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ANTI-CIRCUMVENTION RULEMAKING HEARING

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FRIDAY,

MAY 9, 2003

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The hearing was held at 9:30 a.m. in the hearing room of the Postal Rate Commission, 1333 H Street, NW, Washington, DC, Marybeth Peters, Register of Copyrights, presiding.

PRESENT:

MARYBETH PETERS	Register of Copyrights
DAVID CARSON	General Counsel of Copyright
CHARLOTTE DOUGLASS	Principal Legal Advisor
ROBERT KASUNIC	Senior Attorney of Copyright
STEVEN TEPP	Policy Planning Advisor

1 public to obtain toner cartridges and computer
2 programs that are embedded in them at a price lower
3 than the price that they would pay if this measure
4 were not in place.
5 The logical follow-up question is:
6 Would the public benefit if Lexmark were forced to
7 abandon the Prebate program because of SCC's
8 infringing activities? I think the answer to that
9 question is no.
10 In conclusion, let me just say that I
11 would hope that the Copyright Office would reject
12 SCC's request for a special exemption from the anti-
13 circumvention prohibitions of the DMCA. And I would
14 be pleased to answer any questions at the
15 appropriate time, either now or in writing.
16 Thank you very much, Madam Chairman.
17 MS. PETERS: Thank you, Mr. Oman.
18 Professor Ginsburg?
19 PROFESSOR GINSBURG: Thank you very much
20 for allowing me to appear before you.
21 First of all, I am not here for any
22 party. And I'm also not here to discuss the merits
23 of the Lexmark case. I'm here to explore the
24 implications of the resort to 1201(a) in that case,
25 but not the decision itself. And I'll say at the

1 outset that the remarks that follow are all based on
2 the premise that the Copyright Act was not intended
3 to be used and should not be used to secure the
4 after-market for replacement parts and other
5 noncopyrightable goods.
6 Given that premise, does it therefore
7 follow that a special class of circumventable works
8 is necessary? I note, by the way, that even were
9 such a class necessary, it would not be sufficient
10 because the listing of a class does not entitle the
11 circumventer then to distribute a device. And I
12 think that the problem that we're exploring is
13 essentially one of circulation of devices. So, even
14 if necessary, not sufficient.
15 As to whether or not such a class if
16 necessary, I am actually quite uncertain and tend to
17 think that it is not necessary. But just in case,
18 at the end of these remarks I will propose a class
19 which is essentially a refinement of the class that
20 was proposed by my colleague at the Kernochan
21 Center, June Besek.
22 Okay. So why am I uncertain that a class
23 is necessary at all? For two reasons.
24 First of all, I don't think that 1201(a)
25 was meant to reach this sort of problem. And second,

1 I believe that 1201(f) permits the activities that
2 are necessary to make, use and distribute a
3 noncopyrightable replacement part. If either of
4 those propositions are correct, then it is not
5 necessary to create or list a special class.
6 First, with respect to 1201(a). I do
7 not believe that it covers the circumvention of a
8 technological measure that controls access to a work
9 not protected under this title. And if we're talking
10 about ball point pen cartridges, printer cartridges,
11 garage doors and so forth, we're talking about works
12 not protected under this title.
13 As has already been stated here and in
14 many of the filings, there's nothing in the
15 legislative history that would suggest that such a
16 result was intended. The legislative history points
17 to Congress' desire to protect copyrighted works
18 against circumvention.
19 And moreover, looking at the structure
20 of the statute, if one looks at the factors that
21 this Office is now considering in Section
22 1201(a)(1)(C), the predominately are seeking to
23 access whether access controls improperly lock
24 copyrighted works away from archival, educational,
25 critical or research uses. Although there is indeed

1 a catch-all factor 5, I think the overall thrust of
2 these factors are addressing the impact on
3 copyrighted works of the protection of access
4 controls.
5 That said, there is a literal reading of
6 1201(a) which would reach noncopyrightable
7 replacement parts to the extent that those parts are
8 controlled by computer programs. So the argument
9 would be that the technological measure effectively
10 controls access to a computer program that makes the
11 replacement part work. And that would be the hook
12 for prohibiting circumvention. I think that is a
13 somewhat wooden reading of the statute and don't
14 think it's a necessary reading of the statute, but
15 acknowledge that is a possible reading of the
16 statute.
17 Given that, I then move on to the next
18 question, which is whether even if on a rather
19 literal reading 1201(a) would prohibit the
20 circumvention of access controls protecting access
21 to a computer program that controls a
22 noncopyrightable good, would Section 1201(f)
23 nonetheless permit the making, using and
24 distributing of noncopyrightable replacement parts?
25 And in analyzing Section 1201(f), I think it's

1 helpful to place it in the context that gave rise to
2 it. That is, I think the general understanding that
3 in passing Section 1201(f) Congress was seeking to
4 preserve the result in Sega v. Accolades.
5 Now, that was a case in which Accolade,
6 an independent producer of video games sought to
7 make games that would be capable with the Sega
8 console and reverse engineered the operating system
9 of the Sega console in order to figure out how to
10 make their independently generated video game play
11 on that piece of hardware. And that was held to be
12 fair use by the Ninth Circuit. And I think it's
13 generally recognized to be fair use.
14 The problem is that in what I'll call
15 "son of Sega," one could imagine that Sega would
16 interpose a technological measure controlling access
17 to the operating system in the console so that even
18 if you have an independently produced video game, it
19 will no longer run on the console because it can't
20 get to the operating system with which it has to
21 communicate in order to run on the console. And
22 that would clearly frustrate what is generally
23 recognized to be a fair and desirable use.
24 And so I think that the way 1201(f)
25 works, it would avoid that result through the

1 following means: 1201(f) allows circumvention of
2 the access control in order to create the program,
3 the interoperatable program in the first place. But
4 if that's all it did, you would have the impasse
5 problem. Now you've created the program but you
6 can't use the program because, in effect, to use the
7 program you have to engage in recurring acts of
8 circumvention every time that you want to have the
9 video game run on the console. And I understand the
10 language in 1201(f)(2) in the second part of (f)(2)
11 or for the purpose of enabling interoperatability of
12 an independently created program with other programs
13 to mean circumvention in order to be able to use the
14 program that you have lawfully created pursuant to
15 the terms of (f)(1) and fair use precepts generally.
16 So under (a)(1) you could make the
17 independent video game. Under (f)(2) you can use
18 the independent video game. And I believe under
19 (f)(3) you can distribute to the public the
20 independently generated video game that contains a
21 component that circumvents the access control on the
22 operating system of the console, so long as that's
23 all it does. (f)(3) does endeavor to make sure that
24 the tail doesn't wag a larger dog. But assuming
25 that the access circumvention device is

1 appropriately designed, 1201(f) would allow you to
2 make the program, use the program and distribute the
3 program.
4 Now, let's apply that analysis to
5 replacement parts. Let's take a car door. And since
6 I don't drive, I don't know if this is still the
7 case, but I do remember a time when a computer
8 generated voice would speak to you and tell you "A
9 door is ajar," meaning not that it's a container,
10 but that it not properly closed. Now that was a
11 computer program that would recognize if the door
12 had not been properly closed or locked and would
13 tell you. Okay. There is a computer program in the
14 door, and there is a computer program somewhere else
15 in the car that talked to each other to let you know
16 if the door is opened or closed.
17 Now I'm the Ford Motor Company. And I
18 would like to make sure that the next time
19 somebody's door is damaged in a accident, that the
20 customer must buy a Ford door or a Ford approved
21 replacement door and some other replacement door.
22 And I can do this, perhaps, if I say I've two
23 computer programs here. The door program can't talk
24 to the car program if I interpose an access control.
25 So now let's say I'm Crash Parts, Inc. I

1 want to make a compatible door. But I can't do it
2 because there is the access control. That's where
3 1201(f) comes in. 1201(f) says, first of all, I can
4 circumvent the access control to figure out how to
5 make a compatible door is ajar program with the car
6 computer somewhere else in the car. Then (f)(2)
7 says I can use my door because it doesn't do me any
8 good to make the door if I can't actually use the
9 door, and similarly (f)(3) says that I can sell a
10 door that will work on a Ford car, even though it's
11 not a Ford approved door.
12 Now, if I'm correct in that analysis,
13 then the question would be is there anything that
14 1201(f) doesn't cover that it should cover in order
15 to deal with the replacement part problem? And
16 there I'm not sure that we have a record that will
17 let us answer that question. Where there could be a
18 gap is in the definition in (f)(4) of what
19 inoperatability means which states the ability of
20 computer programs, plural, to exchange information
21 and of such programs mutually to use the information
22 which has been exchanged. So the premise is that you
23 have in the host machine a program and in the
24 replacement part a program and they're going to talk
25 to each other. And if that's how it's set up, then

1 I think my analysis of 1201(f) would cover that
2 replacement part.
3 But what if there is a computer program
4 that talks to something that is not a computer
5 program? I don't know what this would look like. I
6 am simply posting that possibility.
7 If that is the case, then perhaps
8 1201(f) doesn't cover the entire problem. And in
9 that case, perhaps some carefully designed class
10 would be desirable. But I put in all these perhaps
11 because as far as I can tell, we don't have the
12 evidence that would tell us whether or not there is
13 a gap.
14 My other concerns are, given the lack of
15 evidence it's rather difficult to define what that
16 class should look like. And I'm also quite concerned
17 that I wouldn't want the definition of a class to
18 prompt a negative inference that 1201(f) doesn't
19 excuse the creation, use and distribution of the
20 replacement part or that, by the same token, that
21 1201(a) reaches this conduct in the first place.
22 Because the obvious argument would be if you didn't
23 need a class, why did you list one? If you listed
24 one, that must mean that 1201(a) reaches this and
25 1201(f) doesn't forgive it. So I would be very

1 nervous about potential negative inferences that
2 could be drawn wee such a class to be articulated,
3 plus the limited utility of such a class given that
4 it only reaches the active circumvention, not the
5 distribution of the device.
6 That said, and in conclusion, the
7 attempt -- and I acknowledge that it is a continuing
8 attempt to define an appropriate class -- would be
9 as follows, and I did distribute some observations
10 with this language.
11 Computer programs that control access to
12 a physical machine or device in order to restrict
13 use of substitute or replacement parts for that
14 machine or device, where the substitute or
15 replacement parts do not embody a work protected
16 under this title other than a computer program that
17 controls the use of those parts.
18 The problem was figuring out how to
19 draft language that would address the replacement
20 parts issue more broadly than just toners and
21 cartridge, but not so broadly as to create a giant
22 exception for replacement copyrightable works.
23 Thank you.
24 MS. PETERS: Okay. Thank you.
25 Mr. Greenstein, the panel noticed that

1 you were shaking your head during some of the
2 testimony of Mr. Oman, and I wanted to offer you an
3 opportunity to make any statements in rebuttal at
4 this moment, if you wish.
5 MR. GREENSTEIN: Thank you. I apologize
6 if I distracted the panel in anyway.
7 MS. PETERS: No, you didn't distract us.
8 MR. GREENSTEIN: I think there were a
9 few points that I would like to address. One is
10 really, I think, not particularly relevant to this
11 proceeding but nevertheless it has a kind of an
12 atmospheric effect, if you will. And that is this
13 issue of whether Static Control was slavishly
14 copying or pirated software.
15 And certainly Lexmark in its comments,
16 you know, kind of tried tar Static Control with a
17 rather broad rush as a wilful infringer, but Static
18 Control is really nothing of the sort. Static
19 Control devoted months of effort to analyze the 128
20 bytes of hexadecimal code that's found on the
21 Lexmark toner chip. It's not a lot of code, but
22 hexadecimal code is just numbers. It doesn't have
23 any significance to the viewer unless you have some
24 contextual information that explains what that is.
25 Indeed, Lexmark's trial expert conceded

1 on the stand that hexadecimal code without such
2 contextual information is just a meaningless string
3 of numbers.
4 So until the complaint was filed, Static
5 Control did not know that there was a toner loading
6 program or any copyrighted work on the chip.
7 Indeed, we had no way of knowing that that small
8 number of bytes, 34 or 55 bytes, constituted a toner
9 loading program. As we noted in our papers, that
10 number of bytes is in fact less information than is
11 necessary to write the name and the title of the
12 Librarian of Congress.
13 There is no copyright notice that
14 appears on the chip, and even the shrinkwrap license
15 that accompanies the Prebate cartridge does not
16 refer to copyright. It refers only to patents with
17 respect to any intellectual property whatsoever.
18 And it was well known from prior models
19 of printers that the toner loading program, the
20 toner measuring program, if you will, was found in
21 the printer engine software and not on the chip
22 itself.
23 So in our reverse engineering efforts,
24 what Static Control did is we followed the path of
25 the data on the chip to try to determine what it was

1 and how it operated. And what we found was that
2 these few bytes of data that Lexmark has said
3 constitutes its toner loading program were fed into
4 the same super charged SHA1 encryption algorithm,
5 the hash algorithm, that was used to perform the
6 technological protection measure authentication. And
7 we found that if any bit of those bytes was changed,
8 then the printer displayed the error message and
9 wouldn't work.
10 And so with no evidence to the contrary
11 and having done about as much as Static Control
12 could without contextual information, we determined
13 in our view that what those 34 or 55 bytes were was
14 a lock-out code. Essentially a code that also had
15 to match and be fed into the SHA1 algorithm and be
16 exactly as it was or else the printer wouldn't
17 function along with the cartridge.
18 Static Control's technical expert, I
19 guess not surprisingly, but said nevertheless in his
20 independent judgment that that was a completely
21 reasonable belief based on the information that was
22 available to Static Control at the time. That
23 without having access to any of the information
24 concerning the chip that Lexmark closely guarded as
25 a trade secret, even within its own company, it