Before the Copyright Office

Library of Congress

In the Matter of Rulemaking	)	
Exemption to Prohibition on	)	Docket No. RM 99-7A
Circumvention of Copyright Protection Systems	)	
For Access Control Technologies	)	

Response of the Library Associations to Comments

This filing is in response to comments to the Copyright Office's Notice of Rulemaking dated November 24, 1999 (the "Notice"). The Notice asks whether the Office should recommend that the Librarian of Congress establish an exemption to the anticircumvention measure contained in Section 1201(a) of the Copyright Act of 1976, 17 U.S.C. § 1201(a) (the "Act"), *as amended by* the Digital Millennium Copyright Act of 1998 ("DMCA"). This filing is submitted on behalf of five major library associations, the American Library Association, the American Association of Law Libraries, the Association of Research Libraries, the Medical Library Association, and the Special Libraries Association (the "Libraries").

A. The overwhelming preponderance of the filings supports a broad exemption to Section 1201 (a) restrictions.

A careful reading of the 235 initial comments filed in February 2000 reveals that institutions, associations and individuals alike express legitimate concerns that the statutory regime created by the DMCA will render ineffective many of the long-standing copyright statutory limitations. By way of example, without trying to be exhaustive in

the summary, and of course in addition to the examples in the Libraries' comments, we note the following filings:

175 National Digital Library Program, Library of Congress – recognizing the need for circumvention to support efforts at preservation of audio-visual archives.

235 Professors Appel and Felton, Princeton University – describing six compelling cases in which technological measures may adversely affect scholarship, teaching, research and education, thereby impeding non-infringing uses of copyrighted works.

161 Association of American Universities – stressing the harm caused by access controls over particular works, i.e. those defined as having "thin copyright" and those subject to "fair use." The adverse effects on education and learning outweigh the harm to owners if exemptions are not granted.

4 L. Peter Deutsch, President of Aladdin Enterprises – pointing to a specific program (Fontographer) that contains a bug that improperly executes the program, and noting that as the program creators have been unresponsive to complaints, users must circumvent to use the program effectively.

204 Electronic Frontier Foundation – underscoring the fact that technological measures "significantly reduce" the availability of works (especially movies) for archival, preservation and educational uses and "severely restrict" the ability of persons to engage in criticism, comment, news reporting, teaching, scholarship and research.

17 Daniel Hull, Computer Engineer at Purdue University – explaining the harm technological measures have on reverse engineering for interoperability and use in education and preservation.

32 National Association of Independent Schools – identifying the need for a broad exemption from the circumvention rules in order to maintain fair use of works for education uses.

B. The comments of the few who see no present or likely adverse effects from technological measures are among the strongest advocates of a strict licensing regime.

In the main, content owners have chosen not to come forward with comments in the initial stage of this proceeding. Among the few that did, Time-Warner, Sony, and the Motion Picture Association of America profess to be unaware of any negative impact that technological measures have had or could have on education, preservation activities and fair use. They view the controls as only salutary in the advancement of public interests. This attitude is fortified by current (and likely future) licensing structures that permit fees to be charged not simply for "access," but also for "usage," as was explained in the

As an illustration, Time-Warner's comments bypass a meaningful analysis of adverse effects. To Time-Warner:

> The technological and legal measures are intended to protect the copyrighted works against *unauthorized* uses. Anyone wanting to make "fair use" of a copyrighted work need only follow the same steps as he or she would in the absence of technological protections: buy or rent a copy, subscribe to a transmission thereof or borrow a copy from a library. (Time-Warner comments at 2, emphasis in the original.)

Time-Warner does not acknowledge that the limitations in the Copyright Act on the rights of owners involve legitimate uses *not otherwise authorized* by the owners. The very foundation of Sections 107, 108, and 110 of the Act, in particular, are that users do not require owners' consent to make non-infringing uses of the works. If the only way a person can make a non-licensed use of a work is to "borrow a copy from a library," and if the technological measures prevent that use, then no "fair use" can occur.

Time-Warner's representative pointedly states: "I am aware of no negative effects that use of technological access control measures has had on the availability of works for

nonprofit archival purposes." (Comments at 4.) In response, the Libraries would ask Time-Warner: What about an owner who chooses to archive selectively or not to archive at all? The Libraries' initial comments point out many such instances. How can the public record of digital works be maintained if libraries and archives cannot make archival copies? (See the Libraries' filing as well as the comments of the Library of Congress.) The appropriate solution is equally unequivocal: the Librarian should grant an appropriate exemption to circumvent in those cases where a library or archive seeks to carry out archival and preservation activities as allowed under Section 108.

C. Many of the responses express very specific concern about the DVD Content Scrambling System (CSS) encryption scheme that is the subject of current controversy.

A controversy that has welled up in recent months involves CSS and the effort of certain programmers who posted a decryption code on the Internet. Many of the participants in the initial round of comments addressed CSS in terms of reverse engineering and fair use concerns. We note especially in this regard the comments from the Massachusetts Institute of Technology and the Electronic Frontier Foundation ("EFF"). Although this controversy affects only one digital product, there are larger concerns and lessons that can be drawn from the comments. In particular, two points have emerged from the responses that have broader implications for the current study of Section 1201(a):

1. **There exists substantial vagueness and confusion about the meaning and extent of the application of Section 1201.** In particular, is CSS a technological measure? CSS does not prevent duplication of the encrypted contents of the DVD; the duplicate copy will play on any appropriate playback device. Rather, CSS limits the ability to play the DVD to specific playback devices for which manufacturers have paid a license fee.

2. **In using the CSS system to restrict the use of playback devices, the movie industry is essentially asserting a new right under copyright law and using Section 1201 to enforce that right.** The well-stated analysis in EFF's

comments may be generalized to other technological measures: persistent protection measures are and will continue to be used to enforce any number of usage restrictions which may not be copyright-holder rights, but which are potentially enforced under Section 1201 as if they were.

D. Parties on both sides of this regulatory debate acknowledge the vagueness of the statutory terms and, particularly, the difficulty of defining "a particular class of

The Libraries stated in the opening of our comments that Section 1201 of the DMCA has critical flaws, not the least of which is the vagueness of words and phrases crucial to a proper interpretation of the statute. Although advocates for a broad exemption from the impact of the Act struggled at the time to define qualifying classes of works, Time Warner stated in its comments:

> Assuming that some works are to be exempted from the circumvention prohibition (an assumption with which I do not agree*), I know of no way of defining "classes" of works for that purpose*. (Comments at 5, emphasis supplied.)

MPAA chose to "postpone" any discussion of classes of works, while stating a belief that no users of any classes of works are likely to be adversely affected. (MPAA comments at n.2 and 2.)

By contrast, the Libraries identified numerous classes of such works. So too did AAU ("thin copyright works" and "fair use works"). Many others, such as the thoughtful contributing professors from Princeton, offer examples of classes of works (in their case books, musical scores, musical works, videos, digitized texts and computer programs) that require relief if fair use is to maintain vibrancy in the digital era.

The Libraries expect that many owners, who sat out the initial stage of comments, will weigh in at this reply stage. We hope that there will be an opportunity to respond to what constitutes their initial comments both in public hearings and in a future round of commentary.

On behalf of:

American Library Association
American Association of Law Libraries
Association of Research Libraries
Medical Library Association
Special Libraries Association

Respectfully submitted,

Miriam M. Nisbet
Legislative Counsel
American Library Association