



STELLUNGNAHME DER EFF ZUM ENTWURF EINES GESETZES ZUR
ÄNDERUNG DES URHEBERRECHTS IN DER
INFORMATIONSGESELLSCHAFT (BUNDESTAGSDRUCKSACHE 15/38)

**STATEMENT OF THE ELECTRONIC FRONTIER FOUNDATION TO THE
GERMAN JUDICIAL COMMISSION**

The Electronic Frontier Foundation (“EFF”) thanks the German Judicial Commission for the opportunity to comment on the Entwurf eines Gesetzes zur Regelung des Urheberrechts in der Informationsgesellschaft (the “proposed legislation”) implementing Directive 2001/29/EC of the European Parliament and of the Council on the Harmonization of certain aspects of copyright and related rights in the information society (the EUCD). EFF writes today to comment particularly on the issue of legal protections for “technological measures,” as addressed in Article 6 of the EUCD.

The EFF is a leading non-governmental organization devoted to protecting civil liberties and individual rights in the digital world. EFF actively encourages and challenges industry and government to support freedom of expression, consumer rights, privacy and openness in copyright policy and regulation of the Internet. EFF was founded in 1990 and is a private, non-profit organization, with over 8000 paying members. EFF is based in San Francisco, California in the United States of America.

The EFF has been at the forefront of the public policy debates concerning the United States’ Digital Millennium Copyright Act of 1998 (DMCA), which was enacted to implement the United States’ obligations under Article 11 of the WIPO Copyright Treaty (WCT). The DMCA inserted section 1201 into the United States’ Copyright Act, which was intended to provide legal protection for technological protection measures added to copyright works by copyright owners.

Since the DMCA became law in 1998, the EFF has been involved in nearly all of the major legal cases applying section 1201. The U.S. experience with section 1201 has demonstrated repeatedly the difficulties that arise when legal protections for technological measures go too far. These difficulties are described in more detail in the enclosed EFF White Paper, *Unintended Consequences: Four Years under the DMCA*. In practice in the U.S., section 1201 has had the following unintended consequences:

Section 1201 Chills Free Expression and Scientific Research.

Experience with section 1201 demonstrates that it is being used to stifle free speech and scientific research. The lawsuit against 2600 magazine, threats against Princeton Professor Edward Felten’s team of researchers, and prosecution of Russian programmer

Dmitry Sklyarov have chilled the legitimate activities of journalists, publishers, scientists, students, programmers, and members of the public.

Section 1201 Jeopardizes the Balance Struck by Copyright Law.

By banning all acts of circumvention, and all technologies and tools that can be used for circumvention, section 1201 grants to copyright owners the power to unilaterally eliminate copyright exceptions long enjoyed by the public under existing copyright laws. For example, the music industry has begun deploying “copy-protected CDs” that promise to curtail consumers’ ability to make legitimate, personal copies of music they have purchased.

Section 1201 Impedes Competition and Innovation.

Rather than focusing on copyright infringers, many copyright owners have chosen to use section 1201 to hinder their legitimate competitors. For example, Sony has invoked section 1201 to protect their monopoly on Playstation video game consoles, as well as their “regionalization” system limiting users in one country from playing games legitimately purchased in another. As the Commission may be aware, section 1201 contains two types of prohibitions. First, the provisions of section 1201(a) ban the act of circumventing a technological protection measure to gain access to a copyrighted work. Second, the provisions of sections 1201(a)(2) and 1201(b) prohibit the manufacture, distribution and/ or trafficking in “technology” (including software tools) that would enable a user to circumvent a technological protection measure that effectively controls access to a copyrighted work or that effectively protects a right of a copyright owner. Section 1201 also includes a number of exceptions to the prohibition on circumventing access measures, and in some cases legalizes creation and distribution of tools or technology that would enable such circumvention for the relevant activity. However, in practice, these exceptions have proven to be too narrow to achieve their intended purpose.

To avoid some of the pitfalls of the United States’ experience with the technological protection measures in section 1201 of the Copyright Act, the EFF respectfully recommends that the German implementation legislation should incorporate the following features:

- (1) The German implementation legislation should only provide the level of legal protection for technological protection measures that is required by Article 6 of the EUCD***

EFF respectfully recommends that the Judicial Commission considers whether any changes need to be made to the current copyright legislation in order to implement Article 6, or whether the existing penalties for infringement of copyright or other legally-protected interests are sufficient to provide “adequate legal protection” within the meaning of Article 6.

- (2) *If the Judicial Commission considers changes are necessary, any circumvention prohibition should be limited to circumvention done with the purpose of, or having the effect of, infringing copyright.*

As we understand it, the German copyright law, Urheberrechtsgesetz, embodies a balance between rights granted to, or recognized as belonging to, authors and the rights of members of the public to have access to culture and information in copyrighted works. For instance, we understand that German copyright law includes a number of express limitations on the rights of copyright holders, including the right of a member of the public to make a single copy of a copyright work for private use (Article 53(1)), the right to make a single copy of a work for personal scientific use (Article 53(2)) and the right to make copies of small parts of a printed work or individual contribution published in newspapers and periodicals for personal use, in teaching, and in non-commercial educational institutions (Article 53(3)), subject to remuneration to a copyright holder under Article 54.

A circumvention provision which is limited to copyright infringement would preserve the balance embodied in the current German copyright legislation. Further, as copyright works increasingly become subject to technological protection measures, such a provision is necessary if current noninfringing uses of copyrighted works are to be preserved in the face of protection measures deployed by copyright owners. For example, under the provisions of section 1201, virtually any copying of motion pictures released on DVD is unlawful insofar as it involves circumvention of the “CSS” encryption system favored by major motion picture studios. This effectively eliminates a variety of activities that would otherwise be perfectly legal under existing U.S. law.¹ Article 6.4 of the EU CD specifically requires that users who are otherwise entitled to an exception under existing national copyright laws that fall within the scope of exceptions listed in Article 5 of the EU CD must continue to have the means to benefit from such exceptions notwithstanding legal protections for technological measures.

To the extent that Article 6.3 of the EU CD may be construed to permit legislation to protect rights beyond those granted to copyright owners under copyright legislation, the EFF respectfully notes that this may be beyond the scope required by Article 11 of the WCT and recommends that protection be limited to a prohibition on circumvention for the purpose of copyright infringement.

¹ To the extent the legal status of particular uses remains uncertain under existing legal principles (such as where a “fair use” defense is asserted, requiring case-by-case analysis), section 1201 precludes courts from addressing these underlying copyright questions.

(3) *The circumvention prohibition should include an express exemption for circumvention for legitimate purposes*

Any prohibition on circumvention of technological measures should include an express exemption for circumventions undertaken for otherwise legitimate purposes. Such an exception is necessary to allow courts to continue to apply copyright law flexibly where it might otherwise conflict with other areas of law, and to take into account public policy issues outside of copyright law. In order to avoid the chilling effect on innovation and scientific research, any implementing legislation should also provide that people who act in good faith but are found to have inadvertently violated any prohibition on circumvention or manufacture or distribution of circumvention technology should not be subject to criminal sanctions, and should face only an injunction against further activity.

(4) *Circumvention prohibitions should reach only acts of circumvention, and should not include prohibitions on devices and technologies that can be used for legitimate circumvention activities*

The Commission should exercise particular caution in regulating technologies, as distinguished from prohibitions on illegitimate acts of circumvention. Article 11 of the WCT does not *require* the adoption of device or technology restrictions. During the negotiation of the Copyright Treaty, in fact, a device-oriented approach was specifically rejected, and replaced with the more general “adequate protection” language that became Article 11.²

As discussed above, a well-crafted circumvention provision should (1) only apply to activities undertaken with the purpose of copyright infringement; and (2) should be subject to a "legitimate purposes" exception. If these limitations are to have any practical meaning, the public must have access to technologies and devices that will enable legitimate circumvention activities.

The difficulty then becomes distinguishing tools designed to aid legitimate circumvention from those that facilitate unlawful circumvention. This task is likely to be impossible. The very same capabilities that can be used for legitimate purposes can generally also be used for illegitimate ones. In this regard, circumvention technologies and tools are no different from the VCR, photocopiers, and audio recorders, each of which can be used for infringing or noninfringing activities. In such circumstances, a prohibition on the technologies is impractical and impedes legitimate innovation.

For these reasons, EFF recommends that only the act of circumvention be prohibited, and technology, tools and devices should not be prohibited solely because they have the potential for improper purposes.

² See Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 Va. J. Int'l Law 369, 409-15 (1997).

If the Commission concludes that a device prohibition is necessary, we submit that such a restriction should be narrowly limited to devices whose sole use is to perform unlawful circumvention. In other words, such a restriction should be limited to purpose-built “black boxes” that lack any legitimate use. In addition, in order to protect freedom of expression and scientific research, any such restriction should be narrowly tailored to reach only self-contained, fully-functional devices intended for distribution for profit. Scientific methods, ideas, algorithms, research reports, and any noncommercial software code should be expressly carved out of any device prohibition.

We would be very pleased to provide the Judicial Commission with any further information that would be of assistance in considering the various policy choices available to the German government in implementing the obligations of Article 6 of the EUCD and Article 12 of the WCT.

Thank you for your consideration.

Yours sincerely

Gwen Hinze, Esq.
Electronic Frontier Foundation

Encl.

Unintended Consequences: Four Years under the DMCA, EFF White Paper, revised version released January 2003.