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ANTICIRCUMVENTION RULEMAKING
POST-HEARING COMMENTS OF ASMP

It appeared clear from the outset that one of the greatest challenges given to the Library of Congress and the Copyright Office by Congress would be determining what Congress meant by "classes of works." Reading the comments and reply comments and listening to both the testimony and the questions at the public hearings proved that appearance to be correct: defining "classes of works" is as challenging to us today as trying to navigate transatlantic voyages in the days before the invention of the compass must have been to the first sailors.

Fortunately, the comments, reply comments and testimony revealed something else: it is not necessary for the Library of Congress or the Copyright Office to define "classes of works." The purpose of the rulemaking was, in the words of the Notice of Rulemaking, to "determine whether there are 'classes of works' as to which users are, or are likely to be, adversely affected in their ability to make non-infringing uses if they are prohibited from circumventing" technological measures protecting access to copyrighted works. Now that the hearings and filings are over, after countless words, both written and spoken, one thing is absolutely clear: No matter how broadly or narrowly, and no matter on what basis, "classes of works" are defined, there is simply no evidence whatsoever of any users who are, or are likely to be, adversely affected by the anticircumvention provisions of §1201(a)(1). There was nothing more than speculation and assumption.

Speculation and assumption do not meet any standard of proof. They especially do not rise to the burden imposed by Congress: Findings which are based on ''distinct, verifiable, and measurable impacts, and should not be based upon de minimis impacts.'' Further, "mere inconveniences, or individual cases... do not rise to the level of a substantial adverse impact." To put it directly and bluntly, no user has even remotely approached meeting his or her burden of proof.

In the absence of any proof of adverse impact by anyone for any work of any kind, it is simply unnecessary to define what is meant by "classes of works." The issue becomes irrelevant. Congress did not mandate the Library and the Copyright Office to recommend exemptions, it mandated them to find out whether there was anyone who would be entitled to an exemption under very strict standards. No user established such an entitlement. After all of the thousands and thousands of hours of effort on the part of everyone involved in the current rulemaking, no user presented proof of adverse impact or even of its likelihood. That being the case, no exemption should be granted, and the definition of "classes of works" does not have to be addressed.

Perhaps the situation will be different when this issue is addressed again within the next few years. But that will be then, and this is now; and right now there is simply no exemption from

the anticircumvention provisions of 17 U.S.C. §1201(a)(1) that is warranted or that should be recommended to Congress.

Respectfully submitted,

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