

March 31, 2000

David O. Carson
General Counsel
Copyright GC/I&R
P.O. Box 70400
Southwest Station
Washington, D.C. 20024

Dear Mr. Carson:

Public Broadcasting Service (PBS), National Public Radio (NPR), and the Association of America's Public Television Stations (APTS) appreciate this opportunity to submit reply comments in this proceeding initiated by the Copyright Office in its Notice of Inquiry published on November 24, 1999. 64 Fed. Reg. 66,139.

PBS is a nonprofit, noncommercial organization providing programming and related services to 349 noncommercial stations in all 50 states, Puerto Rico, the U.S. Virgin Islands, Guam and American Samoa. Working with member producing stations and independent public television producers, PBS makes available a vast quantity of educational, cultural and informational content in broadcast, print and electronic formats, to more than 97 million Americans each week. NPR is a nonprofit organization providing news and cultural programming for 625 public radio stations nationwide. APTS is a nonprofit organization whose members comprise nearly all of the nation's 352 noncommercial educational television stations. APTS represents public television stations in legislative and policy matters before Congress and federal agencies, and engages in planning and research activities on behalf of its members.

Subsection 1201(a)(1)(A) of the Copyright Act provides that "No person shall circumvent a technological measure that effectively controls access to a work protected under this title." This prohibition, added by the Digital Millennium Copyright Act of 1998, Pub. L. 105-304, becomes effective on October 28, 2000, but "shall not apply to *persons who are users* of a copyrighted work which is in a particular class of works, if such persons are, or are likely to be in the succeeding 3-year period, adversely affected by virtue of such prohibition in their ability to make *noninfringing uses* of that particular class of works" under the copyright law, as determined by the Librarian of Congress and Register of Copyrights following this rulemaking. 17 U.S.C. 1201(a)(1)(B)-(C) (emphasis added).

PBS, NPR and APTS agree with the Copyright Office suggestion that “in classifying works that are to be exempted from the prohibition,” exempt classes should be defined based in part on the purpose for which the works are being used. 64 Fed. Reg. 66,142. While many comments focused on the ability to make fair use of works in digital format under section 107 of the copyright law, the inquiry more broadly encompasses all noninfringing uses under the Copyright Act. Section 1201(c) stipulates that the section does not affect “rights, remedies, limitations, or defenses to copyright infringement, including fair use” under the Copyright Act, and some comments have asserted that noninfringing *uses* under sections 107-122 of the Act are not adversely affected by a prohibition against circumventing *access* controls. See Time-Warner Inc. at 2; MPAA Comment at 3. However, PBS, NPR and APTS agree with groups representing libraries and universities who have pointed out that as technology advances, the distinction between access and use controls becomes blurred, and rights under fair use and other important copyright exemptions may be adversely affected. Association of American Universities at 4; Library Associations at 2, 4, 11, 16-18.

The Copyright Act allows two such noninfringing uses for public broadcasting entities: the use of sound recordings included in educational television and radio programs under section 114(b), and the use of published nondramatic musical works and published pictorial, graphic and sculptural works in connection with noncommercial broadcasting under section 118(d).

Under section 114(b), the reproduction, distribution and derivative work rights in section 106(1)-(3) do not apply to sound recordings included in “educational television and radio programs” that are distributed or transmitted by or through public broadcasting entities, so long as copies or phonorecords of the programs are not commercially distributed by or through public broadcasting entities to the general public. As the legislative history states, “This use of recordings is permissible without authorization from the owner of copyright in the sound recording.” H.R. Rep. No. 94-1476 at 106 (1976).

The ability of public broadcasting entities to make noninfringing uses of published nondramatic musical works depends in part upon access to sound recordings, because a public television or radio producer often will utilize a sound recording in reliance on the exemption in 114(b) and thereby incorporate the underlying musical composition in reliance upon the statutory license in section 118(d). The addition of a performance right for digital audio transmissions of sound recordings in section 106(6) of the Act does not change this equation.

Under section 118(d), a public broadcasting entity, upon compliance with established rates and terms, may use published nondramatic musical works and published pictorial, graphic and sculptural works in performances or displays by or in the course of a transmission by a noncommercial educational broadcast station, and in production, reproduction and distribution of transmission programs intended solely for such transmissions. The legislative history reflects that public broadcasters should be assured “access to copyrighted materials at reasonable royalties and without administratively cumbersome and costly ‘clearance’ problems that would impair the vitality of their operations.” *Id.* at 117. Access to sound recordings, published nondramatic musical works and to published pictorial, graphic and sculptural works for these noninfringing uses should be preserved in the digital age.

Technological controls described in the comments and DMCA legislative history include password protection, encryption and scrambling. To “circumvent a technological measure” that controls access to a work means to descramble or otherwise bypass a technological protection that requires application of information with authority of the copyright owner to gain access to the work. 17 U.S.C. § 1201(a)(3). Notwithstanding the distinction between access and copy control technologies, such protections could have a substantial adverse effect on the ability of public broadcasters to make noninfringing uses of sound recordings and musical works, if sound recordings are distributed increasingly through electronic means or in formats protected by copy control technology. Public broadcasting entities often utilize sound recordings in the commercially available format distributed to the public. As intended by Congress, public broadcasters are not required to secure permission for these uses of sound recordings nor to clear individually these uses of published nondramatic musical works. An inability to make these noninfringing uses without securing authorization of the copyright owner due to technological protections that deny access to the work would vitiate the congressional intent. A similar effect is likely on noninfringing uses of pictorial, graphic and sculptural works if these works are increasingly created, reproduced and distributed in digital form. The prohibition could have an indirect detrimental effect on teaching and other values supported by the noncommercial educational and cultural mission of public broadcasting. *See id.* 1201(a)(1)(C)(ii)-(iii).

While penalties for violating the prohibition generally include injunction, impoundment, actual or statutory damages, fines and more, in the case of a public broadcasting entity “the court shall remit damages in any case in which the public broadcasting entity sustains the burden of proving, and the court finds, that the public broadcasting entity was not aware and had no reason to believe that its acts constituted a violation.” *Id.* 1203(c)(5)(B). This good faith

standard for public broadcasters was added by the Intellectual Property and Communications Omnibus Reform Act of 1999, thereby reaffirming congressional intent that public broadcasters be permitted to continue noninfringing uses notwithstanding the addition to the Copyright Act of sections 1201 and 1202 (integrity of copyright management information). *See* Conf. Rep. No. 106-464 at 148 (1999)(applying to public broadcasters “the standard for nonprofit libraries, archives and educational institutions”). There is a complete bar to applicability to public broadcasting entities of criminal penalties for violation of sections 1201 and 1202. ¹

PBS, NPR and APTS believe that the developing methods of technological protection will be deployed “to support new ways of disseminating copyrighted materials to users, and to safeguard the availability of” works to the public. *See* 64 Fed. Reg. 66,141. As expressed in other comments, PBS, NPR and APTS will continue to monitor the impact of these new technologies on their public service mission. *See* American Association of Museums at 3. In order to preserve the availability of noncommercial educational television and radio programming to the public, if access and copy control technologies diminish the ability of public broadcasters to make noninfringing uses, then the regulations should exempt public broadcasting entities from the 1201(a)(1)(A) prohibition with respect to their noninfringing uses of sound recordings, musical works, and pictorial, graphic and sculptural works.

Thank you for the opportunity to present these views to the Copyright Office.

Respectfully submitted,

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¹ 17 U.S.C. §1204(b). “Public broadcasting entity” has the meaning given it in section 118(g): a noncommercial educational broadcast station, and any nonprofit institution or organization engaged in production, reproduction and distribution of transmission programs solely for purposes of transmissions by such stations. *Id.* 1203(c)(5)(B)(i).

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