



DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING

[Federal Register: November 24, 1999 (Volume 64, Number 226)]

[Proposed Rules]

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LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket No. RM 99-7]

Exemption to Prohibition on Circumvention of **Copyright** Protection

Systems for Access Control Technologies

AGENCY: **Copyright** Office, Library of Congress.

ACTION: Notice of inquiry.

SUMMARY: The **Copyright** Office of the Library of Congress is preparing

to conduct proceedings to make recommendations in accordance with

section 1201(a)(1) of the **Copyright** Act, 17 U.S.C. 1201(a)(1), which

was added by the Digital Millennium **Copyright** Act and which provides

that the Librarian of Congress may exempt certain classes of works from the prohibition against circumventing a technological measure that controls access to a copyrighted work. The purpose of this rulemaking proceeding is to determine whether there are classes of works as to which users are, or are likely to be, adversely affected in their ability to make noninfringing uses if they are prohibited from circumventing such technological measures. This notice requests written comments from all interested parties, including representatives of **copyright** owners, educational institutions, libraries and archives, scholars, researchers and members of the public, in order to elicit information and views on whether noninfringing uses of certain classes of works are, or are likely to be, adversely affected by such prohibition.

DATES: Written comments are due by February 10, 2000. Reply comments

are due by March 13, 2000.

RESSES: Submissions by electronic mail should be made to

"1201@loc.gov"; see SUPPLEMENTARY INFORMATION section for file

formats and other information about electronic filing. If delivered by

hand, comments should be delivered to the Office of the General

Counsel, **Copyright** Office, LM-403, James Madison Memorial Building, 101 Independence Avenue, SE., Washington DC. If delivered by mail, comments should be addressed to David O. Carson, General Counsel, **Copyright** GC/I&R, PO Box 70400, Southwest Station, Washington, DC 20024. See SUPPLEMENTARY INFORMATION section for information about formats of submissions.

FOR FURTHER INFORMATION CONTACT: David O. Carson, General Counsel, or

[[Page 66140]] Charlotte Douglass, Office of the General Counsel, **Copyright** GC/I&R, PO Box 70400, Southwest Station, Washington, DC 20024. Telephone (202) 707-8380; telefax (202) 707-8366.

SUPPLEMENTARY INFORMATION:

1. Written Comments

The **Copyright** Office will be placing all comments and reply comments that are submitted in electronic form on its Website (<http://lcweb.loc.gov/copyright/1201>).

Because of this, the Office prefers that comments and reply comments be submitted in electronic form, in one of the following formats:

If by electronic mail: Send to ``1201@loc.gov'' a message containing the name of the person making the submission, his or her title, organization, mailing address, telephone number, telefax number and e-mail address. The message should also identify the document clearly as either a comment or reply comment. The document itself must be sent as a MIME attachment, and must be in a single file in either Adobe Portable Document File (PDF) format (preferred), or in Microsoft Word Version 7.0 or earlier, or in WordPerfect 7 or earlier.

If by regular mail or hand delivery: Send, to the appropriate address listed above, two copies, each on a 3.5-inch write-protected diskette, labeled with the name of the person making the submission, his or her title and organization. The document itself must be in a single file in either Adobe Portable Document File (PDF) format (preferred), or in Microsoft Word Version 7.0 or earlier, or in WordPerfect Version 7 or earlier.

Anyone who is unable to submit a comment in electronic form should submit an original and fifteen paper copies by hand or by mail to the appropriate address listed above. It may not be feasible for the Office to place these comments on its website.

All written comments (in electronic or nonelectronic form) should contain the name of the person making the submission, his or her title, organization, mailing address, telephone number, telefax number and e-mail address.

2. Hearings and Further Comments

Following the receipt of reply comments, the **Copyright** Office will conduct hearings. The Office will then accept post-hearing written submissions that relate to matters addressed at the hearings. A hearing schedule will be announced in the future.

3. Mandate for Rulemaking Proceeding

On October 28, 1998, President Clinton signed into law the Digital Millennium **Copyright** Act, Pub. L. 105-304 (1998). Section 103 (subtitled ``**Copyright** Protection Systems and **Copyright** Management

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Information") of Title I of the Act added a new Chapter 12 to title 17 United States Code, which among other things prohibits circumvention of access control technologies employed by or on behalf of **copyright** owners to protect their works. Specifically, new subsection 1201(a)(1)(A) provides, inter alia, that ``No person shall circumvent a technological measure that effectively controls access to a work protected under this title." Subparagraph (B) limits this prohibition. It provides that anticircumvention ``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 in this rulemaking. This prohibition on circumvention becomes effective two years after the date of enactment, on October 28, 2000.

During the 2-year period between the enactment and effective date

of the provision, the Librarian of Congress must make the determination as to classes of works exempted from the prohibition. This determination will be made upon the recommendation of the Register of Copyrights in a rulemaking proceeding. The determination thus made will remain in effect during the succeeding three years. In making her recommendation, the Register of Copyrights is to consult with the Assistant Secretary for Communications and Information of the

Department of Commerce and report and comment on the Assistant

Secretary's views. 17 U.S.C. 1201(a)(1)(C).

4. Background

The WIPO **Copyright** Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) require that Contracting Parties provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that authors (or, in the case of the WPPT, performers and producers of phonograms) use in connection with the exercise of their rights and that restrict acts which they have not authorized and are not permitted by law.

In fulfillment of these treaty obligations, Title I of the Digital Millennium **Copyright** Act makes it unlawful to defeat technological protections used by **copyright** owners to protect their works in digital environments, adding a new Chapter 12 to title 17, United States Code.

Specifically, subsection (a)(1) of new section 1201 applies when a person who is not authorized by the **copyright** owner to gain access to a work seeks to do so by circumventing a technological measure put in place by the **copyright** owner to prevent access to the work. See Staff of House Committee on the Judiciary, 105th Cong., Section-By-Section Analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4, 1998, (hereafter House Manager's Report) (Representative Coble) 5 (Comm. Print 1998).

That section provides that ``No person shall circumvent a technological measure that effectively controls access to a work protected under this title." 17 U.S.C. 1201(a)(1)(A) (1998). The relevant terms are defined:

[T]o ``circumvent a technological measure" means to descramble a

.....

scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the **copyright** owner; and (B) a technological measure ``effectively controls access to a work" if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the **copyright** owner, to gain access to the work.

17 U.S.C. 1201(a)(3).

Congress found it appropriate to modify the prohibition to assure that the public will have continued ability to engage in noninfringing uses of copyrighted works, such as fair use. See H. R. Rep. No. 105-551, pt. 2, at 36 (1998) (hereinafter Commerce Comm. Report). To that end, the statute provides that:

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).

17 U.S.C. 1201(a)(1)(B).

The prohibition against circumvention is subject to delayed implementation in order to permit determination whether users of particular classes of copyrighted works are likely to be adversely affected by the prohibition in their ability to make noninfringing uses. Within two years, upon the recommendation of the [[Page 66141]] Register of Copyrights in a rulemaking proceeding, the Librarian of Congress must determine whether to exempt certain classes of works (which he must identify) from the application of the anticircumvention prohibition due to such adverse effects.

Subparagraph (C) of section 1201(a)(1) provides that:

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.

17 U.S.C. 1201(a)(1)(C).

The Conference Report clarifies the procedure to be used in conducting the rulemaking:

It is the intention of the conferees that, as is typical with other rulemaking under title 17, and in recognition of the expertise of the **Copyright** Office, the Register of Copyrights will conduct the rulemaking, including providing notice of the rulemaking, seeking comments from the public, consulting with the Assistant Secretary for Communications and Information of the Department of Commerce and any other agencies that are deemed appropriate, and recommending final regulations in the report to the Librarian.

H.R. Rep. No. 105-796, at 64 (1998).

Thus, the Register is to conduct a rulemaking proceeding, soliciting public comment and consulting with the Assistant Secretary of Commerce for Communications and Information, and make a recommendation to the Librarian, who by October 28, 2000, must make a determination whether any classes of copyrighted works should be exempt from the statutory prohibition against circumvention during the three years commencing on that date.

The primary responsibility of the Register and the Librarian in this respect is to assess whether the implementation of technological protection measures that effectively control access to copyrighted works is diminishing the ability of individuals to use copyrighted works in ways that are otherwise lawful. Commerce Comm. Report, at 37.

As examples of technological protection measures in effect today, the Commerce Committee offered the use of "password codes" to control authorized access to computer programs, for example, or encryption or scrambling of cable programming, videocassettes, and CD-ROMs. Id. Congress intended that the Register and Librarian solicit input

Congress intended that the Register and Librarian solicit input that will enable them to consider a broad range of past or likely future adverse impacts. Thus, this notice requests written comments from all interested parties, including representatives of **copyright** owners, educational institutions, libraries and archives, scholars, researchers and members of the public. The nature of the Librarian's inquiry is delineated in the statutory areas to be examined:

- (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.

17 U.S.C. 1201(a)(1)(C).

Substantial Effect on Use

It is clear from the legislative history that a determination to exempt a class of works from the prohibition on circumvention must be

based on a determination that the prohibition has a substantial adverse effect on noninfringing use of that particular class of works. The Commerce Committee noted that the rulemaking proceeding is to focus on "distinct, verifiable, and measurable impacts, and should not be based upon de minimis impacts." Commerce Comm. Report, at 37. Similarly, the Manager's Report stated that "[t]he focus of the rulemaking proceeding must remain on whether the prohibition on circumvention of technological protection measures (such as encryption or scrambling) has caused any substantial adverse impact on the ability of users to make non-infringing uses," and suggested that "mere inconveniences, or individual cases * * * do not rise to the level of a substantial adverse impact." House Manager's Report, at 6.

Causal Connection

The legislative history also requires the Register and Librarian to disregard any adverse effects that are caused by factors other than the prohibition against circumvention. The House Manager's Report is

instructive:

The focus of the rulemaking proceeding must remain on whether the prohibition on circumvention of technological protection measures (such as encryption or scrambling) has caused any substantial adverse impact on the ability of users to make non-infringing uses. Adverse impacts that flow from other sources * * * or that are not clearly attributable to such a prohibition, are outside the scope of the rulemaking.

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House Manager's Report, at 6. The House Commerce Committee came to a similar conclusion: ``Adverse impacts that flow from other sources, or that are not clearly attributable to implementation of a technological protection measure, are outside the scope of the rulemaking." Commerce Comm. Report, at 37.

Some technological protection measures may mitigate adverse effects. Along those lines, the Librarian must also seek information about positive impacts of technological access control measures. The House Manager's Report notes that:

In assessing the impact of the implementation of technological measures, and of the law against their circumvention, the rule-making proceedings should consider the positive as well as the adverse effects of these technologies on the availability of copyrighted materials. The technological measures--such as encryption, scrambling, and electronic envelopes--that this bill protects can be deployed, not only to prevent piracy and other economically harmful unauthorized uses of copyrighted materials, but also to support new ways of disseminating copyrighted materials to users, and to safeguard the availability of legitimate uses of those materials by individuals.

House Manager's Report, at 6.

Another mitigating factor may arise when a work as to which the **copyright** owner has instituted a technological control is also available in formats that are not subject to technological protections.

For example, a work may be available in electronic format only in encrypted form, but may also be available in traditional hard copy format which has no such technological restrictions on access. The availability without restriction in the latter format may alleviate any adverse effect that would otherwise result from the technological controls utilized in the electronic format. The Librarian is to consider the availability of works in such other formats. Id. at 7.

The requirements that proponents of an exemption demonstrate both causality and substantial adverse effects on noninfringing uses also apply to the determination whether users of works ``are likely to be" affected adversely in the three years following the conclusion of the rulemaking. Proponents who are unable to satisfy those burdens in the

[[Page 66142]] current rulemaking will have the opportunity to make their cases in each of the triennial proceedings that will succeed it.

Scope of "Class of Copyrighted Works"

A major consideration is to determine how to define the scope of

boundaries of a "particular class" of copyrighted works. This inquiry seeks to elicit information to assist the Librarian in addressing that ultimate question.

The House Manager's Report advises that the scope of "class of works" is narrower than the category of works set forth in 17 U.S.C.

102(a). For example, it notes that within the category of literary

works, one finds prose journals, periodicals, and books as well as

computer programs, and concludes that it is unlikely that the impact on prohibiting circumvention of access control technologies will be the same for scientific journals as it is for computer operating systems. Therefore, all of these types of literary works most likely would not fall within the same class of works for purposes of this section

1201(a)(1)(A) determination. *Id.* at 7. The Commerce Committee Report

concurrs that "the 'particular class of copyrighted works' (should) be

a narrow and focused subset of the broad categories of works of

authorship than is (sic) identified in Section 102 of the **Copyright Act**

(17 U.S.C. 102)." Commerce Comm. Report, at 38.

Nevertheless, the Judiciary Committee cautioned against drawing the categories too narrowly, as would be its conclusion if, for example, particular genres of motion pictures were to be divided into thematic categories such as Westerns, comedies or live action dramas. House Manager's Report, at 7.

5. Specific Questions

The Office seeks comment on the following specific questions.

Persons submitting comments need not address all questions, but are

encouraged to respond to those as to which they have particular

knowledge or information. Persons submitting comments are encouraged to submit concrete evidence, examples and data supporting their responses to these questions. Such submissions will carry greater weight than unsupported allegations and predictions.

In response to each question, persons submitting comments are

requested to distinguish between (a) their response with respect to the current state of affairs, and (b) their response with respect to the state of affairs that is likely to exist during the period between

October 28, 2000 and October 28, 2003. For example, in responding to

Question No. 3, persons submitting comments are requested to state (a)

what technological measures that effectively control access to

copyrighted works exist today, and (b) what new technological measures

that effectively control access to copyrighted works are likely to be

introduced between October 28, 2000 and October 28, 2003. In discussing the state of affairs that is likely to exist during the period between October 28, 2000 and October 28, 2003, persons submitting comments should explain the basis for their projections.

A. Technological Measures

1. What technological measures that effectively control access to

copyrighted works exist today?

copyrighted works exist today?

2. Do different technological measures have different effects on the ability of users to make noninfringing uses? Can and should the Librarian take account of those different effects in determining whether to exempt any classes of works from the anticircumvention provisions of section 1201? If so, how? In determining what constitutes a class of works?

B. Availability of Works

3. How has the use of technological measures that effectively control access to copyrighted works affected the availability of such works to persons who are or desire to be lawful users of such works?

4. Are there specific works or classes of works that, because of the implementation of such technological measures, have become unavailable to persons who desire to be lawful users of such works? If so, identify those works or classes of works and explain how they have become unavailable.

5. Are there specific works or classes of works which, because of the implementation of such technological measures, have become less available to persons who desire to be lawful users of such works? If

so, identify those works or classes of works, explain the ways in which they have become less available, and explain whether those works or classes of works are also available in other formats to which such technological measures have not been applied.

6. If there are works that are available both in formats to which technological measures have been applied and in formats to which technological measures have not been applied, to what extent can the works in the latter formats substitute for the works in the formats to which technological measures have been applied?

7. Are there works or classes of works that are available only electronically and only in formats to which such technological measures have been applied? If so, what are they?

C. Availability of Works for Nonprofit Archival, Preservation, and Educational Purposes

8. Has the use of technological measures that effectively control

access to copyrighted works affected the availability of such works for nonprofit archival purposes? If so, how? Are there specific works or classes of works that have been affected in this respect? If so,

identify them, explain how they have been affected, and explain whether those works or classes of works are also available in other formats to which such technological measures have not been applied.

9. Has the use of technological measures that effectively control access to copyrighted works created problems with respect to the

access to copyrighted works created problems with respect to the preservation of such works? If so, how? Are there specific works or classes of works that have been affected in this respect? If so, identify them and explain how they have been affected.

10. Has the use of technological measures that effectively control

access to copyrighted works affected the availability of such works for nonprofit educational purposes? If so, how? Are there specific works or classes of works that have been affected in this respect? If so, identify them, explain how they have been affected, and explain whether those works or classes of works are also available in other formats to which such technological measures have not been applied.

11. For purposes of this rulemaking, in classifying works that are to be exempted from the prohibition against circumvention of

technological measures that control access, should any classes of works be defined, in part, based on whether the works are being used for nonprofit archival, preservation, and/or educational purposes? (E.g., ``new broadcasts" may not be an exempted class of works, but ``news broadcasts used in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place of instruction," may be an exempted class.) Explain why or why not.

D. Impact on Criticism, Comment, News Reporting, Teaching, Scholarship, or Research

12. What impact has the use of technological measures that effectively control access to copyrighted works had on the ability of interested persons to engage in criticism, comment, news [[Page 66143]] reporting, teaching, scholarship, or research?

13. What impact has the use of technological measures that effectively control access to copyrighted works had on the ability of interested persons to engage in noninfringing uses of such works, including fair use and activities permitted by exemptions prescribed by law?

14. Are there specific works or classes of works with respect to which the ability of interested persons to engage in criticism, comment, news reporting, teaching, scholarship, or research has been hindered because of the implementation of such technological measures? If so, identify them, explain how such activities have been hindered, and explain whether those works or classes of works are also available in other formats to which such technological measures have not been applied.

15. Are there specific works or classes of works with respect to which the ability of interested persons to engage in noninfringing uses has been hindered because of the implementation of such technological measures? If so, identify them, explain how such activities have been hindered, and explain whether those works or classes of works are also available in other formats to which such technological measures have not been applied.

16. For purposes of this rulemaking, in classifying works that are to be exempted from the prohibition against circumvention of

technological measures that control access, should any classes of works be defined, in part, based on whether the works are being used for purposes of criticism, comment, news reporting, teaching, scholarship, or research? Explain why or why not.

technological measures that control access, should any classes of works be defined, in part, based on whether the works are being used for purposes of criticism, comment, news reporting, teaching, scholarship, or research? Explain why or why not.

17. For purposes of this rulemaking, in classifying works that are

to be exempted from the prohibition against circumvention of

technological measures that control access, should any classes of works be defined, in part, based on whether the works are being used in ways that do not constitute **copyright** infringement, e.g., as fair use or in a manner permitted by exemptions prescribed by law? Explain why or why not.

E. Effect of Circumvention on the Market for or Value of Copyrighted

Works

18. In what ways can technological measures that effectively control access to copyrighted works be circumvented? How widespread is such circumvention?

19. Has such circumvention (or the likelihood of circumvention) had any impact on the price of copyrighted works? Please explain.

20. Has such circumvention (or the likelihood of circumvention) had any impact on the availability of copyrighted works? In particular formats or in all formats? Please explain.

21. Has such circumvention had any other impact on the marketing of copyrighted works? If so, please explain the impact and which works or classes of works have been affected.

22. Do the answers to any of these questions relating to the effect of circumvention on the market for or value of copyrighted works depend upon the class of work? Please explain.

F. Other Factors and Questions

23. For purposes of this rulemaking, what criteria should be used in determining what is a "class" of copyrighted works?

24. With respect to any adverse effect on use of or access to copyrighted works that has been identified in response to any of the preceding questions, is there an explanation for the adverse effect other than the presence of technological measures that effectively control access to copyrighted works?

25. Has the use of technological measures that effectively control access to copyrighted works resulted in making copyrighted works more widely available? Please explain.

26. Has the use of technological measures that effectively control access to copyrighted works resulted in facilitating lawful uses of copyrighted works?

27. Are there other factors that should be taken into account? If so, please identify and address those factors.

28. What other comments, if any, do you have?

29. Do you wish to testify at a hearing to be conducted by the

Copyright Office in connection with this rulemaking?

Dated: November 15, 1999.

Marybeth Peters,

Register of Copyrights.

Approved by:

James H. Billington,

The Librarian of Congress.

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