ESA OPPOSES WEAKENING "ANTI-CIRCUMVENTION" PROVISIONS

What are the "anti-circumvention" provisions of the DMCA?

Copyright owners often use technological measures – ranging from password protection to sophisticated encryption or copy controls – to manage access to their works, and to control unauthorized copying of those materials. These technologies are critical to efforts to develop viable digital marketplaces for copyrighted video games and other copyrighted products. Congress recognized the importance of these technologies in 1998, when, as part of the Digital Millennium Copyright Act (DMCA), it outlawed the manufacture and distribution of products or services aimed at circumventing these copy protections. For a technology, product, service, or device (or component thereof) is prohibited if one of three conditions is met. It either:

1. is primarily designed or produced for the purpose of circumventing;
2. has a limited commercially significant purpose or use other than to circumvent; or
3. is marketed by the person who manufactures it, imports it, offers it to the public, provides it or traffics in it, or by another person acting in concert, for use in circumventing a technological measure that controls access to work protected by Title 17.

These "anti-circumvention" provisions, codified at 17 U.S.C. Section 1201, were also needed to implement new copyright standards adopted by a World Intellectual Property Organization treaty, with strong U.S. support, in 1996.

Section 1201 is consistent with previous technology-specific laws

Over the years, Congress has enacted other anti-circumvention laws to ban trafficking in tools used to steal intellectual property in certain areas, such as theft of cable TV programming or encrypted satellite signals. Section 1201 is entirely consistent with these long-standing national policies. The DMCA built on this foundation to create a technology-neutral ban, meant to discourage the development and dissemination of technological burglars' tools that threaten the copyright industries. For example, the video game industry is harmed by several examples of circumvention devices, such as "mod chips" (referring to modification chips for the Sony PlayStation console unit that defeat the console's copy protections) and game copying devices which circumvent Nintendo's security and Illegally copy their software. Without Section 1201, we'd have a gaping loophole through which these infringing devices could be allowed. That would be a disastrous outcome, profoundly eviscerating essential copyright protections.

Some critics of Section 1201 argue that only the specific act of "circumventing" should be outlawed rather than the device or tool themselves. They note that circumvention devices could, at least in theory, be used for purposes that do not infringe copyright and that enforcement should be aimed at individual infringers, not the facilitating device. Such a proposal is unrealistic and unenforceable because most "acts" of circumvention take place in private, often on a home computer, and these acts cannot be prosecuted and punished without an unacceptable price in terms of privacy.

Section 1201 takes a far less invasive approach. It seeks to prevent the development of a market in circumvention products or services by going to the source: the developer, distributor, or importer of the tools. This is also an approach taken by the earlier, technology-specific laws on which Section 1201 was based (e.g., wiretapping laws.) **Section 1201 has worked as Congress intended.**

The courts have had little difficulty applying Section 1201 so far, having rejected all constitutional challenges to date. Over the past three years, the federal courts have approved of the use of Section 1201 to prevent dissemination of circumvention technologies that would have allowed unauthorized access to videogames and playing of counterfeit games on console systems; making permanent downloaded copies of music that users were only authorized to access on a streaming basis; and stripping off all encryption from commercially released DVDs that would have enabled unlimited copying and dissemination.

The Section 1201 prohibition provides for legitimate exceptions

In a number of carefully defined circumstances, Congress allowed circumvention for purposes such as law enforcement, encryption research, privacy protection, and reverse engineering of computer programs for specified reasons. It also empowered the Librarian of Congress to expand the list of exceptions, if necessary to prevent unintended adverse impacts on the ability of the public to use specific categories of copyrighted materials in ways that did not infringe copyright. The Librarian has already used this authority to adopt two more exceptions in October 2000 and is currently conducting another review, as is the case every three years. In other words, the Section 1201 ban is designed to evolve with the times and with new technologies, and legislative change is unnecessary.

Section 1201's protections enhance access to copyrighted materials

Indeed, many copyright owners will not use the Internet and other innovative means of digital dissemination unless they have some way of ensuring that only authorized users – e.g., legitimate paying customers – will be able to have access. Others are experimenting with business models – like "tethered downloads," or time-limited "try before you buy" programs – that could not exist without technological protections such as encryption. Section 1201 provides the needed legal foundation to protect the integrity of these technologies and allow the experiments to continue – ultimately promoting greater availability of copyrighted materials to all Internet users. Conversely, if a market in circumvention products and services is allowed to develop without legal consequences, copyright owners will have little alternative but to impose tighter restrictions, employ tougher and less user-friendly encryption, or turn away from the Internet altogether for their most valuable and vulnerable creative works.

The Entertainment Software Assocation (ESA)

The Entertainment Software Association (ESA) is the U.S. association exclusively dedicated to serving the business and public affairs needs of companies that publish video and computer games for video game consoles, personal computers, and the Internet. ESA members collectively account for more than 90 percent of the $6.9 billion in entertainment software sold in the U.S. in 2002, and billions more in export sales of U.S.-made entertainment software. The ESA offers services to interactive entertainment software publishers including a global anti-piracy program, owning the

Electronic Entertainment Expo trade show, business and consumer research, government relations and First Amendment and intellectual property protection efforts.