



Association of American Universities

Executive Vice President

March 31, 2000

Re: Docket No. RM 99-7, Exemption to Prohibition on
Circumvention of Access Control Technologies.

Dear Mr. Carson:

These reply comments on exemptions from the section 1201(a)(1) prohibition on circumvention of access control technologies are submitted on behalf of the Association of American Universities, the American Council on Education, and the National Association of State Universities and Land-Grant Colleges.

We understand that a number of copyright owner groups decided not to submit initial comments, relying instead on their ability to reply. We are disappointed with this approach, which we believe vitiates the process of public comment and reply established by the Copyright Office. We reserve the right to reply as appropriate during the post-hearing comment period.

We will comment here on three groups that did express opposition to a continuation of the section 1201 exemption: Time Warner, Sony Computer Entertainment, and MPAA.

Time Warner. Time Warner concedes (at 1) that the purpose of the section 1201(a)(1) exemption that is the subject of this rulemaking is “to ensure that the public would have continued ability to engage in non-infringing uses of copyrighted works, and to avail itself of the fair use defense.” The Register should ensure that this consideration is given paramount importance in her recommendations to the Librarian.

Thereafter, however, Time Warner invokes an “Open Sesame” argument about the potential damage caused if the 1201(a)(1) exemption is continued. That claim lacks credibility: section 1201(a)(1) is not now in force for any works, yet no damage has occurred. The central premise of Time Warner’s argument is that a defined extension of the section 1201(a)(1) exemption will mean that “it will be exceedingly difficult—if not impossible—to limit permitted circumvention to uses that are not infringing or defensible under the fair use doctrine as distinct from uses that are

neither.” (Time Warner at 3, see also 5, 6, 7.) Time Warner offers no reason why this should be “exceedingly difficult.” Liability for the act of circumvention under section 1201(a)(1) must, by definition, be determined on a case-by-case basis even if no exemption is provided. The act of circumvention takes place with respect to a particular work in a particular instance. Extension of the section 1201(a)(1) exemption will add only the question of whether the particular work at issue is within a class which has been exempted. More to the point, Time Warner ignores the fact that the section 1201(a)(2) prohibition against circumvention devices and services remains in full force and will provide protection against anyone who does engage in permitted circumvention and then attempts to proliferate the method used. Time Warner’s own experience using section 1201(a)(2) against DeCSS demonstrates the potent protection provided by that section.

Time Warner further argues (at 7) that defining classes of works is necessarily based on speculation and will result in overbroad exemptions. This contention is unhelpful and off point; Congress instructed the Librarian of Congress to identify classes of works. Moreover, identifying exempted classes would not in any way limit Time Warner’s copyright rights or even most of its section 1201 anti-circumvention rights. Perhaps Time Warner’s misunderstanding of the scope of this proceeding explains its opposition to the extension of the section 1201(a)(1) exemption.

Time Warner ignores the convergence of access control and use control technologies to argue (at 2) that once a user pays for access to a work, that person can make fair use of the work. However, many of the technologies that Time Warner is playing a leading role in advocating will allow the user to possess the work, but will also employ “access control” to preclude unpaid uses. The “steal a book” analogy invoked by Time Warner simply does not work in a world where a disc in the user’s possession is encrypted and can be viewed on a licensed player, but portions of that disc cannot be copied into a scholarly article or a class paper, incorporated into a database, or otherwise used for traditional educational and research purposes. Such lawful and desirable activities should not be curtailed. It is important that the Register, in her recommendations, distinguish between “access controls” that properly ensure lawful acquisition of works, and technological measures that improperly frustrate lawful *uses*.

Sony Computer Entertainment. The concerns raised by SCE appear to be fully addressed by sections 1201(a)(2) and 1201(b). Moreover, these concerns are far afield from the concerns of protecting copyrighted works against unlawful reproduction or distribution. SCE argues that circumvention prohibitions are needed to protect its ability to segment the market (ensuring that games are played only in the geographic region for which they are authorized) and to prevent competitors from selling. SCE also argues (at 2, and in response to A.2.) that its access control technology is needed to protect its trademark from allegedly inferior products produced by others. SCE appears to be transferring to section 1201(a)(1) the interpretation of the copyright law that the Ninth Circuit spurned in *Sony Computer Entertainment, Inc. v. Connectix Corp.*, 203 F.3d 596 (9th Cir.2000). The Court has rejected SCE’s claims both of copyright infringement and of trademark tarnishment. In light of *Connectix*, SCE’s real goal for section 1201(a)(1) appears to be to prevent competitors from producing new, original games that can play on the producer’s consoles, and to prevent competitors from producing their own consoles capable of playing the

game producer's access-controlled games. That is not the purpose of section 1201(a)(1).

SCE offers (and can offer) no support for its suggestion (at 2) that extension of the section 1201(a)(1) exemption would somehow violate U.S. treaty obligations. This proceeding is an important part of section 1201, which has been widely accepted by the international community as complying with all treaty obligations. Indeed, the WIPO treaties recognize the importance of preserving fair use in the digital environment.

Motion Picture Association of America. MPAA argues that the burden of persuasion rests with those who would extend the exemption from section 1201(a)(1) beyond October 28, 2000. Relying on this position, MPAA declines (at note 2) to offer any comments on particular "classes" of works. As expressed in our February 17, 2000 comments, we disagree with this formulaic abnegation of responsibility.

MPAA also offers a somewhat convoluted argument (at note 3) that the Register should consider the effect of the section 1201(a)(1) "prohibition," rather than the effect of access control measures, on users. Even if this argument were valid, it is not clear how the distinction would affect the Register's analysis of the relevant issues. Indeed, MPAA's focus on the prohibition appears to cut against its own argument that the Register should consider not only those unlicensed users who are restricted from making lawful uses of works, but also those licensed users who will be deprived of access to works in the future because those works will be withheld from the public. It is difficult to imagine that any copyright owner would refrain from publishing a work due to the presence of an exemption from section 1201(a)(1), given the other protections available for such technologies and works. MPAA not only acknowledges (at 2) that "copyright owners have used access control measures for many years, long predating the enactment of the [DMCA]," but has itself successfully used other provisions of section 1201(a) to protect the "crown jewels" of its members from DeCSS. In any event, the structure of section 1201(a) and the legislative history quoted in our initial comment letter make clear that this proceeding is properly focused on those users who are attempting to preserve fair use and their rights to use unprotected material that is otherwise locked inside an "access control" technology.

We urge the Register to recommend, and the Librarian to adopt, the approach set forth in our opening comment letter.

Sincerely,

A handwritten signature in black ink, appearing to read "John C. Vaughn". The signature is fluid and cursive, with the first name "John" being the most prominent part.

John C. Vaughn
Executive Vice President