

Testimony of Peter Jaszi
on H.R. 107, the Digital Media Consumers' Rights Act
Subcommittee on Commerce, Trade and Consumer Protection
U.S. House of Representatives
Committee on Energy and Commerce
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On behalf of the Digital Future Coalition, I thank you for giving me the opportunity to express our support for H.R. 107. For 25 years, I have taught copyright at the law school of American University here in Washington, D.C. At the outset, I wish to stress that I am not speaking today on behalf of AU, but rather am testifying in my personal capacity and for the DFC, which I helped found nearly a decade ago.

The DFC is a coalition of 39 trade associations, non-governmental organizations and learned societies that was organized during the run-up to the Digital Millennium Copyright Act of 1998. (A list is attached to this testimony.) Its members represent a broad cross-section of the educational, high-tech and consumer communities in the United States. The constituents of the DFC are creators and users of text, images and music, so they understand first-hand the importance of laws that achieve a balance between rightsholders' legitimate interests in strong protection and the public's interest in reasonable access to copyrighted works. Our members support both fair use and intellectual property protection. Thus, the DFC strongly endorses H.R. 107, introduced by Mr. Boucher and Mr. Doolittle, because it would enhance consumer freedom and choice by restoring balance to our copyright laws.

Before talking in detail about how we got to where we are today, I would like to make five points for your consideration.

First, H.R. 107 presents Congress with the best and possibly last clear chance – before it is too late – to reverse the unintended damage done to our copyright system by the enactment of Section 1201 of the DMCA.

Second, for over a century and a half, the “fair use” of copyrighted materials has been essential to the growth of our society both commercially and culturally. Without fair use, Disney could never have made all the great movies that draw on modern retellings of classic fairy tales. Without fair use, our high tech-industry could never have become the envy of the world. And without fair use and other exceptions in the Copyright Act none of us in this room would have had the chance to learn through the use of books and other materials made available in libraries, schools and universities throughout the Nation.

Third, this Committee can promote electronic commerce for the benefit of everyone — content owners, device manufacturers, and every other industry group sitting in this room today — by properly balancing the rights of both copyright owners and information consumers. In a world of fair use and strong intellectual property protection, society as a whole will benefit.

Fourth, enactment of H.R. 107 will ensure fairness to your constituents by guaranteeing their freedom to make lawful use of media products they own. The DMCA will enhance their ability to move the materials they have lawfully acquired among digital devices in the home and in the extended home environment, including their cars and vacation houses. When consumers can use these digital products more flexibly, they will place greater value in this new medium. And as the value of digital products increases, the market for them will expand to the benefit of all parties, including the creators of music, video and text.

Fifth and finally, in a post-9/11 world, our priorities must change. Cyber-security is more important today than ever before. I'm not suggesting that we abandon intellectual property protection altogether. But the balance must be recalibrated. Prior to 9/11, when the DMCA was enacted, Congress clearly tipped the scales towards protection. But now, post 9/11, we need to eliminate obstacles to the research and testing so important to our collective security. H.R. 107 carefully recalibrates the balance to allow additional research without unduly compromising intellectual property protection.

The special genius of U.S. copyright law

Let me begin by describing some of the important characteristics of our copyright system as it stood before October 1998. First and foremost, that system had been extraordinarily successful in furthering the goal the Constitution sets for it: the promotion of “progress” in “Science and useful Arts.” In the two centuries following the enactment of the first Copyright Act in 1790, the United States enjoyed an unequalled and unbroken record of progress that gave us, on the one hand, educational institutions and research facilities that are preeminent in the modern world, and on the other, entertainment and information industries that dominate the global marketplace. Schools, libraries and archives benefitted from the operation of our copyright system, and the public reaped the reward; likewise, expanding American publishing, motion picture, music and software businesses generated not only wealth but also less tangible forms of public good. And this was as it should be. From its inception, the copyright system has operated both as a force for cultural development and as an engine of economic growth.

The success of traditional U.S. copyright law was not due only to the extremely high levels of protection it has afforded to works falling within its coverage. That success also stemmed from the fact that strong protection consistently has been balanced against use privileges operating in favor of teachers, students, consumers, creators and innovators who need access to copyrighted material in order to make – or prepare to make – their own contributions to cultural and economic progress. To put the point more simply, the various limitations and exceptions on rights that traditionally have been a part of the fabric of copyright are not results of legislative or judicial inattention; rather, these apparent “gaps” in protection actually are essential features of the overall design. As the Supreme Court observed more than a decade ago, in its Feist decision, the limiting doctrines of copyright law are not “unforeseen byproduct[s] of a statutory scheme....”; in fulfilling its constitutional objective, copyright “assures authors the right to their original expression but encourages others to build free upon” preexisting works. And, as the Court recently has reaffirmed in Eldred v. Ashcroft, these limiting doctrines are the mechanism by which copyright law recognizes and implements the values of free expression codified in the First Amendment.

Over the years, U.S. copyright law has built up a catalogue of limitations and exceptions to copyright protection, including:

- The “idea/expression” distinction, which assures (among other things) that copyright protection does not attach to the factual contents of protected works;
- The “first sale” principle, codified in 17 U.S.C. Sec. 109(a) , which assures that (as a general matter) purchasers of information products from books to musical recordings can sell or lend their copies to others;
- A variety of specific exemptions for educational, charitable and other positive public uses; and, most importantly,
- The “fair use” doctrine, found in Sec. 107, which provides – in essence – that some other unauthorized uses of copyrighted works, not specifically covered by the limitations just summarized, should be permitted rather than punished because their cultural and economic benefits outweigh the costs they might impose on copyright owners.

This particular idea of “fair use” has been a central and unquestioned feature of U.S. copyright law since 1841, when Joseph Story announced the doctrine in the case of Folsom v. Marsh. In a less technical sense, of course, all uses authorized under any of the limiting doctrines are “fair” ones in the collective judgement of two centuries of judges and legislators about how to strike the balance in copyright law. H.R. 107 would restore the vitality of all of these traditional doctrines, which currently are impaired or threatened by the anti-circumvention provisions of the DMCA. By restoring the freedom of consumers and other information users to make reasonable uses of purchased copies of works in digital formats, H.R. 107 would reestablish fundamental fairness in our intellectual property law.

The benefits of balance

Before describing more fully the threat that Sec. 1201 of the DMCA poses to freedom and fairness – and how H.R. 107 addresses it – it may be useful to provide some more specific illustrations of how balance in copyright law has served the twin goals of cultural and economic progress. It is common to note the self-evident proposition that the non-profit educational and library sector depends on limiting doctrines for many essential functions. Although schools and libraries are among the largest purchasers of copyrighted materials in the United States, their most typical and beneficial activities, from classroom teaching and scholarly research to the lending of books and other materials, would not be possible without the built-in fairness safeguards that limitations and exceptions to copyright provide.

It is less frequently noted that such major information industries as motion pictures and computer software came into being not despite the fact that filmmakers and programmers were free to copy important elements of their predecessors’ work, but because of it, and that they have continued to prosper under these conditions; likewise, is critical to a wide range of practices

within the publishing and music industries. It would not be going too far to say that the creativity and innovation that copyright exists to promote are fueled as much by the “gaps” in the law as they are by its strong protections; this is a point that individual creative artists understand well from direct personal experience -- even though large copyright-owning media companies sometimes lose sight of it. Although the entertainment industries are legitimately concerned about “piracy” of copyright works, it is important not to confuse the activities they rightly condemn with the ordinary, lawful exercise of use privileges conferred by the Copyright Act itself.

Equally important, limitations and exceptions to copyright law operate to the direct and immediate benefit of consumers. It is because of these limiting doctrines that we all can make a broad range of personal uses of the contents of information products we purchase, without fear of legal liability. Thus, to cite only a few obvious examples, students can copy texts or images from published sources to enhance a term paper or homework assignment; book buyers can dispose of unwanted volumes at a charity sale; and music fans can combine selections from their personal record collections to make “mixes” for a family member’s birthday or anniversary celebration, without any concern that by doing so they will violate traditional copyright principles. Nor is this all. Ultimately, it is the freedom to read, listen and view information products assured by these limiting doctrines that enables many consumers of copyrighted content to become producers -- to move from absorbing and repeating the words, images and notes of others to making their own creative contributions to the general fund of cultural resources.

The background of the DMCA – piracy and “black boxes”

In the debates leading up to the Digital Millennium Copyright Act of 1998, Congress heard that copyright piracy was a growing domestic and international threat, and that digital technology exacerbated that threat. It heard, too, that copyright industries were beginning to use technological measures to protect themselves against piracy -- something that they had and have every right to do. And it heard that there are different reasons why someone might want to avoid or “circumvent” such technological protections: bad reasons, like the large-scale unauthorized redistribution of copyrighted works, and good reasons, like discovering the structure of a dangerous computer virus, or making public the text of a password protected file detailing corporate wrongdoing, or commenting on an encrypted text in a work of scholarship, or making electronic texts available to library patrons who live far from a bricks and mortar branch -- all the latter being otherwise lawful activities and as far as can be from “piracy,” however that term is defined. The record shows that Congress acted on the understanding that it was cracking down specifically on circumvention in aid of piracy and on what might be called “bad faith” circumvention devices -- that is, “black boxes” designed and marketed specifically to facilitate copyright infringement, whether offered to the public as such or under some justifying pretext.

In fact, the Congress did much more, creating a new legal environment in which many traditional and intentional “gaps” in the copyright system can be effectively filled by legally-enabled technological measures. For example, if encryption prevented a student from taking a single digital image from an article to use in an electronic term paper, the DMCA would effectively bar circumvention for that purpose, even though it would represent a core in

conventional copyright analysis. Even if we could imagine a device that would have the sole and specific purpose of avoiding technological measures to enable this kind of core “fair use,” Sec. 1201(b) would make it unavailable; in banning technologies, that section asks only whether they are made available for circumvention purposes -- not whether they abet “good” circumvention or “bad” circumvention.

The impact of the DMCA

The anti-circumvention provisions of the DMCA are a blunt instrument. Today, for example, it would be illegal for a mother to use circumvention technology to skip past promotions for other movies at the beginning of a DVD, whether because she deems them inappropriate for her young children or after she herself has been forced to see the same ads over and over. It would be unlawful for a child to make a one-minute digital excerpt from a copy-protected electronic encyclopedia to include in a multimedia project for a school music class. Similarly, it would be a violation of Sec. 1201 for a professor of computer science to work with his class to test scrambling technology meant to block terrorists from accessing sensitive first-responder communications.

In the anti-circumvention provisions of the DMCA, Congress put 200 years of legal, cultural and economic achievement at risk. Rather than promoting long-term security for copyright owners, the DMCA has actually done the opposite. Its enactment has helped to trigger a disastrous public decline in the public respect for copyright on which the success of our system depends. H.R. 107 would undo this misstep — preserving the essential features of Sec. 1201 while correcting its excesses.

It is notable that, in the last five years, most of the publicized invocations of Sec. 1201 have had nothing whatsoever to do with copyright piracy. Instead, we have seen the anti-circumvention provisions used (or their use threatened) to restrict ordinary consumers’ abilities to do with lawful digital copies of works in analog media the same things they are accustomed to doing with analog copies: to prevent them from copying recordings of music for personal use, playing European video games in the U.S., skipping offensive portions of a recorded movie in the course of playback, or even reading a book when and where the reader likes — if it happens to be an e-book. Perhaps most remarkably, the DMCA has been invoked in an effort to keep a small company from bringing a universal garage door opener to market and another company from offering consumers a cheaper cartridge for their home printers. This should be of great importance to this Committee. A wide range of products, from toaster ovens to jet aircraft, contain software embedded in microchips. How the courts apply the DMCA in these cases will have an enormous impact on competition in the aftermarket for all these products.

Likewise, the DMCA has been invoked to suppress important research and critical commentary on computer security systems and other software. This is no trivial matter. Although the DMCA includes narrow exceptions for security testing and encryption research, the world of 2004 is very different from the world of 1998. We now have a far greater understanding of the importance of cyber-security, and of the danger we all face from cyber-terrorism. Regardless of what one thinks of Richard Clark’s recent book, it is significant that

while still in the White House he recognized the inadequacy of the DMCA's exceptions and called for an amendment to the DMCA precisely because of its harmful unintended impact on cyber-security research and development.

Even farther afield from piracy, the act's provisions have been manipulated in efforts to create de facto monopolies in computing hardware and a general purpose prohibition on computer network access. In sum, far from promoting the cultural and economic progress that intellectual property laws exist to foster, most invocations of the DMCA have had just the opposite effect.

It is crucial that in our anti-circumvention legislation we now attempt to find our way back to the basic values of American copyright. If we do not, we can only expect further excesses in the use of Sec. 1201: to prevent journalists from publishing copy-protected documents obtained from whistle-blowers, or consumer advocates from investigating the efficacy or safety of new products incorporating computer programs; to undermine the ability of teachers to make otherwise lawful use of digital works in network-based lessons; to exact license fees from students quoting electronic content in their schoolwork; or to put high-tech bars around non-copyrighted facts that the Supreme Court has said should be free for all — this last perverse result being possible because current law bars the circumvention of technological measures applied to protected works as a whole, even those containing mainly unprotected facts with a small amount of original commentary. Under existing Sec. 1201, technological measures could even be used to ration the availability of electronic books to young people in rural communities, for whom library websites on the Internet are likely to become an important information lifeline.

The last example is not a far-fetched one. If our goal is to preserve fair use and the other important use rights in copyright law, we cannot do so simply by safeguarding existing practices. In 1970, few could have foreseen how new decompilers would empower software development; in 1980, most of us could not have guessed at the importance of time-shifting using home video-recorders; and in 1990, the use of thumbnail images on the web -- the display of which was recently determined by the Ninth Circuit Court of Appeals to be a -- was unknown. Sweeping, general anti-circumvention legislation threatens the development of new — as yet unimagined — ways for students, consumers, innovators and others to share fully in the fruits of the information revolution. Eliminating this threat is not a matter of expanding users' rights, but of carrying them forward into a new technological setting.

The inadequacy of the DMCA's safeguards

From the legislative history of the DMCA, it appears clearly that not only did members of Congress in general — and the Energy and Commerce Committee in particular — understand that by enacting Sec. 1201 they were striking a blow against piracy and black boxes, but also that they shared a general concern about the fate of fair use under the new anti-circumvention regime. At that time, many members (as well as a number of academic observers of intellectual property legislation) believed that the “savings” provision of Sec. 1201(c) would operate to preserve traditional copyright values in this new context.

Unfortunately, this has not proved to be the case. Authoritative judicial interpretations have made it abundantly clear that there is no fair use exception to Sec. 1201, and that the savings provision actually saves nothing of real significance; properly understood, it merely states the truism that this “paracopyright” legislation (as anti-circumvention rules sometimes are termed) does not have a direct effect on the operation of the underlying copyright law itself. As has already been indicated, however, the real cause for concern is the indirect effect of the legislation on the traditional use privileges that it makes difficult or impossible for consumers to exercise in practice. Likewise, the narrowly defined exceptions to the anti-circumvention regime provided in Secs. 1201(d)-(j), although they provide adequately a few specific areas of traditional fair use (such as decompilation for reverse engineering in computer software development) are largely unavailing for most information consumers and innovators.

Moreover, the periodic Library of Congress rule-making provided for in Sec. 1201(a)(1) has proven wholly inadequate as a mechanism to counter the threats that anti-circumvention laws pose to traditional use privileges. This rule-making procedure is marked by several major shortcomings. First, as interpreted by the Copyright Office, the grant of authority to craft new exceptions applies only to descriptive categories of works (like encyclopedias, or computer operating system programs, or popular novels) rather than functional ones (like works important to scientific research, or subject to “thin” rather than “thick” copyright protection). This constraint alone makes the task of crafting meaningful exceptions difficult or impossible.

Were this not enough, where the issue of harm is concerned the Copyright Office’s interpretation of the statutory grant imposes an exceptionally high standard of concrete proof on the proponent of any new exception. In an environment of rapid technological and commercial change, the practical effect of this standard is crippling. This problem is so acute that in October 2000, following the first rule-making, the Librarian of Congress wrote to ask Congress “to consider developing more appropriate criteria for assessing the harm that could be done to American creativity by the anti-circumvention provision....,” stating that “[a]s presently crafted, the statute places considerable burdens on the scholarly, academic, and library communities to demonstrate and even to measure the required adverse impacts on users.” Similarly, the Assistant Secretary of Commerce, with whom the Copyright Office must consult concerning the rule-making, wrote in August 2003 that the standard employed by the Copyright Office “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.” It is noteworthy, therefore, that although numerous instances of harm from anti-circumvention were presented to the second rule-making proceeding, completed in 2003, only one very limited new exception (for e-book editions programmed to exclude literally all uses by disabled readers) emerged from the lengthy and carefully conducted process.

Finally — and perhaps most significantly — any exceptions to Sec. 1201(a)(1) allowed by the Librarian are likely to be hollow promises, because other provisions of the DMCA (not subject to the rule-making) still make the technology to implement them unavailable. The modest carve-out for the circumvention of obsolete technological measures in the year 2000 rule, for example, is of no value to anyone who cannot build the necessary circumvention tools for himself or herself.

The alternative approach of H.R. 107

Because it takes the dynamism of information use practices and information technology fully into account, the approach of H.R. 107 can succeed where other ways of making space for consumers and competitors within an anti-circumvention regime inevitably will fail. As has previously been noted, Congress intended in 1998 to crack down on copyright piracy and the market in black boxes. As revised by H.R. 107, Sec. 1201 would continue to be tough on both. But the bill also would restore the balance of copyright by assuring that tomorrow's consumers and innovators can employ the best technology to read, view, listened to and learn from material created by others. It accomplishes this in four straightforward provisions:

- The CD labeling language assures that consumers will not be misled into buying digital products that will not permit the full range of uses otherwise allowed in copyright law. (Proper labeling actually would diminish a consumer's need to circumvent. If a consumer purchases a product only to discover that it will not play on his computer, that consumer might consider circumventing the technological protection in order to get his money's worth. However, if the product were properly labeled, the consumer would not buy it in the first place.) Alone, however, this is not enough. Thus, other provisions of the bill would modify Sec. 1201 itself.

Sec. 1201 now applies civil and criminal penalties to circumvention for any and all purposes, good or bad, unless they are covered by a few narrowly defined exceptions. Thus, H.R. 107 also includes:

- A new exemption for computer security research that is broad enough to cover a wide range of activities crucial to the progress of science – and the national defense;
- Amendments to Sec. 1201(a)(1) assuring that consumers will never be sued or prosecuted for making other lawful use of a CD, e-book, or digitized image; and
- Provisions making certain that what is theoretically permitted also will be practically possible, by ensuring that end-users can get the tools they need to engage in permitted practices. By incorporating the Supreme Court's time-tested Sony "Betamax" standard, this part of the bill gives courts the tools they need to make sure that vendors of true black boxes – i.e. devices with limited purposes other than to enable wrongful circumvention – cannot avoid the full weight of the law.

Importantly, H.R. 107 would do nothing to diminish copyright owners' ability to prosecute infringers for copyright infringement. The content industries may assert that without sweeping, general anti-circumvention legislation they cannot protect their rights in the Internet environment. The record suggests otherwise -- as, for example, the recording industries' current enforcement campaign against individual participants in P2P networks demonstrates the

continued vitality of traditional copyright enforcement. In fact, the same digital technologies that enable unauthorized trafficking in copies of protected works also facilitate the tracking of the individuals who engage in such trafficking. H.R. 107 would give copyright owners still more tools to use in pursuing and punishing bad actors, without burdening the rest of the American public. If there are, and there well may be, specific contexts in which still more protections are required to assure the security of particular kinds of content, these situations can be dealt with through specific legislative and regulatory provisions. Such a targeted approach to enhanced anti-circumvention protection has the virtue of addressing problem areas in which there are real, demonstrated needs while leaving consumers and competitors generally free to engage in otherwise lawful practices.

Conclusion: the international perspective

In closing I would note that not only should Congress seize the opportunity presented by H.R. 107 to restore the historic balance founded on freedom and fairness that the DMCA has disturbed, but that it clearly possesses the authority to do so consistent with the international obligations of the United States. The only multilateral agreements dealing with the issue of anti-circumvention are the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaties of 1996. Clearly, those treaties do not require the rigid and inflexible approach adopted in Sec. 1201 of the DMCA. Indeed, these relevant provisions of the treaties directly contemplate exceptions to national anti-circumvention legislation for uses that are the subject of exceptions and limitations to copyright itself. As the foremost experts on the treaties have put it, they “contain[] no obligation to protect technological measures in areas where...limitations or exceptions to the rights exist under domestic law and thus have ‘permitted by law’ the use of the protected works.” [Jorge Reinbothe and Silke von Lewinski, The WIPO Treaties – 1996 146 (2002).]

In fact, when the legislation that became the DMCA was pending, Mr. Boucher put this question to the Commissioner of the Patent and Trademark Office, the lead official for the Administration in negotiating the treaties and then selling the implementing legislation to Congress:

Mr. BOUCHER. “Within the confines of the treaty and its legal requirements, assuming that we ratify it, could we meet those requirements by adopting a conduct oriented approach as opposed to a device oriented approach?”

Mr. LEHMAN. In my personal view -- it has not been cleared through the whole Administration, the Department of Justice and so forth – In my personal view, the answer is yes. . . .”

[H.R. 2281, WIPO Copyright Treaties Implementation Act and H.R. 2180, Online Copyright Liability Limitation Act, Hearing before the Subcommittee on Courts and Intellectual Property, 105th Cong., 2d Sess. 62 (1997).]

As the same experts I quoted previously have candidly acknowledged, it is not clear how the treaties foresee prohibitions against the manufacture and distribution of circumvention technologies being adapted to accommodate limitations and exceptions under domestic law. On this issue, the solution offered by H.R. 107 – that of transposing the Sony standard into the context of anti-circumvention legislation – represents a creative approach that, in my opinion, is fully defensible within the scheme of existing international law.

In sum, H.R. 107 deserves enthusiastic and general support. We urge you to work with your colleagues to enact this vitally important bipartisan legislation into law.

Thank you for this opportunity to share my views, and those of the Digital Future Coalition, with the Subcommittee.