March 31, 2000

David O. Carson
General Counsel
Copyright Office, LM-403
James Madison Memorial Building
101 Independence Avenue, SE
Washington, DC 20540

Dear Mr. Carson:

I am pleased to provide these comments on behalf of the member companies of the Business Software Alliance[1] (BSA) in response to the submissions made to the Notice of Inquiry (NOI) issued by the Copyright Office and published in the Federal Register on November 24, 1999 (64 Fed. Reg. 66139). The BSA has, jointly with a number of other interested parties, made a general submission to you stating our recommendation that the application of 1201(a)(1)(A) of the Copyright Act should not be suspended with respect to any class of works in this rulemaking. The reasoning leading us to this conclusion is presented in detail in that submission.

We provide these additional comments with respect to only one issue that has been raised by a number of comments: the issue of reverse engineering.

For software developers, Section 1201(a)(1)(A) is perhaps the most important provision of the Digital Millennium Copyright Act. As the marketplace for computer programs has developed, it has become the practice of most developers of business software products to license these works to their customers. This has proved to be the most efficient means of making these works available to both vendors and consumers. A business or other user will often receive a single copy of the work, and the license will authorize the use of that product by a specified number of persons. This practice often referred to, as "site licensing," is now an industry standard. To ensure that only authorized persons use the software, loading the specific copy of the work in a computer often requires the application of a serial number, password or access code, to ensure that the person is legally entitled to access and use the software. It has now become commonplace for persons to hijack these access controls (password, serial codes, etc.) and post them on the Internet. A recent search of the Internet using the term "carckz", the common term used for these sites, revealed over 1,000,000 such postings. Section 1201(a)(1)(A) provides us the best legal weapon against these illegal sites.

---

[1] *The Business Software Alliance (BSA) is the voice of the world's leading software developers before governments and with consumers in the international marketplace. Its members represent the fastest growing industry in the world. BSA educates computer users on software copyrights; advocates public policy that fosters innovation and expands trade opportunities; and fights software piracy. BSA members include Adobe, Apple Computer, Autodesk, Bentley Systems, Compaq, Corel Corporation, IBM, Intel, Intuit, Lotus Development, Macromedia, Microsoft, Network Associates, Novell, Sybase, Symantec and Walker Digital. BSA websites: www.bsa.org; www.nopiracy.com.

As the NOI correctly notes, the sole matter that this rulemaking is to consider is the prohibition on the act of circumvention contained in section 1201(a)(1)(A). Many of the comments suggest, however, principally in response to recent court cases ruling on the use of certain copy control technologies applied to motion pictures distributed on DVD discs, that the rulemaking should change the law itself, and provide for a general exception permitting reverse engineering. We respectfully submit to you that making such a change to the law is outside the scope of this rulemaking as directed by the Congress.

The cases which prompted these submissions, *Universal City Studios, Inc. v. Reimerdes*, No. 00 Civ. 0277 (LAK), 2000 WL 124997 (S.D.N.Y. Feb. 2, 2000), and several other cases, have applied section 1201(a)(2), and in some instances section 1201(b)(1) to enjoin activities that violate the Digital Millennium Copyright Act's prohibitions against trafficking in circumvention products or services. None of these cases were decided on the application of the rules contained in section 1201(a)(1)(A), since those rules are not now in effect, and will not come into effect until October of this year. Thus, arguments that these cases justify a change in section 1201(a)(1)(A), are simply wrong.

The interrelation between anticircumvention rules and acts of reverse engineering, (legitimate acts of studying and analyzing a computer program), were considered in detail by the Congress in the course of its deliberations on the Digital Millennium Copyright Act. Section 1201(f), was added by the Senate during its consideration of the Digital Millennium Copyright Act. That section is a specific, and narrow, exception to Section 1201(a)(1)(A), and thus reflects the deliberate judgment of the Congress in respect of exceptions it determined to be appropriate. The legislative history of the Senate bill implementing the WIPO Treaties, makes clear that the specific intent of the Senate in adding section 1201(f) was to "…ensure that the effect of current case law interpreting the Copyright Act is not changed by enactment of this legislation for certain acts of identification and analysis done in respect of computer programs. Thus, the scope of this rulemaking does not require or empower the Librarian to reconsider or alter the decision of the Congress on this matter.

Section 1201(f) is not the subject of this rulemaking. Whether changes to 1201(f) are appropriate is a mater for the Congress, and the Congress has not directed this rulemaking to consider that issue.

Thank you very much for receiving these comments. BSA would like to reserve the opportunity to testify at any hearings that you may hold in connection with this rulemaking.

Sincerely,

Robert W. Holleyman , II
President and CEO