



Association of American Universities

Executive Vice President

Via Electronic Mail

January 14, 2003

Veronica Steadman
United States Patent and Trademark Office
Office of Legislative and International Affairs
Room 902
2121 Crystal Drive
Arlington, VA 22202

RE: Docket No. 2003-C-006, Technological Protection Systems for Digitized
Copyrighted Works: Higher Education Associations' and Library Associations'
Comments and Request to Testify

Dear Ms. Steadman:

I write on behalf of the Association of American Universities ("AAU"), American Council on Education ("ACE"), National Association of State Universities and Land-Grant Colleges ("NASULGC"), American Library Association ("ALA"), Association of Research Libraries ("ARL"), American Association of Law Libraries ("AALL"), Medical Library Association ("MLA") and Special Libraries Association ("SLA") in response to the Patent and Trademark Office's December 13, 2002 Notice of Hearings and Request for Written Comments on Technological Protection Systems for Digitized Copyrighted Works ("Notice"), 67 Fed. Reg. 72920. AAU, ACE, and NASULGC (collectively, the "Higher Education Associations") represent thousands of U.S. institutions of higher learning, including the leading research universities and state and land grant universities and colleges in the United States. ALA, ARL, AALL, MLA, and SLA (collectively the "Library Associations") represent thousands of libraries and librarians throughout the United States

The Higher Education Associations and Library Associations participated extensively and directly as major stakeholders in the hearings and negotiations that led to the distance education provisions of the Technology, Education and Copyright Harmonization Act of 2002 ("TEACH Act"), Pub. L. 107-273. The primary purpose of that Act is to foster the development of distance education programs by expanding and updating the types of conduct and copyrighted works that are subject to distance education-related limitations on the rights of copyright owners.

Among the issues considered in the process that culminated in the TEACH Act was “the extent to which technological protection measures should be mandated as a condition of eligibility for any exemption [under the Act].” Report of the Senate Committee on the Judiciary on the Technology, Education and Copyright Harmonization Act of 2001, S. Rep. No. 107-31, pt. 2, at 5 (2001) (“Senate Report”). As the primary beneficiaries of the TEACH Act, the users of libraries and higher education institutions throughout the United States have a significant interest in the Act’s proper interpretation and application, including the provisions regarding technological protection measures (TPMs). Most notably, Congress made clear that this proceeding was not to construe, affect or influence in any way, the TPM requirements of the TEACH Act.

Part I of these comments provides the PTO with context related to those requirements and discusses the limited role of this proceeding. Part II of the comments responds to the PTO Notice’s specific question related to voluntary industry activities. Part III discusses an additional important issue that the PTO should discuss in any evaluation of TPMs – the extent to which each type of TPM accommodates fair use and other uses of protected works that are not infringement of copyright. The educational and library communities are increasingly dependent on works in digital form and are acutely affected by the deployment of TPMs to limit access to or use of copyrighted materials. TPMs increasingly are being applied even to works lawfully acquired by users. The use of TPMs to prevent lawful uses of copyrighted works threatens to destroy the careful balance between the rights of copyright owners and the interests of the public that is embodied in the Copyright Act. The ability of TPMs to accommodate fair use is a critical issue that should be considered by Congress, and the Patent and Trademark Office should so recommend in its Report. Finally, we request that the Higher Education Associations and Library Associations be invited to provide a witness to testify in hearings the PTO may hold on this issue.

Part I – Construction of the TEACH Act

Subsection (d) of the TEACH Act directs the Undersecretary of Commerce for Intellectual Property to create a report (the “PTO Report”) regarding “technological protection systems that have been implemented, are available for implementation, or are proposed to be developed to protect digitized copyrighted works and prevent infringement.” The report is intended to provide information to Congress and is to be submitted to the Committees on the Judiciary of the Senate and the House of Representatives. The subject matter of the PTO Report is not limited to TPMs that might prove useful in the distance education context. Rather, the provision requesting the report stands alone as a request for generally useful information about technological measures that might be used to protect copyrighted works. Indeed, it was added to the TEACH Act after the completion of negotiations related to distance education.

The general nature of the PTO Report is confirmed by the fact that the Act (in subsection (d)(2)), makes clear that the Report is “solely to provide information to Congress” and is “not [to] be construed to affect in any way, either directly or by implication” any provision of the TEACH Act. (Emphasis added). In other words, the PTO Report – and the comments and testimony received in connection with the Report – is not to be used or considered in evaluating

compliance with the section 110(2)(C) requirement of limiting reception of transmissions “to the extent feasible,” or the section 110(2)(D)(ii) requirement of applying TPMs that “reasonably” prevent retention or further dissemination of works, or any other provision of the Act. In short, the TEACH Act contains carefully negotiated language regarding eligibility for its protection, and the legislative history includes further guidance. Congress made clear that the late-added provision requesting a PTO Report on TPMs was not to affect the substantive provisions of the Act.

Part II – The Existence of Industry Led Activities

The Higher Education Associations and Library Associations are aware that certain industry activities have been undertaken to identify possible technological protection measures for certain mass audiovisual media, such as broadcast television, cable television and packaged movies. These activities have been led by motion picture studios, consumer electronics companies, and IT companies, and have not been directed to or acknowledged the educational needs of libraries and academic institutions. Further, the group levies a charge for participation and the activities are conducted in a manner that makes it impractical for substantial participation by nonprofit educational institutions and libraries. We are not aware of any activities focused on technologies that might be useful to meet the provisions of the TEACH Act.

Part III – The Threat to Fair Use Posed by TPMs

Fair use has long been a fundamental principle of American copyright law. “As the text of the [Copyright Clause of the] Constitution makes plain . . . Congress . . . has been assigned the task of defining the scope of [a] limited monopoly that should be granted to authors . . . in order to give the public appropriate access to their work product . . . [T]his task involves a difficult balance between the interests of authors . . . in the control and exploitation of their writings . . . on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand.” *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (emphasis added). Thus, while Congress has granted a limited set of exclusive rights to copyright owners, “[f]rom the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, ‘[t]o promote the Progress of Science and useful Arts....’” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (quoting U.S. Const., Art. I, § 8, cl. 8). That opportunity was provided first by the common law, *see, e.g., Folsom v. Marsh*, 9 F.Cas. 342 (No. 4,901) (CCD Mass. 1841) (Justice Story distilling the elements of fair use still discernible in today's statute), and in 1976 codified in the Copyright Act.

The legislative history of the TEACH Act and the Copyright Office's Report on Copyright and Digital Distance Education make clear the “critical” importance of “the continued availability of the fair use doctrine,” particularly in the education environment. Senate Report at 15; 21st Century Department of Justice Appropriations Authorization Act, Sec. 13301 No. 107-685, at 234 (2002) (“Conference Report”); Register of Copyrights, Report on Copyright and Digital Distance Education (1999) at xvi (“Register's Report”). The legislative history quotes with approval the Register's Report's emphasis on fair use:

Fair use is a critical part of the distance education landscape. . . . Not only instructional performances and displays, but also other educational uses of works . . . will continue to be subject to the fair use doctrine. Fair use could apply as well to instructional transmissions not covered by the changes to section 110(2) [instituted by the TEACH Act].

Senate Report at 15 (quoting Register’s Report at 161-62). The Register’s Report and legislative history further note that the TEACH Act is “enacted in recognition of the following” two principles:

- a. The fair use doctrine is technologically neutral and applies to activities in the digital environment; and
- b. The lack of established guidelines for any particular type of use does not mean that fair use is inapplicable.

Id. (Emphasis added). Thus, Congress and the Copyright Office both have recognized the “critical” nature of fair use and its viability in digital environments, particularly for education, and the express dependence of the TEACH Act upon that principle.

TPMs, however, have the potential to alter the delicate balance of rights in the digital environment. While fair use is “technologically neutral” and is applied and evaluated by courts on a case-by-case basis under an equitable “rule of reason” standard, *Sony*, 464 U.S. at 448, TPMs apply (mostly) to digital technology and can be implemented at the sole discretion of copyright owners. Further, TPMs typically work without regard for the lawfulness of the use that is being prevented. Encryption-based TPMs can prevent lawful, fair use of lawfully acquired copies as easily as they prevent infringing uses. Moreover, encryption-based TPMs packaged as “access control measures” are, in fact, designed to control the use of works that have been fully exploited by widespread dissemination. A user may acquire a copy of the work, but have its use of the work constrained by the encryption technology.

The use of TPMs as “access controls” has become particularly troublesome for lawful users of copyrighted works in light of the anticircumvention provisions of the 1998 DMCA, codified at 17 U.S.C. § 1201, and the Copyright Office’s subsequent interpretation of these provisions. Section 1201 provides for civil and criminal penalties against any person that “circumvent[s] a technological measure that effectively controls access to” a copyrighted work, 1201(a)(1), or that provides “any technology, product, service, device, component, or part thereof, that is primarily designed or produced for the purpose of circumventing” such technological measures, 1201(a)(2). In addition to the provisions prohibiting circumvention of access controls, section 1201 also prohibits manufacture or providing of copy protection technologies. *See* 17 U.S.C. § 1201(b).

Recognizing that many lawful uses, such as fair use, do not require permission from copyright owners, and that TPMs preventing access to a work necessarily would prevent lawful uses thereof (unless the TPM could be circumvented), Congress directed the Copyright Office, in consultation with the Department of Commerce, to conduct triennial rulemakings to determine

appropriate limitations and exceptions to the section 1201 prohibitions. The rulemaking is to determine “classes of works” that are exempt from section 1201(a). The House Commerce Committee, where the provisions governing this rulemaking were drafted, explained its purpose as follows:

[T]he Committee was concerned that [the anticircumvention provisions] would undermine Congress’ long-standing commitment to the principle of fair use. Throughout our history, the ability of individual members of the public to access and to use copyrighted materials has been a vital factor in the advancement of America’s economic dynamism, social development, and educational achievement. In its consideration of [the bill], the Committee on Commerce paid particular attention to how changing technologies may affect users’ access in the future. Section 1201(a)(1) [rulemaking] responds to this concern.

Committee on Commerce, House of Representatives, Digital Millennium Copyright Act of 1998, H.R. Rep. No. 105-551 (1998) at 35-36. Congress further explained that the rulemaking was intended to address “the risk that enactment of the [anticircumvention] bill could establish the legal framework that would inexorably create a ‘pay-per-use’ society.” *Id.* at 26.

Accordingly, when the first rulemaking was conducted in 2000, many institutions (including libraries, academic institutions, law professors, and consumer groups) proposed an exemption to section 1201 for the purpose of making “lawful uses” of copyrighted works, or “fair use” of “lawfully acquired” works, and similar exceptions. The Commerce Department endorsed this approach:

[T]he Assistant Secretary [for Communications and Information in the Department of Commerce] urges the Register to follow the House Commerce Committee’s intent to provide for exceptions analogous to fair use. He advises the Register to preserve fair use principles by crafting exemptions that are grounded in these principles in order to promote inclusion of all parts of society in the digital economy and prevent a situation in which information crucial to supporting scholarship, research, comment, criticism, news reporting, life-long learning, and other related lawful uses of copyrighted information is available only to those with the ability to pay or the expertise to negotiate advantageous licensing terms. . . . [H]e concludes that the determination of exempted classes of works should include a factual examination of the uses to which copyrighted materials are put. . . . In particular, he would support the crafting of the following exemption: “Works embodied in copies that have been lawfully acquired by users or their institutions who subsequently seek to make noninfringing uses thereof.”

Exemptions to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 Fed. Reg. 64556, 64561 (Oct. 27, 2000). Unfortunately, in the first rulemaking, the Copyright Office rejected the Commerce Department’s recommendations,¹

¹ The Copyright Office’s authority for simply rejecting the Commerce Department’s views, in light of the statutory mandate that it must “consult” with the Commerce Department, is questionable. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 585 (1992) (Stevens, J., concurring) (“[i]f Congress has required consultation between

adopting only two narrow exemptions related to malfunctioning TPMs and lists of filtered web sites. *Id.* These narrow exemptions do not begin to address the problem of preserving fair use in the digital environment.

Any discussion of technological protection measures must include the extent to which those measures interfere with fair use and other lawful uses. For example, many DVDs are protected by an encryption-based TPM that prevents the extraction of small portions of video material for use in classroom settings. The Higher Education Associations and Library Associations therefore respectfully urge the PTO, in its Report to Congress, to evaluate each of the TPMs that it discusses in light of that measure's effect on fair use and other lawful uses.

agencies, we must presume that such consultation will have a serious purpose that is likely to produce tangible results.”); *id.* at 603 (Blackmun, J., dissenting) (“Consultation is designed as an integral check on federal agency action, ensuring that such action does not go forward without full consideration of its effects.”). The second triennial rulemaking under section 1201 has begun, and the Higher Education Associations have submitted Comments urging the Copyright Office to appropriately “consult” with the Commerce Department in reaching its decisions, as Congress intended.

Conclusion

The PTO has the opportunity, in its Report, to clarify some of the legal issues raised by the use of TPMs and to provide meaningful information that Congress can use to address those problems in the coming session. The Higher Education Associations respectfully urge the PTO to consider the recommendations in these comments, and to include a witness provided by the Higher Educational Association and Library Association in hearings it may hold.

Thank you for your consideration of this request.

Sincerely,

A handwritten signature in black ink, appearing to read "John C. Vaughn". The signature is fluid and cursive, with the first name "John" and last name "Vaughn" clearly legible.

John C. Vaughn
Executive Vice President,
Association of American Universities

and on behalf of

American Council on Education
National Association of State Universities and Land-
Grant Colleges
American Library Association
Association of Research Libraries
American Association of Law Libraries
Medical Library Association
Special Libraries Association