

Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
and the
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION
UNITED STATES DEPARTMENT OF CONGRESS

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In the Matter of :
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 : Docket No. 990428110-9110-01
Effects of the Digital Millennium : RIN 0660-ZA09
Copyright Act on Encryption Research and :
Development of Encryption Technology :
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COMMENTS OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS ON SECTION 1201(g) OF THE DIGITAL MILLENIUM COPYRIGHT ACT

The American Society of Composers, Authors and Publishers (“ASCAP”) hereby submits these comments in response to the Notice of the Copyright Office and the National Telecommunications and Information Administration of the United States Department of Commerce (“NTIA”) of May 25, 1999, 64 Fed. Reg. 28802 (May, 27, 1999). The Notice of the Copyright Office and the NTIA was given pursuant to 17 U.S.C. §1201(g)(5), as adopted in the Digital Millennium Copyright Act (“DMCA”), Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998). That section directed the Register of Copyrights and the Assistant Secretary for Communications and Information of the Department of Commerce to prepare a report for the Congress examining the impact of section 1201(g) on: (a) encryption research and the development of encryption technology; (b) the adequacy and effectiveness of technological measures designed to protect copyrighted works; and (c) protection of copyright owners

against the unauthorized access to their encrypted works. The Notice is intended to solicit comments from interested parties that will be considered in the preparation of that report.

ASCAP's Interest in this Proceeding.

ASCAP is the oldest and largest musical performing rights society in the United States with a repertory of millions of copyrighted works and more than 85,000 songwriter and publisher members. ASCAP is also affiliated with over 60 foreign performing rights organization around the world and licenses the repertories of those organizations in the United States.

ASCAP members, as owners of copyrighted musical works, enjoy exclusive rights in those works as are granted under section 106 of the Copyright Act. These rights include the right to perform the works publicly, the right to produce the works in copies and the right to distribute such copies. On behalf of its members and affiliated foreign performing rights societies, ASCAP licenses only their non-dramatic public performance rights.

The types of users to whom ASCAP grants public performance licenses are wide and varying, and include, for example, television and radio broadcasters, hotels, nightclubs and college and universities. As new means of technology have been created to transmit music, ASCAP has sought to offer new forms of licenses appropriate to these mediums. Thus, as transmission of copyrighted musical works became possible over the Internet, ASCAP became the first performing rights organization to license these transmissions.

More recently, and of relevance to this proceeding, ASCAP has been exploring on behalf of its members, watermarking technology and other means of “digitally marking” a copyrighted work so that the public performance of a work so marked if digitally transmitted

can be tracked and the owner of such work properly compensated for the work's performance. Clearly if means of "hacking" or circumventing this watermark were to be used, it would undermine the copyright owner's rights.

As the Copyright Office is aware, ASCAP has sought to represent its members' concerns over the impact of digital transmission on their rights as copyright owners in the recent studies being conducted by the Copyright Office, at the direction of Congress. Indeed, ASCAP participated in the Copyright Office's recent studies on the matter of notice to libraries and archives of normal commercial exploitation or availability at a reasonable price, see 63 Fed. Reg. 71785 (Dec 30, 1998) (Copyright Office Notice for Comments), and in the study of the promotion of distance education through digital technologies. See 63 Fed. Reg. 63749 (Nov. 16, 1998) (Copyright Office Notice for Request of Information). With regard to the study on distance education, ASCAP's contributions to the Copyright Office's study were acknowledged in the Office's report. That study culminated in recommendations given to Congress which supported an "updating" of copyright law to permit the use of digital technologies to provide distant education, while still taking into account the need to employ appropriate technologies to secure copyright owners' rights. See Report on Copyright and Digital Distance Education at www.loc.gov/copyright/disted.

As the technological landscape is radically changing, copyright owners have been struggling to take advantage of the new possibilities technological advancements offer, while still protecting against unauthorized and unlicensed uses. For example, in its comments to the Copyright Office with regard to digital distance education, ASCAP strongly recommended that any legislation with regard to the digital delivery of distance education include guidelines that safeguard against abuses; and, specifically recommended that such

guidelines include technological safeguards to protect against the unauthorized use of ASCAP's members' copyrighted works.

ASCAP has always heralded the advancement of technology. Such advancement acts to encourage and advance our members' creative process and output. Nevertheless, at the same time, ASCAP strives to ensure that its members are duly compensated for the use of that creative output. It is for this reason ASCAP supported the enactment of section 1201(g) in the DMCA, which specifically prohibits the act of circumventing technological measures that effectively control access to a copyrighted work protected under the Copyright Act and the manufacture, import, offering or trafficking in any technology or product which is primarily designed or produced to circumvent a technological measure that controls access to a copyrighted work.

Nonetheless, ASCAP understands that in order to properly safeguard against unauthorized uses of its members' copyrighted works, constant research and development of effective protective measures is necessary. Accordingly, ASCAP appreciates that the exception created by section 1201(g) is intended to permit good faith encryption research, defined by section 1201(g)(1)(B) as the "activities necessary to identify and analyze flaws and vulnerabilities of encryption technologies applied to copyrighted works, if these activities are conducted to advance the state of knowledge in the field of encryption technology or to assist in the development of encryption products." However, as with any legislative exception, certain limits and guidelines must be set.

Issues of Concern to ASCAP

ASCAP supports the limitations already set forth in section 1201(g)(2) and guidelines set forth in section 1201(g)(3). The limitations of section 1201(g)(2) require the researcher to have obtained the copyrighted work lawfully and to have made a good faith effort to obtain authorization from the works' owner prior to circumvention, and requires that the circumvention be "necessary to conduct such encryption research." The factors in determining whether the research fits under the exemption under section 1201(g)(3) include: (a) the dissemination of the information derived from the encryption research; (b) the person performing the circumvention; and (c) whether the copyright owner is given notice of the findings of the research.

However, ASCAP is concerned that in order for this exemption to serve its intended purpose, the following three factors must be more carefully considered and delineated so it is clear: (1) who may perform the research; (2) what the permitted purposes for the research are; and (3) what may be done with the research once performed. By focusing on these factors, the limits to the exemption can and should be structured such that it permits only research that is truly directed at studying the flaws and vulnerabilities of encryption technology *for the benefit and protection of the copyright owner*.

(1) *Who May Perform the Research?* An exemption for encryption research should explore more than whether the person is engaged in a legitimate course of study and whether the person is experienced in the field of encryption technology as provided in section 1201(g)(3)(B). Research can be broken into three groups: (i) academic research; (ii) governmental research; and (iii) research for private commercial concerns. To the extent that there are differences between these groups, legislation should take into account those

differences. However, in all cases, the recommendation should explicitly state that no entity, including federal and state governmental entities, is immune from application of the U.S. copyright laws and that all entities must respect the rights of copyright owners. Accordingly, section 1201 should specifically include governmental circumvention within its general rule and its exceptions, including section 1201(g)(2).

(2) *What are the Permitted Purposes of the Research?* The definition of encryption research under the statute specifies that the research must be done in the pursuit of identifying and analyzing flaws and vulnerabilities of encryption technology as part of advancing “the state of knowledge in the field of encryption technology” or to assist in the development of encryption products. ASCAP is concerned that this definition may not necessarily protect copyright owners from those who may indeed be advancing the state of knowledge of encryption, but for less than genuine purposes. For example, it may be that a student engaged in a legitimate course of study may be engaged in research of encryption technology – research which may indeed advance the field – but could be deployed in a manner that would run counter-active to the interests of protecting copyrighted works.

Presently, notice and documentation are merely *factors* in determining the exemption under section (1201(g)(3)(C). The Copyright Office and the NTIA should propose regulations that spell out how these factors may be satisfied. For example, the person conducting the research could be required to give the copyright owner of the work to which the technological measure is applied notice of the research prior to its performance, a list of those who will be performing the research and documentation of the research once the research is completed. Alternatively, instead of satisfying the above criteria, a researcher would have to comply with certain research guidelines, such as a requirement that any

research which requires pre-approval or is funded through a grant – public or private – may be subject to set preconditions that must be strictly enforced and could then guarantee that a legitimate purpose for the study is being pursued.

ASCAP urges the Copyright Office and NTIA to explore a means of ensuring the narrow application of this exemption so that it only permits legitimate encryption research that respects and protects copyright owners' rights.

(3) *What May be Done With the Research?* An additional factor in determining whether the 1201(g) exemption applies is whether the information derived from the research is disseminated, and if so, whether it is disseminated in a manner reasonably calculated to advance the state of knowledge or development of encryption technology. As it has been observed, the effectiveness of encryption technology is contingent on the ability to keep such technology out of the hands of those who may abuse it. Therefore, ASCAP supports this factor as a control against infringing use of copyrighted works, but would recommend promulgation of regulations whereby researchers would be prohibited from disseminating their research to anyone or entity that may further deploy that research in a manner that is adverse to copyright owners' interests and that the burden is on the researcher to inquire of the person or entity to whom the research is to be disseminated that the information will not be put to such adverse uses. If not unduly burdensome, researchers should also be required to provide to the copyright owner or their agent or their representative organization (such as, a collecting or performing rights society, a recording or publishing association) upon whose works the encryption research was performed, a list of all those to the research was disseminated and a certification that the person to whom the research is being supplied is not believed to be seeking the information for purposes adverse

to copyright owners' interests. Such requirements would go along way towards preventing research from being disseminated to those who might abuse the findings of the research while at the same time it would permit copyright owners to retain better control over the exploitation of its works. Control over use is one of the exclusive rights granted under the Copyright Law; encryption research under this exemption to the extent permitted should not undermine any of the exclusive rights of copyright owners.

Conclusion

ASCAP, while not directly involved in the research of encryption technology, is on behalf of its members exploring the uses of such technology and has a great interest in ensuring that such technology protects the copyrighted works of its members. ASCAP hopes that the Copyright Office and the NTIA will take the above issues that ASCAP has pinpointed into consideration in making its report to the Congress on the effects of section 1201(g) on encryption technology.

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Respectfully Submitted,

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