

March 31, 2000

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

By E-Mail: 1201@loc.gov

Dear Mr. Carson:

The National Archives and Records Administration (NARA) submits the following comments to the November 24, 1999 Notice of Inquiry on the Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies. Among NARA's vast holdings of federal records, presidential papers, materials, and records, and donated historical materials, a small, but significant, portion contain copyrighted materials.

NARA believes that exemptions from a prohibition on the circumvention of technological measures that control access to copyrighted works is essential for the effective preservation, processing, and availability of archival materials at the National Archives and similar institutions around the country. Accordingly, in response to questions 11, NARA believes that classes of works *should* "be defined, in part, based on whether the works are being used for nonprofit archival, preservation, and/or educational purposes."

The first step that NARA performs whenever it takes possession of records or donated materials in an electronic medium is to create a "preservation copy." Without an exemption from the prohibition on circumvention of technological measures, NARA would be unable to perform this most basic, and fundamental, archival function. Given the growing volume of electronic records being produced (with the copyright status sometimes being unclear), NARA would not be able to secure individual rights of access to make preservation copies and process the records.

Unless a record is specifically exempt from disclosure by statute, executive order, or the terms of a donor's deed of gift, NARA makes all of its archival holdings to researchers for inspection and copying. The fact that copyright rights may attach to a record does not generally limit the right of access to NARA's holdings. Rather, NARA informs the researchers that there may be restrictions on the use of the material and that the researcher has the responsibility to obtain appropriate permission.

In only one instance has Congress required that NARA impose somewhat more stringent requirements concerning public access to copyrighted works: i.e., the domestic release of material prepared for foreign distribution by or on behalf of the United States Information

Agency (now the Broadcast Board of Governors). Under 22 U.S.C. § 1461, the Archivist of the United States must “issue necessary regulations to ensure that persons seeking its release in the United States have secured and paid for necessary United States rights and licenses and that all costs associated with the provision of the material by the Archivist shall be paid by the persons seeking its release.” *Id.* sec. 1461(b)(3). The regulations at 36 C.F.R. § 1256.58(b) allow NARA to release these records when it obtains “a requester's signed certification in accordance with paragraph (b)(4) of this section that the materials sought will be used only for purposes permitted by the Copyright Act of 1976, as amended, including the fair use provisions of 17 U.S.C. 107. No copies of USIA audiovisual records will be provided until the fees authorized under part 1258 of this chapter have been paid to NARA.” Thus, even under these statutory restrictions, researchers may obtain access to copyrighted USIA materials under the fair use provisions of the Copyright Act.

NARA believes that its researchers must be able to have fair use access to all copyrighted materials. An exemption to the prohibition on the circumvention of technological measures that control access to copyrighted works is necessary to ensure that NARA and other archival and research institutions can engage in the full range of activities, from archival preservation and handling to researcher access.

Sincerely,

GARY M. STERN
General Counsel
National Archives and Records Administration