



Association of American Universities

Executive Vice President

Via Electronic Mail

February 4, 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'
Statement for the Record

Dear Ms. Steadman:

Please accept for consideration the following statement, which responds briefly to three significant issues raised in the comments received by the PTO. This statement is intended to give the PTO a more complete and accurate record to consult in drafting its report to Congress and is submitted 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") (collectively, "Higher Education and Library Associations"). The Higher Education and Library Associations, along with fifteen (15) other organizations, previously submitted written comments in response to the PTO's notice and request for comments.

First, the PTO should note that none of the sixteen commenters argues that the PTO Report is to have any effect on the interpretation of the TEACH Act and its requirements. In fact, the Motion Picture Association of America (MPAA) (one of the higher education and library community's primary counterparts in TEACH Act negotiations) expressly notes that the comments are not meant to suggest how the TEACH Act should be interpreted, including "suggest[ing] a view as to whether or not the use of a particular technology would be sufficient for purposes of qualifying to take advantage" of the TEACH Act's exemption. MPAA comments at 2. Several other commenters, however, imply that certain technology is appropriate for the TEACH Act's

requirements. *See, e.g.*, Digimarc Corporation comments at 9 (watermarks “enabl(e) uses supported by law, such as for distance education in the TEACH Act”); ContentGuard, Inc. comments at 1 (MPEG Rights Expression Language “satisf(ies) the requirements of the TEACH Act”); Blue Spike, Inc. comments at 1 (suggesting that watermarks are the only meaningful protection measure). The Software & Information Industry Association (SIIA) attempts to “rate” the level of protection of certain TPMs, and asserts that institutions are required to implement “robust, effective” TPMs and must “continuously monitor the effectiveness and success rate” of the TPMs they implement. SIIA comments at 3, 13.

The PTO should ignore implications that certain technologies are appropriate for the TEACH Act requirements, and ignore assertions that certain activities are – or are not – required by the Act. Put simply, the PTO Report should avoid any suggestions as to the requirements of or appropriate technologies for the TEACH Act. Rather, the Report should – as specified by the legislation requesting it – “provide information to Congress” and assist Congress in “understanding the types of technologies that have been developed, are being developed, or might be developed to protect digitized copyrighted works and prevent infringement.” Pub. L. 107-273, Sec. 13301(d)(2); MPAA comments at 2. The PTO Report is separate from the substantive requirements of the TEACH Act and is meant to educate Congress on TPMs, not to provide a record affecting construction of the Act.

Second, several commenters attempt to criticize or downplay the role of fair use in the digital environment, and assert or imply that it is secondary to the rights of copyright owners. *See, e.g.*, Macrovision Corporation comments at 3; MPAA comments at 2, 9. Macrovision,¹ in particular, makes some flagrantly inaccurate statements, calling fair use a “dubious” component of the inter-industry debates regarding DRMs, claiming that it is “often used as a smokescreen . . . to deride copy protection and DRM technologies,” and calling for fair use to be “redefined in such a way to protect the intellectual property owner” in the digital world. Macrovision also wrongly states that users are not permitted to make back-up copies of digital works – an activity that not only is frequently fair use but also is in some cases expressly permitted by statute. *See, e.g.*, 17 U.S.C. § 108, 117.

As the Higher Education and Library Associations described in our written comments, fair use has been a critical component of copyright law for several centuries. The U.S. educational system is widely regarded as one of the best in the world, and much of its vigor and quality can be attributed to the fair use doctrine. Fair use comes into play when, for example, a student wants to quote from a novel in a report, or a professor writes a critique or parody of someone else’s work. Fair use also unleashes the rich information stores of libraries when, for example, a scholar photocopies an informative page from a journal for his or her research.

The viability of fair use is even more important – not less – in the digital world, where some copyright owners envision end-to-end control of their copyrighted works in ways that necessarily would reduce or eliminate fair use and other lawful uses not necessarily “authorized” by the copyright owner. *See* MPAA comments at 2, 5-6; The Walt Disney Company comments at 1-2.

¹ Macrovision’s primary business is developing, marketing, and selling TPMs, and therefore it benefits directly and substantially from ubiquitous TPM requirements and minimization of fair use.

That is not what Congress intended by enacting section 107, nor what the Courts intended throughout the previous centuries when fair use was part of the common law. Certain rights are reserved for copyright users, because the public interest is not best served by giving copyright owners complete and unfettered control over their works. As discussed in our written comments, TPMs create exactly this danger – requiring every access, every copy, and every use to be authorized. Therefore fair use must be an important aspect of any discussion regarding TPMs.

Third and finally, some of the commenters speak optimistically of the potential for DRMs to track consumer habits and actions of users. Such technology would, commenters indicate, benefit consumers by permitting copyright owners (and the third parties to whom they sell data and rights) to “more effectively target” their products and services. *See, e.g.*, SIIA comments at 2. Without needing to go into great detail, these types of technologies raise serious privacy concerns for users. Congress in recent sessions clearly has been concerned about the privacy issues raised by consumer tracking technologies. When writing its report, the PTO therefore should discuss the potential concerns with as well as potential advantages to the various technologies discussed, to give Congress a comprehensive and balanced view of the information.

Thank you for your consideration of this statement, and of our prior written comments.

Sincerely,

A handwritten signature in black ink, appearing to read "John C. Vaughn". The signature is fluid and cursive, with the first name "John" being the most prominent part.

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