



February 16, 2010

Stanford K. McCoy
Assistant U.S. Trade Representative for Intellectual Property and Innovation
Office of the United States Trade Representative
600 17th St NW
Washington, DC 20006

Re: Special 301 Review
Docket no. USTR-2010-0003

Dear Mr. McCoy:

I am writing on behalf of the Free Software Foundation (FSF), a registered 501(c)3 nonprofit organization based in Boston, Massachusetts, with comments for the 2010 Special 301 Report. The FSF believes that everyone should be allowed to share and change the software that they use, and that people are harmed when they are prohibited from doing so. When software is licensed under terms that permit such modification and redistribution, we call that software free software. We provide technical and informational resources to developers who are releasing free software. We also hold the copyright for more than 200 such programs.

With the passage of the Digital Millennium Copyright Act (DMCA) in the United States, and various national implementations of the European Union Copyright Directive (EUCD), other governments are coming under increased pressure to "harmonize" their copyright laws by passing similar legislation. However, such laws do not benefit all copyright holders. In fact, these laws harm the development and distribution of our software, and other free software programs, in a variety of ways. They also force computer users into an unconscionable choice between participating in our culture and using software they do not control. Furthermore, the damage done to free software has negative effects on other industries, including electronics manufacturing, hospitality, and scientific research. Thus, we suggest that no country should be placed on the Special 301 Report Priority Watch List or Watch List for lacking such legislation.

I. Anti-Circumvention Laws Hurt Free Software and Commerce

A primary component of laws like the DMCA and implementations of EUCD are commonly referred to as "anti-circumvention" terms. These specific portions of the law prohibit the development and distribution of products and information that would help

people circumvent so-called "effective technological protection measures" on copyrighted works. It is these provisions which represent the biggest obstacle to free software development posed by these laws.

In such legislation, "effective technological protection measure" is a term of art referring to Digital Restrictions Management (DRM)—some kind of technology that attempts to maintain control over how a user accesses and enjoys some kind of media, such as a musical or video recording. There are two common implementation strategies for DRM today: the data can be encrypted and require proprietary information to decrypt, or access to the data can be controlled by software that queries a server before permitting the user to access it. These methods can be used separately or in conjunction with each other.

These laws make few distinctions between different reasons why people and organizations try to bypass the DRM. As a result, activities that would otherwise be legal are now illegal simply because the copyright holders do not authorize them. A person who legally purchases a DVD or some DRM-encumbered music will not be able to enjoy it without also obtaining specially licensed player software.

To date, no popular DRM scheme that qualifies as an "effective technological protection measure" under these laws can be legally implemented with free software. A person or company who was interested in doing so would have to enter a licensing agreement with the industry group that controls the corresponding DRM. These groups believe it is vitally important to maintain as much secrecy as possible about how the DRM works, and so the licensing agreements include terms that effectively prohibit releasing player software under a free software license.

In the end, all this means that people who prefer to use free software on their computers have no legal means to enjoy any DRM-encumbered media that they have purchased. This hurts the adoption and development of free software in a number of ways:

- Fewer people are willing to use free software systems, preferring instead to use a system that allows them to enjoy all the media they have purchased. Furthermore, because free software users are often encouraged to help contribute to the software's development—by submitting feedback, bug reports, improved documentation, or even new code—less adoption results in less development activity.
- Because the anti-circumvention terms in these laws are so far-reaching, they touch almost every aspect of free software development, from the moment the first line of code is written until the time when it is published. Volunteers and companies who help create and distribute free software are compelled to spend significant amounts of time and effort ensuring compliance with the law. This creates a significant opportunity cost for the free software community: that time could be better spent improving the software.
- Free software developers often coordinate their work and plan for the future at dedicated conferences. Since the 2001 arrest of Dmitri Sklyarov in the United

States on charges of distributing circumvention software—charges that were later dropped—some developers have refused to travel to conferences hosted in the U.S. or other countries with similar legislation. This impedes the coordination and planning that these conferences are designed to foster.

Put simply, free software would be better than it is today had these laws not passed. Anti-circumvention laws force people to make a choice: they can either refrain from enjoying some of the art that is produced and published today—effectively cutting themselves off from part of our shared culture—or they can use software that they are not allowed to share with others, and that they cannot guarantee works only for their interests. In fact, a number of programs written to implement DRM in recent years have hurt the security of users' computers and invaded their privacy, even well beyond what was strictly necessary to merely enforce the DRM. The fact that people are forced into that unethical choice hurts us all, no matter what decision they make.

But even beyond the costs inherent to such legislation, commerce and trade are hurt as a consequence as well. The effects are wide-reaching:

- Hardware manufacturers depend on free software. In every category of electronics, including televisions, cellular phones, GPS navigation systems, and networking equipment, free software is a crucial component of many popular products. Device manufacturers like to use free software because it's easily adaptable to their needs, and does not require the payment of licensing fees or royalties. However, they often must do their own development work when readily-available free software does not perform to their specifications. Improvements in free software would cut development and per-unit costs for companies in this industry.
- Offices that rely on free software for their day-to-day business would be more productive and save costs if that software had more features and fewer bugs. This is especially true when companies need to deal with DRM-encumbered formats, where free software can offer no support at all.
- Free software conferences are a boon to the U.S. hospitality industry, and contribute to our standing as a world leader in software development and scientific research. The negative effects in these areas might be negligible if they were limited to a small number of would-be attendees who boycott venues with anti-circumvention laws. However, conference organizers who are choosing a venue have often been pressured not to select cities in these countries for precisely this reason. As a result, entire conferences move elsewhere, and the loss is palpable.

Put plainly, anti-circumvention legislation represents a significant obstacle to the Free Software Foundation's mission, and to the development of free software worldwide. The effort spent navigating those obstacles has negative consequences in a wide variety of industries.

II. Foreign Governments Should Not Be Pressured to Enact Similar Laws

Since the DMCA was passed in 1998, foreign governments have been under increasing political pressure to enact similar legislation. Much of that pressure comes from the United States Trade Representative. This issue was a highlight of the 2009 Special 301 Report: failure to implement the WIPO Internet Treaties were cited as a source for concern in ten separate reports for countries on the Priority Watch List or Watch List. Obligations to implement anti-circumvention legislation have featured in at least eight bilateral Free Trade Agreements that the U.S. has entered since then. The USTR also sought to include such obligations in the proposed multilateral Free Trade Area of the Americas agreement, and though little official information is available, various reports suggest that the Anti-Counterfeiting Trade Agreement currently includes similar provisions.

All this happens despite the fact that such laws hurt the development of free software, and have negative impacts on trade throughout several industries. The effects are serious enough that the DMCA remains controversial more than a decade after it came into effect, and implementations of the EUCD face similar opposition. The USTR has a responsibility to promote trade in a manner consistent with the democratic principles our country was founded upon, and advocating for anti-circumvention legislation abroad does not meet that criteria. The USTR should cease using such laws as a negotiating stick in the Special 301 Report.

III. Conclusion

The structure of anti-circumvention legislation assumes one particular economic model around copyrighted works; one in which all the works with economic value are distributed by a handful of large companies that are dedicated to the task and profit by controlling that distribution. This may have been the predominant way for trade to benefit from creative works in the past, but the Internet has ushered in new means for creating and distributing these works, and numerous industries have benefited from this change. Anti-circumvention laws funnel benefits to incumbent industry leaders but impose opportunity costs on other areas of commerce and trade. Those costs are made visible in the way free software is developed; without them, we stand to provide benefit to numerous sectors of the economy, both domestically and internationally.

It may be commonly believed that what's good for some copyright holders is ultimately good for all of them. This notion is reflected in terms like "intellectual property rights"—a misleading term that lumps together disparate issues and frames debate with an assumption that rightsholders share one particular set of interests. However, such a notion is plainly false: there are many copyright holders in the United States, and they have many varied interests, which are sometimes at odds with each other. In the case of anti-circumvention legislation, what may benefit large copyright holders of music and movies is harmful to many free software developers. Indeed, all of those

software developers have clearly demonstrated through their actions that they are far more interested in providing freedom to computer users than using copyright to control access to their work. The USTR should not hamper their efforts by advocating for anti-circumvention legislation abroad. Failure to enact such legislation should not be part of criteria for inclusion on the Special 301 Report's Priority Watch List or Watch List.

Sincerely,

Brett Smith
License Compliance Engineer
Free Software Foundation