



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: Rosemary C. Smith
Associate General Counsel

FROM: Office of the Commission Secretary *MWD*

DATE: April 8, 2004

SUBJECT: *Ex Parte* Communication regarding the
Rulemaking on Political Committee Status

Attached is an e-mail received by Commissioner Toner regarding
the above-captioned matter.

cc: Commissioners
Staff Director
General Counsel
Press Office
Public Disclosure

Attachment



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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2004 APR -8 A 10: 04

MEMORANDUM

DATE: April 8, 2004
TO: Mary Dove, Commission Secretary
FROM: Michael E. Toner, Commissioner *MT*
RE: *Ex Parte* Communication regarding the Rulemaking on Political Committee Status

I received the attached email regarding the Political Committee Rulemaking.





Melissa Laurenza/FEC/US
04/08/2004 09:41 AM

To
cc
bcc
Subject Fw: Anti-Circumvention in BCRA and DMCA

----- Forwarded by Michael Toner/FEC/US on 04/07/2004 10:50 AM -----
Robert A Bauer <rab2@georgetown.edu>

04/03/2004 11:42 PM

To mtoner@fec.gov
cc
Subject Anti-Circumvention in BCRA and DMCA

Commissioner Toner-

Thanks again for sharing your time and insight with our "Advanced Election Law" class at Georgetown last week. I am personally grateful for your clear picture of what I view as the most pressing issue before the FEC right now- whether §527 groups not registered with the FEC should be regulated.

It is because of the urgency of your pending decision that I respond, as promised, with a more details on anti-circumvention in another legal context that has recently shared the media spotlight with you: copyright law.

If you decide that the anti-circumvention elements detailed in McConnell compel-or at least allow-the FEC to rule on 527 groups, I humbly submit the following as one example of how the anti-circumvention principle works in practice.

FACTS:

Before DVD's were introduced the public in 1998, the content-owning companies (movie studios) took every precaution to ensure their property (the content) was safe. Seven years of sound science and technological tweaking were spent by the film industry on creating a data encryption system for DVD's called "Content Scramble System" (CSS). Studios were understandably apprehensive of nakedly distributing their content, a movie which they just invested upwards of \$90 million to produce, to the public who have an obsession for copying. (See: audio cassette tapes and CD burners).

5 weeks after the industry released its "secure" product, a 15-year old Norwegian cracked the encryption code and posted his "De-CSS" de-encrypting algorithm to a popular hacking website on the internet. As soon as the media picked this up, thousands of websites worldwide carried a click and download application that unclothed every DVD produced-and since millions of homes had already invested in DVD PLAYERS, which themselves used the legal de-encryption to play the DVD's, the studios could not change the code without customer angst and great expense.

Fortunately, studios had a remedy in the anti-circumvention provision of the Digital Millennium Copyright Act (DMCA). Section 1201 of the DMCA (pasted in pertinent part to this email below) prohibits the anti-circumvention of copyright control mechanisms embedded in copyrighted works.

In the case against the Norwegian circumventing copyright infringer, *Universal Cities v. Reimerdes*, 111 F. Supp. 2d 294 (2000), at 306 the anti-circumvention provision was broadened to encompass any technical device that EFFECTIVELY controlled access. Then the court held that posting the "de-encryption" link to a website as done here was knowingly circumventing a copyright protection in violation of the DMCA's anti-circumvention provision.

Had the plaintiff not been able to avail themselves of 17 USC 1201, studios would have no remedy, and it would be legal for the first consumer to "rip" or "burn" any DVD legally purchased at a local Wal-Mart into a million more copies for their closest friends - causing a great deal of economic pain to the film industry.

ANALYSIS:

In many ways, digital technology and election law move at the same warp speed: as soon as you've plugged one hole, two more leaks have sprung up where you least expected them. Our 15-year old hacker is your billionaire contributor, both determined to find a way to beat the system or read around the letter of the law to accomplish their end. A Congressionally debated, anti-circumvention provision is one way to enforce the spirit of the law without going back to Congress every time a solution is needed.

There exists a cadre of studio copyright lawyers who wake up every day with one thing on their mind: how do I protect the creative content that we work so hard (and spend so much \$\$) to produce? Without anti-circumvention laws, they would have not remedy for whatever method of stealing the hackers dream up next--and there are plenty of smart hackers.

As a matter of interpretation, even if the Commission decides to enforce McConnell's anti-circumvention mandate in this instance, the non-registered 527's might argue that they did not KNOWINGLY violate FECA--a small hurdle that the film industry was able to overcome in the *Universal Cities* case. I am happy to provide background on that in a separate email, if you are interested.

I hope you find this perspective useful. Please let me know if I can provide any more assistance or more extensive background. If I can't answer, I'm glad to put you in touch with any of the real attorneys (not law students!) who helped shape the DMCA anti-circumvention provision just 5 years ago before its passage.

Good luck with your rule making in the months ahead. I'll certainly follow with great interest.

Best Wishes,

-Robert Bauer
GULC Law Student
Law Clerk, Motion Picture Association of America
202-359-5163

. . . PERTINENT EXCERPTS:

Title 17 § 1201. Circumvention of copyright protection systems

(a) Violations regarding circumvention of technological measures.--(1) (A) No person shall circumvent a technological measure that effectively controls access to a work protected under this title. The prohibition contained in the preceding sentence shall take effect at the end of the 2-year period beginning on the date of the enactment of this chapter.

(E)

(2) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that--

(A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;

(B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or

(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.

(3) As used in this subsection--

(A) to "circumvent a technological measure" means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner; and

(B) a technological measure "effectively controls access to a work" if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.

(b) Additional violations.--(1) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that--

(A) is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof;

(B) has only limited commercially significant purpose or use other than to circumvent protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof; or

(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof.

(2) As used in this subsection--

(A) to "circumvent protection afforded by a technological measure" means avoiding, bypassing, removing, deactivating, or otherwise impairing a technological measure; and

(B) a technological measure "effectively protects a right of a copyright owner under this title" if the measure, in the ordinary course of its operation, prevents, restricts, or otherwise limits the exercise of a right of a copyright owner under this title.

(c) Other rights, etc., not affected.--(1) Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.

(Exemptions for research, libraries, minors, etc. . . NOT INCLUDED HERE)

(1) Circumvention permitted.--Notwithstanding the provisions of subsection (a)(1)(A), it is not a violation of that subsection for a person to circumvent a technological measure that effectively controls access to a work protected under this title, if--

(A) the technological measure, or the work it protects, contains the capability of collecting or disseminating personally identifying information reflecting the online activities of a natural person who seeks to gain access to the work protected;

(B) in the normal course of its operation, the technological measure, or the work it protects, collects or disseminates personally identifying information about the person who seeks to gain access to the work protected, without providing conspicuous notice of such collection or dissemination to such person, and without providing such person with the capability to prevent or restrict such collection or dissemination;

(C) the act of circumvention has the sole effect of identifying and disabling the capability described in subparagraph (A), and has no other effect on the ability of any person to gain access to any work; and

(D) the act of circumvention is carried out solely for the purpose of preventing the collection or dissemination of personally identifying information about a natural person who seeks to gain access to the work protected, and is not in violation of any other law.

(2) Inapplicability to certain technological measures.--This subsection does not apply to a technological measure, or a work it protects, that does not collect or disseminate personally identifying information and that is disclosed to a user as not having or using such capability.