Argument

Technological measures designed to control access to and use of eBooks and other literary works in electronic media are currently being implemented in a manner which fails to permit access by individuals with visual or print disabilities who utilize “screen readers” or similar text-to-speech or text-to-braille devices as aids to perception. Fewer than 10% of books published in the United States are ever made available to such individuals in accessible formats (such as braille or “talking books”) that are not subject to access controls. Moreover, the availability of works in such formats is typically delayed until months after a work is first released to the general public. For these reasons, and because circumvention to facilitate access by individuals with visual or print disabilities is not likely to result in cognizable harm to the market for or value of copyrighted works, an exemption should be granted for “*Literary works, including*

eBooks, which are protected by technological measures that fail to permit access, via a 'screen reader' or similar text-to-speech or text-to-braille device, by an otherwise authorized person with a visual or print disability."

C. Argument

For individuals with visual or print disabilities such as dyslexia, digital publishing holds the promise of "right off the shelf access" to literary materials, comparable to the level and timing of access that is regularly enjoyed by non-disabled members of the general public. *See, e.g.,* George Kerscher & Jim Fruchterman, *The Soundproof Book: Exploration of Rights Conflict and Access to Commercial eBooks for People with Disabilities*, The Open eBook Forum (visited Dec. 18, 2002) <<http://www.openebook.org/library/informational/soundproof.htm>> [hereinafter "Kerscher & Fruchterman, *The Soundproof Book*"]. For many visually- and print-disabled individuals, the personal computer, used in connection with screen reader technology, is the information-access tool of choice. Screen readers use text-to-speech synthesizers (TTS) to intercept text being written to a computer display so that it can be mechanically vocalized in response to user controls. For example, by pressing specific keys, a user may direct a screen reader to vocalize the current word, line, or paragraph of a literary work in digital format. Screen readers also permit the conversion of text into dynamic braille displays instead of, or in addition to, TTS. Kerscher & Fruchterman, *The Soundproof Book*.

- **The Availability of Literary Works for Noninfringing Uses by Individuals with Visual or Print Disabilities Has Been and Will Continue to be Adversely and Substantially Affected by the Section 1201(a) Prohibition.**

Electronic books (“eBooks”) have not yet been made widely available by commercial publishers in the U.S. However, studies suggest that electronic book publishing will account for 10% of the U.S. consumer publishing market by 2005. *See, e.g., Association of American Publishers, Digital Policy/Ebook Project-Project Information, at Project Background* (visited Dec. 17, 2002) <<http://www.publishers.org/digital/info.cfm>>. Copyright in commercial eBooks is protected by Digital Rights Management technology (DRM) designed to interact with PC-based eBook reading software to present text visually without permitting reproduction and distribution to persons not authorized by the copyright owner. Unfortunately for persons with visual or print disabilities, DRM technology can also be utilized to prevent eBook text from being perceived and converted into synthetic speech or braille by a screen reader device. As a result, otherwise authorized persons with visual or print disabilities are frequently denied access to electronic publications on the basis of disability. Kerscher & Fruchterman, *The Soundproof Book*. These individuals are rendered unable to make noninfringing uses of access-protected literary works, despite the fact that they have compensated the copyright owner or publisher for access.

In many instances, the author or publisher of a copyrighted work sells the right to produce and distribute an audio version of that work apart from the right to produce a print or eBook version. Because some copyright holders and publishers consider the vocalization of electronic text by a screen reader an infringement of the public performance right in a copyrighted work, eBook publishers are often expressly required

to block perception of electronic text by screen readers. In addition, TTS capability is automatically disabled by leading eBook-readers, including Microsoft Reader, if the highest level of security is selected by a publisher. Kerscher & Fruchterman, *The Soundproof Book*.

The library community does not agree with some copyright holders that the section 106 right to control public performance of a work is implicated when electronic text is vocalized by a screen reader or similar technology for the purpose of facilitating personal use by an individual. However, even if the right of public performance is *implicated* by the use of vocalization technology, any such performance would almost certainly qualify as fair use where made solely to facilitate perception of a lawfully-made copy by an individual with a visual or print disability. Neither the rights of a copyright owner nor the interest in preventing unlawful access to a work are contravened when an individual in possession of a lawfully-made copy of a work accesses that copy through a screen reader; therefore, the circumvention of technological protection measures that inhibit this activity should not be prohibited under section 1201(a).

- **The Availability of Certain Literary Works in Alternative Formats is not Sufficient to Facilitate Noninfringing Uses by Persons with Visual and Print Disabilities.**

For reasons discussed above, the library community maintains that, as a general proposition, the availability of a copyrighted work in formats not protected by technology should not factor into the section 1201(a)(1)(C) analysis. However, for individuals with visual and print disabilities such as dyslexia, gaining access to published materials in traditional media has always been a challenge. Recording for the Blind & Dyslexic (RFB&D), the largest accessible-format provider in the world, utilizes more than 5,000

volunteers in 32 recording studios around the country to produce approximately 4,000 accessible-format titles per year. The National Library Service for the Blind and Physically Handicapped (NLS), a division of the Library of Congress, produces accessible-format versions of an additional 2,500 works each year. However, despite these services, fewer than 10% of the books published each year in the United States are ever made accessible in audio or braille formats. Moreover, it often takes many months for a work to be made available in such a format. These delays present particular difficulty for students. As a result of the time-barriers presently associated with gaining access to course material in accessible formats, students with visual and print disabilities often drop courses and may even choose career paths on the basis of materials accessibility as much as on the basis of personal interest. Kerscher & Fruchterman, *The Soundproof Book*.

When literary works are not made available in accessible formats, individuals with visual or print disabilities are forced to rely on human readers and scanning systems. Reliance on human readers is prohibitively expensive for many individuals. Although a web-based service known as Bookshare.org has recently been launched to provide shared access to scanned books, the scanned versions of many works are unusable because complex content is frequently beyond the capability of today's character recognition technology. Kerscher & Fruchterman, *The Soundproof Book*.

- **The Proposed Exemption is Not Likely to Result in Harm to the Market for or Value of Copyrighted Works Because Synthetic Speech has Negligible Mass-Market Appeal.**

The proposed exemption is not likely to result in cognizable harm to the market for or value of copyrighted works. To most non-impaired individuals, the TTS-vocalized

version of a work in digital format would not be fungible with a commercially-released audio version of that work. Most commercially-released audio books, also known as “talking books,” are professionally recorded in a studio, with professional engineers and editors taking great care to achieve the most appealing vocalization and the best possible sound quality. In contrast, synthetic speech sounds distinctly mechanical, with room for significant improvement in phrasing and expression. A person with a visual or print disability is likely to have had substantial experience using TTS devices, and as a result, he or she has most likely become desensitized to the robotic quality of TTS vocalization. However, for most non-impaired individuals, the limitations of TTS would make it difficult to focus on the content of the work. Kerscher & Fruchterman, *The Soundproof Book*.

- **Market-based Initiatives Aimed at Accommodating Persons with Visual and Print Disabilities Have Not Yet Proven Successful**

The library community is aware that a host of traditional media publishers, electronic publishers, hardware manufacturers that produce devices for reading electronic books, software developers, and various disability organizations are currently working together as the Open Electronic Book Forum (OEBF) to develop a cross-platform protocol for electronic files. Text-to-speech encoding specifications developed by groups such as the National Information Standards Organization (NISO), the American National Standards Institute (ANSI), and the Digital Audio-based Information System Consortium (DAISY) may be incorporated into the OEBF protocol. This development might enable digital content fixed on any OEBF-compliant CDROM to be vocalized by any specially-designed OEBF-compliant player. It is also possible that Internet content may someday be capable of direct vocalization by popular browsers. However, participation by

publishers in the OEBF standardization effort is voluntary, and there is no guarantee that a common protocol will ever be widely implemented. Therefore, an exemption is warranted for *“literary works, including eBooks, which are protected by technological measures that fail to permit access, via a “screen reader” or similar text-to-speech or text-to-braille device, by an otherwise authorized person with a visual or print disability.”*

Respectfully Submitted,
American Association of Law Libraries
American Library Association
Association of Research Libraries
Medical Library Association
Special Libraries Association

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