March 30, 2000

David O. Carson
General Counsel
Copyright GC/I&R
P.O. Box 70400
Southwest Station
Washington, D.C. 22024

Re: SIIA Reply Comments Filed Pursuant to Copyright Office Notice of Inquiry Relating to Section 1201(a)(1)

Dear Mr. Carson:

The Software & Information Industry Association ("SIIA") appreciates the opportunity to respond to the 235 public comments filed pursuant to the Notice of Inquiry published in the Federal Register of November 24, 1999. SIIA files the following reply comments on behalf of its members.

SIIA is the principal trade association of the software and information industry and represents over 1,400 high-tech companies that develop and market software and electronic content for business, education, consumers, the Internet, and entertainment. SIIA members represent a wide range of business and consumer interests. In particular, numerous SIIA members:

- create and develop new and valuable access-control technologies for use by others,
- use access-control technologies to protect their proprietary content, and
- purchase or license software and information products and other content and services that utilize access-control technologies.

Consequently, SIIA and our members are extremely interested in issues relating to the protection and use of access-control technologies and the relationship between the fair use of copyrighted content as it relates to the anti-circumvention provisions in section 1201(a)(1) of the Digital Millennium Copyright Act ("DMCA").

Because of the vast number of comments submitted and the fact that many of the comments make repetitive arguments, we organized and present our comments by subject matter.

The fact that we have chosen not to address each comment individually should not be construed to mean that we concur with any comment not directly or indirectly addressed below. If, after reviewing these comments, the Copyright Office[1] would like us to address particular comments or provide supplemental information, we would be pleased to provide such information in written form or during our testimony at the upcoming hearings.

Our reply comments begin with the more general comments and then address some of the specific concerns raised in the comments. In sum, we conclude that: (1) none of the 235 comments submitted, either individually or taken as a whole, provide sufficient concrete evidence to justify the creation of an exemption to section 1201(a)(1); and (2) many of the comments submitted relate to the potential impact caused by the prohibition on circumventing copy-control technologies in section 1201(b)—not the impact caused by the prohibition on circumventing access-control technologies in section 1201(a), which is the subject of this rulemaking.

## A. The burden is on proponents of an exemption and the proponents have failed to meet this burden

Several commentators contend that the burden of persuading the Copyright Office to exempt certain classes of works from the prohibition against circumventing an access-controlling technological measure is on proponents of the prohibition, *i.e.*, the copyright owner community.[2] These commentators are incorrect.

The legislative history makes clear that the burden of persuading the Copyright Office that a certain class of works should be exempt from the prohibition in section 1201(a)(1) is on those who seek to establish an exemption. For instance, the House Report states that the "prohibition is presumed to apply to any and all kinds of works" unless, and until, it is established that an exemption is necessary. H.R. Rep. No. 105-551, 2d sess., pt. 2, at 37 (1998).

The Notice of Inquiry confirms that the burden of persuading the Copyright Office that an exemption is necessary falls on those seeking the exemption. In the Notice of Inquiry, the Copyright Office states that:

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[1] Reference to the Copyright Office throughout these comments includes the Assistant Secretary for Communications and Information of the Department of Commerce, with whom the Copyright Office will consult, as well as the Librarian of Congress.

[2] *See* John C. Vaughn, Comments of the Association of American Universities, at page 5 (Feb. 17, 2000) (hereinafter "AAU Comments") (stating that "absent a *strong showing* that circumvention of access control technology will reduce incentives to create these works, per se civil and criminal liability for circumvention . . . should continue to be deferred.") (emphasis added); *see also* Miriam M. Nisbet, Comments of the Library Associations, at page 4 (Feb. 17, 2000) (hereinafter "Library Associations Comments"), (stating that "[t]he Libraries respectfully submit that the Librarian's responsibility is to resolve any uncertainty concerning the change of the "existing legal regime," i.e., fair use and other limitations, in favor of the preservation of the explicit limitations in law on the otherwise exclusive rights of the copyright holder. The rules that implement Section 1201(a) must place the *legal burden* of diminishing the vitality of these principles on those who would restrict the doctrines.") (emphasis added).

> [t]he requirements that proponents of an exemption demonstrate both causality and substantial adverse effects on noninfringing uses also apply to the determination whether users of works "are likely to be" affected adversely in the three years following the conclusion of the rulemaking. *Proponents who are unable to satisfy those burdens* in the current rulemaking will have the opportunity to *make their case* in each of the triennial proceedings that will succeed it.
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> Notice of Inquiry, 64 Fed. Reg. 66142 (Nov. 24, 1999) (*emphasis added*)

Not only is the burden on those who seek to establish an exemption, but this burden is a high one indeed. As the legislative history and the Notice of Inquiry make clear, those who seek to establish an exemption must provide the Copyright Office with ample evidence proving that the "prohibition has a substantial adverse effect on noninfringing use."[3] "Mere inconveniences, or individual cases" are insufficient.[4] Rather, proponents of an exemption must come forth with evidence that establishes "distinct, verifiable, and measurable impacts."[5]

Exemption proponents must also establish a causal connection between the alleged substantial adverse effects and the prohibition in section 1201(a)(1). If the adverse effects are caused by factors other than the section 1201(a)(1) prohibition, then the Copyright Office must disregard such effects.[6] This mandate is especially important given that the prohibition in section 1201(a)(1) has not yet gone into effect. It is impossible to understand how any of the alleged adverse impacts complained of in the comments can be caused by a provision that has yet to go into effect. In fact, because the prohibition has not yet become effective, to the extent that the alleged adverse impacts complained of in the comments are bona fide, they must have been caused by some factor other than the section 1201(a)(1) prohibition.

It is SIIA's view that none of the information in any of the 235 comments submitted to the Copyright Office comes even remotely close to meeting the high burden established by the law to create an exemption. The comments fail to provide "distinct, verifiable, and measurable impacts." Moreover, many of them are replete with conditional and provisional language and mere prognostications. For example, such conditional statements as "[d]ue to the persistent nature of advanced technological measures, fair usage *could* fall dramatically" and "digital materials *may* become inaccessible once a subscription expires" are found throughout the comments.[7]

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[3] Notice of Inquiry, 64 Fed. Reg. 66141 (Nov. 24, 1999)

[4] Staff of House Committee on the Judiciary, 105th Cong., Section-By-Section Analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4, 1998, 6 (Comm. Print 1998) (hereinafter " House Manager's Report").

[5] H.R. Rep. No. 105-551, 2d sess., pt. 2, at 37 (1998).

[6] House Manager's Report, at 6; Notice of Inquiry, 64 Fed. Reg. at 66141.

[7] *See* Library Associations Comments, at pages 12, 15 (emphasis added). There are numerous others examples are found throughout the Library Associations Comments and the comments of many others.

Furthermore, none of the comments establish a causal connection between the supposed adverse impacts and the prohibition. As noted above, this is hardly surprising, given that the prohibition has yet to become effective. SIIA, therefore, takes the view that the "evidence" provided in the comments is nothing more than "sky is falling" rhetoric which fails to satisfy the requisite legal burden for establishing an exemption.

B. The Fair Use Doctrine does not provide a right of "fair access" to copyrighted works and should not form the basis of an exemption

Several of the comments, indicated that the fair use exception, as codified in section 107 of the Copyright Act, was broad enough to allow hackers to circumvent access-control technological protections in order to make fair use of protected copyrighted content.[8] One commentator went so far as to suggest that there was a right of "fair access."[9]

"Fair use is an affirmative defense. As such, it is a privilege, not a right."[10] Fair use permits a party to *use* a copyrighted work in certain limited instances without the copyright owner's authorization and without compensating the copyright owner for such use.[11] It does not, however, allow a party to *access* a copyrighted work where that party does not otherwise have the authority to access that work. For example, as noted by another commentator, "a fair use defense might allow a user to quote a passage from a book but it does not follow that the user is allowed to break into a bookstore and steal a book" to do so.[12] Such an interpretation would run counter to the intent and purpose underlying various criminal and civil trespass laws, anti-hacking laws, and privacy laws.[13] More significantly, it would contravene the incentive

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[8] *See e.g*., Robin D. Gross, Comments of Electronic Frontier Foundation (Feb. 17, 2000) (hereinafter "EFF Comments"); AAU Comments; and Library Associations Comments.

[9] *See* Library Associations Comments, at page 30.

[10] William F. Patry, Copyright Law and Practice, Vol. 1, 725 (citing to *Campbell v. Acuff-Rose Music Inc.*, 114 S. Ct. 1164, 1177 (1994) and *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985)).

[11] 17 U.S.C. 107. (The use must be for "purposes such as criticism, comment, news reporting, teaching. . ., scholarship, or research." Whether a particular use may qualify as a fair use is decided on a case-by-case basis depending on: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.)

[12] Bernard Sorkin, Comments of Time-Warner Inc., at page 2 (Feb. 7, 2000).

[13] It is curious to note the conflicting viewpoint of the Library Associations on this matter. On the one hand, they suggest that the section 1201(a)(1) prohibition "will create a significant intrusion into privacy," (see page 9 of their comments) while on the other hand they fail to recognize that access-control technologies may be used by copyright owners to protect their privacy and the privacy of others. For instance, access-control technologies may be used by the owner of a database containing various items of personal information of others to protect against unauthorized access by a third party who intends to make illicit use of such information. Further, it is not to difficult to conceive of the prospect of a young girl using access-control technologies to protect her electronic (copyrightable) diary from

underlying the copyright law by compelling copyright owners to restrict or discontinue the distribution of their works to the general public.

SIIA supports the fair use doctrine. We recognize the important societal good as well as the public and private benefit that results from the use of copyrighted content in the course of teaching, news reporting, research, commentary, and criticism and encourage the uses of content for these purposes. While SIIA supports fair use, we believe that it is equally important that the fair use exception not be so broadly construed so as to adversely affect the rights of creators, artists, authors, and other entrepreneurs who create copyrighted content. When this occurs, the impetus for creation and dissemination of new works—the very purpose of the copyright law—becomes diluted.

Therefore, SIIA urges the Copyright Office not to validate the comments of the few commentators who seem to believe that there exists a right of "fair access" by establishing exemptions to the section 1201(a)(1) prohibition based on this premise. While we support the concept and appropriate application of the fair use exception, unduly broadening the fair use exception to the extent suggested by these comments would in essence sanction the activities of a hacker in "fair use clothing."

C. Many of the comments misconstrue the scope of the anti-circumvention prohibition in section 1201(a)(1)

Several of the comments displayed a lack of understanding of the scope of the anti-circumvention prohibition in section 1201(a)(1). In general, these comments: (1) failed to distinguish between the protections afforded by section 1201(b) and those in section 1201(a); (2) interpreted the scope of section 1201(a) too broadly so as to cover public domain and other noncopyrightable materials; and/or (3) failed to consider the existing exceptions in section 1201, such as those that exist for security testing and reverse engineering. SIIA provides its response to these comments below.

(i) Many of the comments fail to distinguish between section 1201(a)(1), which deals with *access* to copyrighted works and is the subject of this rulemaking, and section 1201(b), which deals with *use* of copyrighted works and is *not* the subject of this rulemaking

Many of the comments displayed a general lack of understanding of either the scope of the rulemaking and/or the scope of the section 1201(a)(1) prohibition. First, despite the fact that the rulemaking applies only to access-control technological protections covered by section 1201(a)(1), many commentators complained of adverse impacts on noninfringing uses that are allegedly caused by copy-control technological protections[14] covered by section 1201(b). Since

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the prying eyes of her brother. There can, therefore, be no doubt that protections against circumventing someone's access-control technological protections do much more to protect against intrusions into privacy than to create these intrusions.

copy-control technologies fall outside the scope of this rulemaking, we do not address the comments relating to such technologies.

Second, a few commentators displayed an apparent inability to distinguish between access-control technologies and copy-control technologies.[15] These commentators raised concerns that encryption technology could be used to "prevent use of a work even after copies of that work are distributed."[16] This statement (and statements like it) displays the common misconception that when a person lawfully possesses a copy of the medium, that person also lawfully possesses the right to access the work contained on that medium.

To address this misconception, it is important to understand the distinction among three separate rights that often work together. First, a copyright holder can grant a right to possess the media that contains a copyrighted work, *e.g.*, a CD-ROM, DVD or hard drive.[17] Second, a copyright holder can grant a separate right of access to that work, *e.g.*, by using encryption technology and the like to control access. Third, a copyright holder can grant specific use rights, controlled by technology that becomes effective once someone accesses the work, *e.g.*, read-only works that cannot be copied. The prohibition in section 1201(a)(1) applies only to those technologies that fall within the second category.

In sum, SIIA believes that, while the technologies are certainly complex and evolving, there is a clear line between those technologies that fall within the coverage of section 1201(a)(1) and those that do not. To the extent that any perceived adverse impact is allegedly caused by the prohibitions against circumventing technological measures used by copyright owners to protect their works from infringement, we urge the Copyright Office to ensure that it considers the impact caused by the prohibition against circumventing access-control technologies and not the impact caused by the prohibition against circumventing copy-control technologies, which is not the subject of this rulemaking.

(ii) Section 1201(a) does not affect public domain materials

Some commentators raised concern that the prohibition in section 1201(a)(1) would be extended to public domain material.[18] SIIA does not believe that this is a genuine concern.

The language in section 1201(a)(1) makes clear that the prohibition against circumvention of an access-control technology applies only where the content protected by such technology is a "work protected under [title 17]." Although access-control technologies may be

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[14] Use of the term "copy-control technologies" throughout these comments is intended to encompass technologies that allow the copyright owner to control copying as well as other types of uses that fall within its exclusive rights under section 106 of the Copyright Act, such as distribution and display.

[15] *See* AAU Comments, at page 4.

[16] *Id*.

[17] Where the first sale doctrine (17 U.S.C. 109) applies, a third party may also transfer possession of the media.

[18] *See* Comments submitted by Sean Standish and David Wagner.

used to prevent unauthorized access to non-copyrightable or public domain materials, the section 1201(a)(1) prohibition, by its terms, would not apply in these situations.

(iii) Section 1201(a) reflects carefully balanced exceptions to permit security testing and reverse engineering

Several commentators suggested that the prohibition in section 1201(a)(1) would prevent legitimate reverse engineering and security testing activities.[19] This is not the case because the anti-circumvention prohibition in section 1201(a)(1) is subject to numerous exceptions. First, section 1201(f) permits a person to circumvent the access-control technology in order to reverse engineer a computer program where that person has lawfully obtained the right to use a copy of that program and the sole purpose of the reverse engineering is to achieve interoperability with an independently created program.[20]

Second, section 1201(g) permits a person to circumvent encryption protection of a copyrighted published work where the circumvention is in the course of good faith encryption research.[21] Third, section 1201(j) allows authorized persons to engage in good faith security testing.[22]

These statutory exceptions are narrowly crafted and well balanced because they were the result of extensive negotiations, debates, and consultations between the interested parties and various officials in the executive and legislative branches of the government. Therefore, it is SIIA's position that no new exceptions for encryption research, security testing or reverse engineering are needed. Nor would revising existing exceptions in these areas be appropriate as it would upset the delicate balance achieved among the competing interests.

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[19] *See* comments submitted by Eric D. Scheirer and Leonard N. Fonar of the Massachusetts Institute of Technology, at page 4; John Drabik, at page 2; Association of Computing Machinery, at page 1.

[20] 17 U.S.C. 1201(f).

[21] 17 U.S.C. 1201(g) (the statute also sets forth certain other conditions that must be met to qualify for this exception). In addition, the statute also enumerates factors used to determine whether a person qualifies for the exemption, including: "whether the information derived from the encryption research was disseminated, and if so, whether it was disseminated in a manner reasonably calculated to advance the state of knowledge or development of encryption technology, versus whether it was disseminated in a manner that facilitates infringement under this title or a violation of applicable law other than this section, including a violation of privacy or breach of security;" "whether the person is engaged in a legitimate course of study, is employed, or is appropriately trained or experienced, in the field of encryption technology;" and "whether the person provides the copyright owner of the work to which the technological measure is applied with notice of the findings and documentation of the research, and the time when such notice is provided." *Id*.

[22] 17 U.S.C. 1201(j) (factors used to determining whether a person qualifies for the exemption include: "whether the information derived from the security testing was used solely to promote the security of the owner or operator of such computer, computer system or computer network, or shared directly with the developer of such computer, computer system, or computer network;" and "whether the information derived from the security testing was used or maintained in a manner that does not facilitate infringement under this title or a violation of applicable law other than this section, including a violation of privacy or breach of security.")

D. "Class of Works" should not be defined as all DVDs

The comments submitted by the Electronic Frontier Foundation ("EFF") suggest that the "class of works" for which an exemption should be created should be defined as all DVDs.[23] SIIA strongly disagrees with the EFF recommendation for several reasons.

Most importantly, EFF's recommendation that DVDs comprise a "class of works" runs counter to legislative history of the DMCA. In passing the DMCA, it was Congress' intent that "the 'particular class of copyrighted works' be a narrow and focused subset of the broad categories of works of authorship than [are] identified in Section 102 of the Copyright Act (17 U.S.C. 102)."[24] The EFF's recommended definition of class of works is neither a subset of the categories of works in section 102 nor is it narrow and focused, as required by the statute.

Furthermore, creating an exemption that applied to a particular medium, rather than a type or types of works, would likely accomplish nothing more than to create an incentive for copyright owners to use a competing medium by which to exploit their works—one for which the exemption does not apply. While audiovisual works are currently distributed on DVDs more so than any other works, because of the great benefits of DVD technology, several of our member companies are distributing their information products on DVD and many others in the software and information industries will likely be distributing their products on DVDs in the near future.[25] Exempting all DVD's from the section 1201(a)(1) prohibition could force these companies to reconsider their long-term plans to their detriment and the detriment of their customers. For these reasons SIIA asserts that it would be improper and inefficient to craft an exemption to section 1201(a)(1) that is applicable to all works embodied on a DVD.

E. An exemption is not necessary to allow lawful users to gain access to content where the owner of the content has gone out of business, to "fix a broken lock," or to modify the software.

Several commentators gave various reasons that they would need to circumvent the technological protections used to protect copyright software and information products. For example, Spectrum Software, Inc. suggested that "if a company goes out of business, there is no one to support the authorized customer when a hardware lock is damaged. . . ."[26] Similarly, the Computer & Communications Industry Association ("CCIA") suggested that "it is often

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[23] *See* EFF Comments, at page 4.

[24] H.R. Rep. No. 105-551, pt.2, at 38 (1998). See also House Manager's Report, at 7 (stating that the "class of works" is to be defined narrower than the categories of works in section 102(a) of the Copyright Act).

[25] *See e.g.*, Lisa Guernsey, "7 Dental Schools Stuff 4 Years' Worth of Books into 1 DVD," New York Times (Mar. 2, 2000) (stating that digital textbooks were not used earlier because of "technical limitations" and "fears of copyright infringement."); Jason M. Mahler, Comments of Computer & Communications Industry Association, at page 4 (stating that "at some point in the near future computer programs will be distributed on DVDs.") (hereinafter "CCIA Comments").

[26] Joseph V. Montoro, Comments of Spectrum Software, Inc., at page 3 (Feb. 16, 2000).

necessary to circumvent the security protection in order to perform the necessary modifications [in the underlying computer program] to prevent a network or computer shutdown or to prevent malfunctions in processing."[27]

While at first blush both these examples appear to justify the creation of an exception to section 1201(a)(1), in reality, however, there are real-life solutions to these problems that are easily implemented without the need to establish an exemption. For example, there are numerous third-party companies (several of which are members of SIIA) that offer to escrow software code in confidence. If consumers are concerned about having access to code due to irreparable damage to the access-control technology or the demise of the copyright owner's business, they can use these trusted third parties to escrow the software to ensure future access to the content if such an event were to occur.

Another option is to get the copyright owner or the manufacturer of the access-control technology to "fix" the technology. In the rare instance that a "fix" is necessary, this is often the solution presently used by software companies and their consumers.

In addition, it is also important to note that, under section 106(2) of the Copyright Act, the copyright owner of a computer program controls the right to modify the program. It follows, that a user may not make any modification to the program that implicates the copyright owner's rights under section 106(2) without the express authorization of the copyright owner or otherwise permitted by law.[28] Therefore, circumventing an access-control mechanism to access and modify a program is insufficient reasoning to justify an exemption.

F. An exemption for "Thin Copyright Works" and "Fair Use Works" is not appropriate

The American Association of Universities ("AAU") and, to a lesser extent, the Library Associations both recommend the creation of an exemption for so-called "thin-copyright works" and "fair use works."[29] The AAU defines "thin copyright works" as those that "are primarily valuable for the information they contain, not for the richness of their protected expression" and "fair use works" as those "that are central to education, science, and scholarly research."[30] These definitions are extremely broad and indefinite. Consequently, they do not comply with the congressional mandate (as described in section D above) that the class of works be a subset of the categories of works in section 102 and be narrow and focused.

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[27] CCIA Comments, at page 5.

[28] *See* 17 U.S.C. 117 (providing that an adaptation of a computer program may be made if the adaptation (1) " is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner," or (2) "is for archival purposes . . . .")

[29] *See* AAU Comments, at pages 2-4; Library Associations Comments, at pages 19-23.

[30] AAU Comments, at pages 3, 4.

Furthermore, the AAU provides no means to distinguish between works that qualify as "thin copyright works" or "fair use works" and works that do not. According to the AAU, to determine whether a work falls within either of the these so-called classes, a person must make a subjective evaluation about which works are "valuable for the information" or "central to education . . . ." Such subjective valuations are contrary to the very underpinnings of copyright law. Ever since the Supreme Court decision in Bleistein v. Donaldson Lithograph Co., 188 U.S. 239 (1903), almost a century ago, courts have eschewed making valuations of a work based on the quality or social utility of the work.

Despite this long held tenet of copyright law, the AAU now recommends that certain works become second class citizens under copyright law solely because of the nature of their audience. Such second class citizens would include databases, legal casebooks, scholarly journals, and newspapers. SIIA is gravely concerned that adoption of the AAU recommendation would sanction a new lower class of copyrighted works. This in turn might lead to a shortening of the term of protection or an elimination of some of the exclusive rights assured by section 106 for this so-called lower class of works. The Copyright Office and the Administration have consistently preached the nondiscriminatory treatment of all categories of copyrighted works at home and abroad. It would be unfortunate indeed if the Copyright Office were to back away from this long-held position by adopting the open-ended exemption for "thin copyright works" and "fair use works" proposed in the comments.

Adoption of a "thin copyright work" exemption or a "fair use works" exemption would adversely affect the availability of these works. Because databases and other fact-intensive works are not accorded the same level of protection by the courts as other types of copyrighted works, it is more imperative that section 1201(a)(1) protect access to these works without exemption (other than those already existing under section 1201).[31] Because of the more limited protections afforded by copyright to fact-intensive works, there is less of an incentive for their owners to widely disseminate these works (unless technological protections may be used and protected from circumvention). As a result, fact-intensive works, such as certain databases, will become less widely available, especially in electronic form, if these works are exempted from the section 1201(a)(1) prohibition.

## G. Limitations Placed on the Numbers of Concurrent Users Through Technology Do Not Justify Exempting Those Works That Use Such Technology

The Library Associations state that because "certain technological measures in works licensed or sold to libraries are programmed to deny access once a certain number of authorized users is reached" these measures have adversely impacted their ability to engage in teaching, scholarship and research.[32] The limitations on concurrent access fail to meet the substantial impact test set forth by the statute.[33]

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[31] While these works may not be afforded the same level of protection as other works by the courts, it is significant to note that there are no express exceptions or limitations in the Copyright Act that apply to these works, as has been suggested by AAU.

To the extent that there is any adverse impact resulting from a work being protected by technology that controls the number of concurrent users, this impact is insignificant and more than offset by the numerous benefits libraries and their users obtain from having greater access to these works. For works available in non-electronic form only, library users' access to such works is constrained by the library's storage space, its location, or its ability to obtain a work through inter-library loan. Thus, the number of non-electronic works that can be available by a library depends on criteria such as size of the library, the amount of money it has to spend on these works and, perhaps, the time it takes to obtain a copy of the work from another library. Because works made available to libraries in electronic form do not present the same space or time concerns raised by non-electronic copies, electronic copies of works are and will be more widely available to libraries and their users. Thus, while technological measures may impose certain limitations on concurrent access, these limitations pale in comparison to those libraries and their users have been and are currently subject to with regard to non-electronic copies of works.

The argument that limitations on concurrent access substantially and adversely affects one's ability to make noninfringing use of a work is of great concern to SIIA. Software and information companies routinely license their copyrighted products to consumers in ways that limit the number of concurrent users. Consumers often find this licensing option to be beneficial. If not, there are other licensing alternatives available to them. If, however, consumers were permitted to circumvent the technologies that allow such limitations on concurrent access—under the guise of fair use—the concurrent access licensing system would quickly become ineffective and obsolete. In its place, software and information companies would be forced to use other licensing alternatives, perhaps to the detriment of consumers of these products.[34]

It is also worth noting that any adverse impact from restrictions placed on concurrent access are frequently due to reasons other than the use of access-control technological measures. For example, in many cases, library users are unable to access an electronic work because the library has a limited number of devices or computers from which to access these works. In such a situation, allowing a library to circumvent the access-control technology will have no effect on the user's ultimate ability to access a copy of the work. The solution to this problem requires libraries to obtain more computers, not allowing them to circumvent access-control technologies.

Perhaps the easiest solution of all to the concurrent use issue is patience. If a user cannot access a particular work because too many other users are accessing the work at the same time or because the library does not have sufficient terminals to access the work, the user need only wait her turn. With such a simple solution available, we hardly think it tenable to create a concurrent

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[32] *See* Library Associations Comments, at page 32.

[33] The concurrent use argument espoused by the Library Associations amounts to nothing more than "mere inconveniences," which (according to the House Manager's Report) are insufficient to warrant the creation of exemption.

[34] For instance, one alternative to a concurrent use license is a network, unlimited use license. The increased flexibility afforded by this type of license often comes at a higher cost, however.

access exemption to the detriment of the creators providing the information in the first place and at the cost of the creators' incentive to provide the information in digital form.

H. Section 1201(a)(1) Does Not Prevent The Preservation and Archiving Of Works

The Library Associations recommend that "[a]s long as a user has had initial lawful access to a work, it should be permitted to re-access that work for fair use and other uses permitted under copyright law."[35] This recommendation is based on a perceived concern that access-control technology will prevent libraries from archiving or preserving works protected by such measures.[36] The American Association of Museums raised similar concerns in their comments.[37]

Although the comments present the archival and preservation issue as one that relates to the access-control technology prohibition, the issue actually relates to the copy-control technology prohibition. If an entity has "initial lawful access to a work" and desires to make a copy of it for preservation or archival purposes, to the extent the entity is prevented from making a copy for these purposes, it will be a result of copy-control technology protected under section 1201(b), not access-control technology protected under section 1201(a). Thus, the preservation and archival issue is actually one that falls outside the scope of this rulemaking.

Even if the Copyright Office were to conclude that this issue does fall within the gambit of this rulemaking, SIIA asserts that the commentators have failed to provide the requisite evidence to establish that an archival and preservation exemption to section 1201(a)(1) is necessary. In particular, the recommendations fail to consider that the works addressed by these comments may be licensed or otherwise obtained from the copyright owner.

One of the focuses of the rulemaking is on whether copyright content is available to persons who desire to make *noninfringing* uses of such content. Accordingly, if copies of a work are available for noninfringing use through a license, then there would be no reason to create a statutory exemption to section 1201(a)(1). We found no evidence in any of the comments that the commentators or the entities they represent were denied permission to license any works. In fact, the comments show just the opposite to be the case. They demonstrate that the commentators are able to license the materials.[38] We, therefore, find no justification for a so-called preservation or archival exemption.

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[35] Library Associations Comments, at page 26.

[36] *Id*.

[37] *See* Barry G. Szczesny, Comments of American Association of Museums, at page 3 (Feb. 17, 2000) (stating that "it is not difficult to imagine in the years to come that actions prohibited by the anticircumvention provision may be necessary to gain access to our cultural heritage.")

[38] It would appear from the comments that it is not the ability to license works that are of concern, but rather the terms and conditions of those licenses. Issues relating to terms and conditions of licenses are beyond the scope of this rulemaking. We urge the Copyright Office not to take any position that may adversely impact any parties freedom to contract.

Not only do many of our members license their products to libraries and other eleemosynary institutions, but they usually do so at significantly reduced rates and under relaxed terms and conditions. Moreover, in many circumstances several of our member companies will (upon request) provide libraries with access to their content even once their license expires or will offer their discontinued products to libraries so that the libraries may preserve and/or archive the products. If a so-called re-access exemption to section 1201(a)(1) were created, because of the potential risk of uncontrolled infringement, copyright owners might be hard-pressed to continue to offer these deals to these institutions.

Furthermore, because copyright owners will continue to use technology to control access to their works in order to prevent piracy, the existence or nonexistence of the proposed re-access exemption would have little effect on a library's ability to preserve or archive a work unless they invested their resources in obtaining the technological know how to circumvent the technologies. SIIA believes that libraries and other eleemosynary institutions ought to use their limited resources to providing their customers with the works they desire, rather than investing them in technology to circumvent access-control measures which protect works they can otherwise license.

## I. There Is No Justification For Deferring The Effective Date Of Section 1201(a)(1)

The AAU recommends that the effective date of section 1201(a) be deferred.[39] The AAU, however, provides no justification for the deferral. Instead they merely suggest that the effective date be deferred until copyright owners can make "a strong showing that circumvention will cause substantial loss to the affected copyright owners."[40] As stated in section A of these comments, the burden is on the proponents of an exemption to prove substantial impact, not on the copyright owners. Because this burden has not been met by any of the proponents, either individually or as a whole, there is no reason to defer implementation of the prohibition.

## Request to Testify

According to the Federal Register Notice, we understand that the Copyright Office will hold a hearing on May 2- 4 in Washington, D.C. and on May 18-19 in California to solicit comments on the subject of the rulemaking. SIIA hereby notifies the Copyright Office of its intent to testify at the hearings.

## Conclusion

In closing, we would once again like to thank the Copyright Office for giving us the opportunity to provide our reply comment. We would also like to take this opportunity to

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[39] *See* AAU Comments, at pages 2, 5.

[40] *Id*. at 2.

applaud the Copyright Office on its fine work in making all the comments available online and in doing so in such an efficient, organized and expedient manner.

Should the Copyright Office have any questions or concerns about the statements made in this letter, we would be pleased to expand upon them. We look forward to reviewing the reply comments online and to testifying at the upcoming hearings on this matter.

Respectfully submitted,

Ken Wasch
President
Software & Information Industry Association