February 20, 2003


David O. Carson
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P.O. Box 70400
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Washington, D.C.  22024-0400


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 51 public comments filed pursuant to the Notice of Inquiry published in the
Federal Register dated October 4, 2002.  SIIA files the following reply comments on behalf of
itself and its members.

SIIA is the principal trade association of the software and information industry and represents
over 600 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 seeking to protect their copyrighted software and content with such
  technologies,

- Use access-control technologies to protect their proprietary software and 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 noninfringing 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 many of the comments submitted to the Copyright Office recommend identical or similar classes of works be exempted and make related arguments in support of these classes, we: (i) organized our reply comments by general description of the classes recommended, (ii) identified which proposed class exemptions fall within this general class, and (iii) addressed related factual and legal arguments collectively. Where appropriate we individually addressed unique arguments found in a particular comment. The fact that we may 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 SIIA's 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 hearing(s).

In SIIA's reply comments, we reached the following conclusions:

- Most of the comments submitted, individually and taken as a whole, provide insufficient or incorrect factual evidence and legal arguments to justify the creation of an exemption to section 1201(a)(1).

- Before qualifying for any exemption, SIIA recommends that the following threshold requirements be satisfied:
    1. Any person or organization seeking to qualify for an exemption must have legal access to the work at time of circumvention.
    2. Any person or organization seeking to qualify for an exemption must notify the copyright owner and give the copyright owner an opportunity to cure the alleged problem, for instance, by providing a copy of the work in a form not protected by access-control technologies or fixing the problem with the access-control measure.
    3. There must not be a noninfringing work available in unprotected form that is equivalent to, or would serve as an adequate substitute for, a specific digital work that is protected by an access-control measure and would otherwise be subject to an exemption.

- A few comments submitted do appear to provide some degree of support for an exemption for a subset of the "malfunctioning, damaged, or obsolete" exemption that applies when damage results, or in the immediate future will result, to a work protected by the malfunctioning, damaged, or obsolete access-control measure;

- Given the pending litigation involving the filtering software exemption, SIIA neither supports nor opposes renewal of the exemption for another three years.

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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.

**Preliminary Comments Regarding the Proposed Exemptions**

As our detailed comments below discuss in more detail, we believe that the comments submitted to the Copyright Office, and the exemptions proposed by them, at best, justify narrowing the existing exemption for "malfunctioning, damaged or obsolete" access-control technologies, and possibly renewing the existing class exemption for filtering software.

Regardless of whether the Copyright Office agrees with the conclusions, factual evidence or legal arguments we present in our reply comments, we strongly urge the adoption of certain threshold requirements that would attach to any new and existing class exemptions codified into law as a result of this rulemaking process. These threshold requirements must be met by any individual or organization wishing to qualify for an exemption. These requirements serve the purpose of preventing misuse of an exemption by those whose intent is to pirate copyrighted works or to take advantage of other loopholes in the law, ensuring the efficient use of copyright owners' and users' resources, and circumscribing the exemptions so that they apply only as originally intended by the Copyright Office.

We recommend that, at a bare minimum, the threshold requirements include the following:

1.  <u>Any person or organization seeking to qualify for an exemption must have legal access to the work at time of circumvention</u>. Mere possession of a work should not be sufficient for an exemption to apply. The person or organization seeking to avail itself of the exemption must have legal access to the work at time of circumvention. To allow otherwise would harm numerous business models used by copyright owners today and in the future to get their products into the hands of their customers. For instance, many software and information companies make their products widely available to users, but access to the works is limited to those users who have a key (*e.g.*, password, product activation code etc.). To obtain this key the user must first license the product from the copyright owner. Allowing those who merely possess a copyrighted work to circumvent the access control attached to that work, would adversely affect these business models to the disadvantage of many users. Users would have more difficulty locating the products they need and licensing them on terms and conditions that benefit them. For instance, the software as a service model would likely not exist if anyone was allowed to circumvent the access-control measures that prevent nonlicensees from accessing the software. Similarly, allowing a person who had legal access at some point, but does not have legal access at the time of circumvention, would likely destroy other business models used to make copyrighted works available to consumers, such as pay-per-use and try-before-you-buy software.

2. <u>Any person or organization seeking to qualify for an exemption must notify the copyright owner and give the copyright owner the opportunity to cure the problem, for instance, by providing a copy of the work in a form not protected by access-control technologies or fixing the problem with the access-control measure.</u> When a user cannot access content she has legal access to, it is usually more efficient for that user to contact the copyright owner to remedy the problem, rather than taking it upon herself to circumvent the access-control measure. To promote commerce and efficient use of resources on the part of copyright owners and users, it is essential that users contact the copyright owner about the problem and give the copyright owner a reasonable period of time to cure the problem. In many cases, the copyright owner will be willing and able to adequately address the users' concerns. Frequently, users are unable to obtain the assistance necessary to access a protected work only when the company has gone out of business or is no longer willing or able to support the access control used on their products. In those two circumstances the user can easily meet the threshold requirement with little effort. By requiring users to contact the copyright owner, the Copyright Office would be promoting efficient use of resources, time and money by all the parties involved. Also, requiring that users contact the copyright owner and give the owner time to cure the problem, will ensure that the copyright owner is aware of the problem and can take steps to fix the problem. It will also give the copyright owner the opportunity to notify other users of the problem and provide them with the appropriate technical solution.

In its first rulemaking, the Copyright Office acknowledged that "circumvention is likely to be more difficult and time-consuming than obtaining assistance from a copyright owner who is responsive to the needs of customers."[2] As a result, users are "unlikely to circumvent the access controls unless they have first sought but failed to receive assistance from the copyright owner."[3] The Copyright Office assumes that the only persons attempting to circumvent the access-control measures are legitimate users. While legitimate users may often circumvent, so do those seeking to pirate the underlying work.[4] The distinction between the two groups is that the user will, as the Copyright Office suggests, more often than not contact the copyright owner for

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[2] Final Reg., 65 FR 64554, 65465

[3] *Id*.

[4] We understand that piratical use of a copyrighted work should not be able to qualify for an exemption in any event, because 1201(a)(1) exemptions are intended to apply only when the ensuing use is a noninfringing use. Nevertheless, because the exemptions that resulted from the first rulemaking did not include specific requirements that the ensuing use must be a noninfringing use and there were no threshold requirements, public perception of these exemptions is not narrowly restricted to noninfringing uses. SIIA has encountered numerous instances of pirates attempting to use one or more of the DMCA exemptions and/or 1201(a)(1) rulemaking exemptions to justify their copyright violations.

assistance. The pirate will not. Therefore, these two threshold requirements are an easy and efficient way for the Copyright Office to distinguish between those that should be able to qualify for the exemption and those that clearly should not.

3. <u>There must not be a noninfringing work available in unprotected form that is equivalent to, or would serve as an adequate substitute for, a specific digital work that is protected by an access-control measure and would otherwise be subject to an exemption.</u> The availability of a work in unprotected form ought to be a significant factor in determining whether an exemption should be permitted. We can think of no instance where a user would suffer the substantial adverse effects required to necessitate an exemption when that user has access to a noninfringing version of the work or its equivalent is legally available without the access-control measures. In general, neither increased cost nor delay in availability of the work rise to the level of substantial adverse effects. Nor do users have a right to have a work in a particular format or a right to access a work on a particular medium or with a particular device. The Copyright Office and the Courts have acknowledged these principles.[5] For instance, in its first rulemaking, the Copyright Office stated that the availability of a work in analog format is a significant factor in deciding whether to grant an exemption in the first place.[6] In the case of many databases and information-based literary works, the Copyright Office also has recognized that "most of the uncopyrightable material in [sic] databases can be found elsewhere, albeit not with the access and use-enhancing features provided by the copyrightable contributions."[7] Therefore, to the extent the work, its equivalent, or a reasonable substitute for the work is accessible, an exemption should not apply.

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[5] *See* results of first rulemaking at Final Reg., 65 FR 64554 and <u>Universal Studios v. Corley</u>, 273 F.3d 429 (2d Cir. 2001)

[6] "Any harm caused by the existence of access control measures … can be avoided by obtaining a copy of the work in analog format." Final Reg., 65 FR 64554, 65468 (citing to House Manager's Report)

[7] Final Reg., 65 FR 64554, 64567

**SIIA Response to Proposed Classes of Works to Be Exempted**

## I. General Description of Proposed Class

Literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage or obsoleteness (including lack of support); and literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage or obsoleteness which results in data loss or damage to archived materials.

### A. Specific Classes Proposed That Fall Within This General Class

*Comment 18:*   *Circumvention of Software - where the encryption needs to be circumvented due to unavailability of password(s) caused by absence, death, or termination.*

*Comment 23:*   *content created by a person or entity is no longer accessible [sic], rendering the data useless.*

*Comment 24:*   *Data archival mechanisms.*

*Comment 25:*   *Literary and audiovisual works embodied in software whose access control systems prohibit access to replicas of the works.*

*Comment 29:*   *Class #1: Those literary works, musical works and audiovisual works, for which a person has lawfully obtained a right of use, protected by access control mechanisms which include features, flaws or vulnerabilities that (a) expose (i) the works to be protected or (ii) other assets of the users of such measures--including computers, computers systems or computer networks or the data or other protected works used with them--to infringement, compromise, loss, destruction, fraud and other adverse actions or (b) permit the privacy of such users to be compromised.*

           *Class #2: Those literary works representing computer software programs and databases, for which a person has lawfully obtained a right of use, that operate to control access to works protected under the Copyright Act but contain features, flaws or vulnerabilities that (a) expose (i) the works to be protected or (ii) other assets of the users of such measures-- including computers, computers systems or computer networks or the data or other protected works used with them--to infringement, compromise, loss, destruction, fraud and other adverse actions or (b) permit the privacy of such users to be compromised.*

*Class #4: Literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage or obsoleteness.*

*Comment 30: Class #6: Literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage or obsoleteness.*

*Comment 32: Class #2: Literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage or obsoleteness.*

*Class #3: Literary works, including computer programs and databases, protected by access control mechanisms that are at high risk of failure in the near-term future because of malfunction, damage or obsoleteness. In order to invoke this case, the potential malfunction, damage, and/or failure must not be due to intentional damage meant to invoke this clause.*

*Class #5: Literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of the copyright owner and/or their designated agent fail to provide the necessary support means.*

*Comment 33: Class #1: Literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage or obsoleteness.*

## B.  SIIA Position

SIIA opposes in part the class exemptions identified above as proposed by Comments 18, 23-25, 29, 30, 32 and 33 and, in part requests clarification and correction of the exemption.

## C.  Summary of the Argument

None of the comments provide a factual basis or substantive legal arguments in support of the "malfunction, damage or obsoleteness" exemption.  These comments merely recommend that this class exemption be renewed absent evidence to the contrary.  In direct conflict with the requirements established by the Copyright Office, these comments fail to provide *any* justification for the Copyright Office to renew this exemption for another three years.  The burden of proving that an existing exemption should be renewed must be placed with those who are engaging in the activity for which an exemption is requested.  Since the only

comments that were filed merely make a perfunctory request that the "malfunction, damage or obsoleteness" exemption be renewed without providing any evidentiary or legal support whatsoever, the Copyright Office must reject the exemption for "malfunction, damage or obsoleteness."

Although there is no evidentiary or legal support for renewal of the "malfunction, damage or obsoleteness" exemption, there does appear to be at least some evidence that a subset of this class exemption should be renewed. Consequently, SIIA would not oppose the codification of an exemption for, "subject to the threshold conditions, literary works, including computer programs and databases, that the circumventer has legal access to but are protected by access control mechanisms that fail to permit such access because of malfunction, damage or obsoleteness which results, or in the immediate future will result, in damage to such works."

## D. Factual and Legal Support For Argument

Comments 29 (class 4), Comment 32, Comment 33 (class 1) provide no factual basis and no substantive legal arguments in support of the class exemptions proposed. These comments merely recommend that the exemption for "Literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage or obsoleteness" be extended "absent evidence that the problems which originally warranted the exemptions have been corrected."[8] As such, these comments fail to provide *any* justification for the Copyright Office to renew this exemption for another three years. This directly conflicts with the requirements established by the Copyright Office that "[t]here is a presumption that the [section 1201(a)(1)] prohibition will apply to any and all classes of works, including those as to which an exemption of applicability was previously in effect, unless a new showing is made that an exemption is warranted."[9]

The only factual basis or legal arguments that support an extension of the exemption are found in Comment 30. However, the factual basis and legal arguments made in Comment 30 identify only alleged problems with access-control technologies used for audiovisual works.[10] Comment 30 fails to provide any examples of access-control technologies used to protect literary works that fail to permit access because of malfunction, damage or obsoleteness. As such, Comment 30 fails to provide adequate (or for that matter any) justification for any

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[8] Comment 33, at page 5.

[9] Final Reg., 65 FR 64554, 654558 (stating that "prior exemptions will expire unless the case is made in the rulemaking proceeding that the prohibition has or will more likely than not have an adverse effect on noninfringing use.")

[10] As SIIA generally does not represent the interests of publishers of audiovisual works, SIIA makes no statements as to veracity or value of the audiovisual-related arguments proffered in Comment 30.

exception for malfunctioning, damaged or obsolete access-control technology applying to *literary works (including databases and software)*.

Finally, it is also worth noting that the main impetus for this exemption in the first rulemaking came from Spectrum Software, Inc., a company that, among other things, provides tools that allow those with legal access to certain software programs to circumvent the dongles that protect those programs. If there were a continued need for this exemption, one would expect that Software Spectrum and other companies with similar business models would have filed comments providing factual and legal support for the exemption. However, no such comments were filed. The only comments that were filed merely make a perfunctory request that the exemption be renewed.

Several of the comments suggest that the burden should fall on the opponents of the exemption to prove that the exemption should not be renewed. Specifically, one comment suggests that "absent evidence that the problems which originally warranted the exemptions have been corrected by the marketplace, it seems reasonable to presume that the adverse effects which were deemed likely to occur [during the three-year period] are no less likely to occur during the [following three-year period]."[11] We strongly disagree with this recommendation.

Placing the burden of proof on the opponents of an exemption would have the effect of creating a perpetual exemption. Under this scenario, the opponents of an exemption would have to prove something that they are not in a position to know. While the opponents of an exemption may have a general idea of who is taking advantage of an exemption, how many are taking advantage of an exemption, and what type of activity they are engaged in, often times they do not know this information at all or can only make rough estimates. There can be no doubt that the burden of proving the need for a new exemption or renewal of an existing exemption should fall squarely on those who are in the best position to provide evidence of the value and need for the exemption and the adverse effects that are likely to occur without one.

For example, Aladdin Knowledge Systems, Inc. is a software company and SIIA member who is affected by the "malfunction, damage or obsoleteness" exemption. There is no way for them to know precisely how many of their customers – or more significantly, non-customers -- contacted or used Spectrum Software or similar companies to circumvent their dongles and whether the need for the exemption still exists for these companies.

If there is an explicit requirement in the exemption that the copyright owner first be contacted by the circumventer (as suggested in the threshold requirements described above) then

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[11] Comment 33, at page 6.

copyright owners, like Aladdin, would perhaps have a better idea -- based on the number of requests it received to cure a malfunctioning, damaged or obsolete access control measure -- of the number of people wishing to take advantage of the exemption. Because the existing exemption includes no explicit requirement that the copyright owner be contacted first, there is no way for the copyright owner to know with any certainty whether anyone is availing themselves of this exemption.

The burden of proving that an existing exemption should be renewed is best placed with those who are engaging in the activity for which an exemption is requested. Doing so, ensures that: (1) those in the best position to have evidence to support the exemption (*i.e.*, those whose livelihoods and activities depend on the exemption) come forward with the evidence necessary to renew the exemption; and (2) the Copyright Office is not needlessly burdened by superfluous comments ritualistically filed by those who oppose an exemption merely stating that they are not aware of anyone who is availing themselves of the exemption.[12] Moreover, there is little danger of those who are taking advantage of the exemption being unaware of the rulemaking because the proponents of the exemption must be familiar with the Copyright Office's rulemaking process in order to have successfully argued the need for an exemption in the first place.

Although there is no evidentiary or legal support for renewal of the "malfunction, damage or obsoleteness" exemption, there does appear to be at least some evidence that a subset of this class exemption should be renewed. The subset is comprised of literary works, including computer programs and databases, that have been legally archived or preserved and are protected by access control mechanisms that fail to permit access because of malfunction, damage or obsoleteness which results, or in the immediate future will result, in damage to such works. This subset is a restatement of the class exemptions proposed by comments 23-25, 29 (classes 1 and 2), and 32 (class 5). While SIIA questions whether the proponents of this subset have actually met the regulatory requirements necessary to qualify for an exemption, we are willing to give these commentators the benefit of the doubt. Therefore, SIIA does not oppose the codification of an exemption for:

> *Subject to the threshold conditions,[13] literary works, including computer programs and databases, that the circumventer has legal access to but are protected by access control mechanisms that fail to permit such access because of malfunction, damage or obsoleteness which results, or in the immediate future will result, in damage to such works.*

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[12]  Instead these copyright owners can monitor comments filed with Copyright Office to determine whether there is a need to respond.

[13]  Reference to the "threshold conditions" here refers to the threshold conditions recommended by SIIA earlier in these comments.

Although SIIA does not oppose the above exemption, we are certainly concerned about its possible abuse. A mere belief that the works may be susceptible to damage should not be enough to qualify for the exemption. The circumventer must have tangible credible evidence that supports a good faith belief that imminent damage to the protected work(s) will occur. Otherwise, this exemption could be misused by pirates and hackers merely by claiming that circumvention was necessary because they *thought* the protected works are or will be damaged.

In addition, it is essential that the threshold conditions outlined by SIIA earlier in these comments be incorporated into this exemption. This is especially true for threshold condition two – which requires that "any person or organization seeking to qualify for an exemption must notify the copyright owner and give the copyright owner the opportunity to cure the problem." As noted above, this requirement will promote commerce and efficient use of resources on the part of copyright owners and users. It will also: (i) ensure that the copyright owner is aware of the problem and can take steps to fix the problem, and (ii) will give the copyright owner the opportunity to notify other users of the problem and provide them with the appropriate technical solution.

Lastly, it is important to recognize that an exemption to section 1201(a)(1) is not the only recourse for the proponents of the exemption. In the area of software, there are easy real-life solutions to the concerns alleged in Comments 23-25, 29 (classes 1 and 2), and 32 (class 5), that can greatly diminish their concerns. For example, there are numerous third-party companies that offer to escrow software code in confidence. If users are concerned about having access to code due to malfunction or irreparable damage to the access-control technology or due to 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. In formulating the scope of any exemption for malfunctioning, damaged or obsolete access-control measures that cause damage to the underlying work, these solutions ought to be taken into consideration and the exemption narrowly-tailored, as suggested above.

## II.    General Description of Proposed Class

Technology protection measures that control access to "thin copyright works," "fair use works," "per se educational works," works containing both copyrighted and noncopyrighted materials, public domain works, and works intended for open access.

## A. Specific Classes Proposed That Fall Within This General Class

*Comment 2:*    *Literary works, including computer programs and databases, protected by access control mechanisms in which the mechanism controls access both to copyrighted works and to works not under copyright.*

*Comment 14:*    *Class #1: Works in the Public Domain that have been distributed using access controls.*

*Comment 22:*    *Copyrighted content that the copyright holder consents to publish or distribute without payment. A slightly broader way to describe this class: copyrighted content for which the copyright holder consents to provide \*open access\*, when "open access" is defined as access permitting the unrestricted reading, downloading, copying, sharing, storing, printing, searching, linking, and crawling of some body of work.*

*Comment 28:*    *Class #1: "Per se Educational Fair Use Works" – This class of exempt works shall consist of the following subcategories of literary works, musical works, pictorial, graphic, and sculptural works, audiovisual works, and sound recordings: (a) scientific and social science databases, (b) textbooks, (c) scholarly journals, (d) academic monographs and treatises, (e) law reports, and (f) educational audiovisual works.*

*Class #2: "Fair Use Works" – This class is meant to be a more flexible version of proposed exemption no. 1 above. The exemption would apply to "any lawfully acquired copy or phonorecord including a copyrighted work falling within any category in section 102 that, due to its nature and the users who typically use it, is likely to be lawfully used in particular environments under the fair use doctrine. The exemption shall apply only to such users in connection with such fair use" (e.g., the exemption would protect a university professor who circumvents a lock on a lawfully acquired e-book to use a short excerpt in a classroom setting, but would no longer protect the professor from suit under section 1201 if the professor then posts the (unlocked) e-book on the public Internet).*

*Class #3: "Per se Educational Thin Copyright Works" – Thin Copyright Works are works that contain limited copyrightable subject matter, and which derive significant value from material in the public domain, such as facts, processes, ideas, or other elements that are beyond the scope of copyright protection. To satisfy concerns of vagueness, the Copyright Office should recommend a specific list of types of works that are subject to the exemption, i.e., a "per se" list. The list proposed herein is focused on those works most*

*often lawfully used in research and education. Thus, this class of exempt works consists of "particular subcategories within section 102 and 103, namely databases, histories, statistical reports, abstracts, encyclopedias, dictionaries, and newspapers."*

*Class #4: "Thin Copyright works" – This category consists of "works that contain limited copyrightable subject matter, and which derive significant value from material in the public domain, such as facts, processes, ideas, or other elements that are beyond the scope of copyright protection."*

## B.  SIIA Position

SIIA opposes the class exemptions identified above as proposed by Comments 2, 14 (class 1), 22 and 28.

## C.  Summary of the Argument

The proposed class exemption for public domain materials fails because section 1201(a)(1) clearly only applies to copyrighted works, not to public domain materials.  The proposed class exemption for works that contain public domain material should also be rejected because, in most of these works, it is not possible to circumvent the access-control technology to access only the public domain materials without also accessing the entire work.  Since many copyrighted works contain some elements that are in public domain, creating an exemption for works that contain public domain material would be subject to significant misuse.

The proposed class exemptions for "thin copyrighted works," "fair use works," "per se educational thin copyright work" and "per se educational fair use works" should be soundly rejected because these exemptions were rejected in the first rulemaking, and no new facts or legal arguments are proffered that would alter the analysis or decision rendered by the Copyright Office in the first rulemaking.  Also, because the recently-enacted TEACH Act creates an exemption that directly affects certain educational uses of copyrighted works protected by access-control measures, at the very least, it would be unwise to create any "per se educational" use exemption.

With regard to an exemption for open access products, SIIA is of the strong belief that the concerns raised in this comment can and are being adequately addressed by licenses for these open access products and by the fact that many (if not most) of these open access products are in the public domain and thus, not protected by 1201(a)(1).

## D.  Factual and Legal Support For Argument

SIIA opposes the class exemptions identified above as proposed by Comments 2, 14 (class 1), 22, and 28.  The most significant problem with these proposed exemptions is that they do not comply with the requirement that the class of works be a subset of the categories of works in section 102 and be narrow and focused.

Some comments raised concern that the prohibition in section 1201(a)(1) would be extended to public domain material.  There is no need to create an exemption to address the concerns raised in these comments because 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 used to prevent unauthorized access to works that are comprised entirely of non-copyrightable or public domain materials, the section 1201(a)(1) prohibition, by its terms, would not apply in these situations.

Contrary to the proposal in Comment 2, where a work protected by an access-control technology is not in the public domain, but contains elements that have fallen into the public domain, the prohibition in section 1201(a)(1) should be applicable to that work.  If not, persons would be able to pirate a literary work, motion picture, database or other work containing public domain materials under the guise that they were merely attempting to access the underlying public domain screenplay, data, or other public domain content.  In these cases, the works, the public domain elements contained in those works, and the access-control technology are inextricably linked.  One cannot circumvent the access-control technology without accessing the entire work, including those elements that are not in the public domain.

As to the recommendation in Comment 28, that an exemption be created for so-called "thin copyright works" or "fair use works" (whether they are tied to education or not), there is no factual or legal support provided in Comment 28 that would warrant the creation of either exemption.  Comment 28, filed by the Association of American Universities and others (hereinafter "AAU Comments"), relies almost entirely on the comments it filed in the first rulemaking three years ago.  The alleged factual and legal basis for these exemptions was rejected then and – in the absence of any new evidence -- should likewise be rejected today.

The most significant problem with an exemption for "thin copyright works" and "fair use works" is that there is no means to distinguish between works that qualify as "thin copyright works" or "fair use works" and works that do not.  Any distinction would necessarily be subjective in nature.  Moreover, because any work may be used for fair use purposes and there is no bright line test for determining whether a particular use is a fair use, the proposed class exemptions are fatally flawed.

Adoption of a "thin copyright work" exemption or a "fair use works" exemption would most certainly 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. 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.

Comment 28 also proposes "per se educational" subclasses of the "thin copyright work" and "fair use works" exemptions. These proposed class exemptions fail for the reasons noted above and the reasons stated in the Copyright Office's report from the last rulemaking. In addition, because the recently-enacted TEACH Act creates an exemption that directly affects certain educational uses of copyrighted works protected by access-control measures, at the very least, it would be unwise to create any "per se educational" use exemption.

Specifically, the TEACH Act provides that, under certain limited circumstances, an accredited nonprofit educational institution or governmental body may convert a portion of a copyrighted work from analog to digital. This limited exception applies only when: (1) there is no digital version of the work available to the educator, or (2) a digital version of the work is available to the educator, but the educator cannot use the material under the exception because of technological protection measures that attached to the work. Therefore, where the TEACH Act applies, qualifying educators do not need to circumvent an access-control measure because they are given a limited ability to legally digitize an analog work for the purpose on availing themselves of the TEACH Act exception. Because the AAU provides virtually no factual and legal support for the two "per se educational" class exemptions, the recent enactment of the TEACH Act adequately addresses all their concerns.

Finally, with regard to the proposed exemption for works intended for open access, which was suggested by Comment 22, SIIA is of the strong belief that the concerns raised in this comment can and are being adequately addressed by licenses for these open-access products. This belief is bolstered by the fact that in most cases the licensors of open access works have the same "open access" objectives as their licensees, and these objectives are reflected in the license agreements between the parties. It is also significant that many (if not most) of these open access products are in the public domain and thus, not protected by the section 1201(a)(1) prohibition.

### III.     General Description of Proposed Class

Tethering or any access-control measure that limits post-sale use.

### A.  Specific Classes Proposed That Fall Within This General Class

*Comment 13:*   *Electronic books (literary works, possibly also containing pictorial works in the form of illustrations, in electronic form).*

*Comment 20:*   *Class #1:  Literary works restricted by access controls that tether the work to a specific device or platform, thereby preventing a lawful possessor from using the work on an unsupported system in a non-infringing way.*

*Class #4:  Literary works restricted by access controls that limit lawful access to and post-sale uses of the work, where circumvention allows a lawful possessor to use the work in a non-infringing way.*

### B.  SIIA Position

SIIA opposes the class exemptions identified above as proposed by Comments 13 and 20.

### C.  Summary of the Argument

An exemption for tethering or access-control measures that limit post-sale use is unwarranted.  Because tethering technologies and business models that rely on such technologies are in their infancies and not yet widely implemented, creating an exemption at this early stage would destroy many new developing business models.  The Copyright Office should not dictate which technologies and models will succeed and which will not – as would be the case if the Copyright Office were to establish a tethering exemption.

The marketplace will ultimately control whether tethering technologies succeed in a consumer-friendly way.  In the coming months and years, as users become more educated and aware of their choices, businesses and technologies that do not effectively respond to consumer preferences and interests will simply fade away.  Products that incorporate tethering technologies are no exception to this rule.

There is no factual evidence or legal justification for an exemption for tethering or post-sale transfers.  Many of the alleged problems and concerns with tethering and post-sale transfers are presently being addressed by those software companies that use tethering.  Alleged problems for those who upgrade their computers, change operating systems or transfer software to another person are based on incorrect or incomplete information.  To the extent

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there is any basis to the concerns raised, the benefits in being able to curtail piracy greatly outweigh temporary glitches and inconveniences.

## D.  Factual and Legal Support For Argument

We urge the Copyright Office to approach the issue of tethering[14] with skepticism and caution.  Given the rapid change in technology and business models, it would be inappropriate for the Copyright Office to dictate which technologies and models will succeed and which will not.  Users benefit greatly from the use of tethering technology and other access-control technologies (see below).  The marketplace for access control technologies, such as tethering, is emerging with incredible speed, creativity and variety — a rush to create an exemption would only serve to sharply curtail the development of new tethering technologies and business models that rely on tethering technologies.  Moreover, the introduction of new tethering technology and associated business models should not be impeded by the adoption of an exemption that fails to take into account emerging capabilities.

The Copyright Office must not create an exemption for tethering or post-sale transfers.  It is much too early in the development of tethering technologies and the business models that rely on it.  The software and information industries need time to determine how best to implement the technology and users need time to understand and adapt to the technology and also to determine how they want to receive tethered content or software.  Creation of a tethering exemption would only short-circuit this development process.  The new economy and increased market complexity that drives the creation and distribution of software and information products requires caution in adopting policy solutions that may directly or indirectly choose the outcome of market evolution.  A tethering exemption will only serve to hinder electronic commerce and consumer benefits from new software and information products and services.

The history of the software industry demonstrates this evolution.  For example, about twenty years ago, anti-copying mechanisms were incorporated into software to protect against unauthorized copying of the software.  Eventually, consumers complained that such mechanisms made the software unduly difficult to use.  The industry listened to its customers and responded by discontinuing its use of anti-copying technologies incorporated into the software and seeking out other ways to protect against piracy of software.  As a result, many software companies moved to different distribution business models, such as site licenses and shrinkwrap licenses, and different technological protections, such as passwords, registration numbers, encryption and dongles, to protect their copyrighted software from piracy.  The

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[14]  As suggested by Comments 13 and 20, tethering refers to access-control technologies that restrict access to a work to a particular device.  These comments did not include within this definition tethering works to particular individuals, and therefore, we only address issues relating to tethering works to a device.

marketplace largely accepted these approaches and eventually, with the anticircumvention provisions (*e.g.*, 17 U.S.C. 1201) of the DMCA and related laws, Congress provided copyright owners with the tools for enforcing these marketplace solutions.

Fortunately for consumers, market dynamics and the law are already working to ensure that the business practices that have the best chance of long-term survival are those that balance convenience, price and consumer protections. In the coming months and years, as consumers become more educated and aware of their choices, businesses and technologies that do not effectively respond to consumer preferences and interests will simply fade away.

One need look no further than Comment 13 for evidence of market forces dictating the success or lack thereof of new tethering technologies. On page 3 of comment 13, Steve Pendergrast is quoted as saying they have twice as many encrypted eBooks as unencrypted eBooks, but the unencrypted eBooks still outsell the encrypted by a wide margin. He adds that "encrypted eBooks cause several times as many support issues as unencrypted (thus driving up labor costs) so profit margins are quite low on them." This helps prove the point that market forces will dictate the success or lack of success of tethered works. If copyright owners are not able to create encrypted eBooks that are protected by technologies that respond to consumer preferences, encrypted eBook will go the way of other so-called break through technologies.

The arguments in support of a tethering exemption made in Comments 13 and 20 fail to override these market and emerging technology considerations. Neither of the comments that propose class exemptions for tethered copyright works provide sufficient factual basis or substantive legal arguments to support the exemptions proposed. Both these comments also fail to cite to any actual examples of problems with tethered software. To the extent comments 13 or 20 provide any basis whatsoever that tethering prevents certain noninfringing uses, the problems cited relate to their concerns that section 109 of the copyright law (*i.e.*, the first sale exception) does not apply to downloaded copies, and not to concerns with section 1201(a)(1). In fact, the Copyright Office addressed these same concerns in its section 104 study and found tethering technology to be too nascent to recommend any changes to section 109 or 117 of the Copyright Act. The arguments against tethering found in Comments 13 and 20 merely recycle the same arguments that failed in the context of the section 104 study. The tethering technology and the market for tethered works has not changed substantially since the Copyright Office issued its 104 report to justify a change in policy on this issue.

Tethering technologies, such as product activation codes, are being used by several software companies to prevent piracy and control licensing of their products. Changes in technology over the past few years have made it much easier to illegally copy and distribute software and digital information products. The result of these changes is a shift in the business model of many software companies. Some have begun using product activation codes and other

technological protection systems on the medium by which the software is distributed, while others have migrated from traditional shrinkwrap products to the software as a service model.[15] These business models are not so different. The product activation business model tethers the software to a particular device, while the software as a service model tethers the software to a particular user. To accomplish this tethering both models use access-control technologies to ensure that only those that have legal access to the software can get legal access to the software.

The benefits to these companies in being able to curtail piracy and to users in being able to access works for lower prices and under more flexible licensing terms greatly outweighs the temporary problems and inconveniences experienced by some users of these products. With the popularity of certain software products, the copyright owners of these products strongly believe they need to take a different approach to better control the licensing and distribution of their software products. Previously, these companies were unable to do this in a way that was easy, secure, and unobtrusive for their customers. Improvements in technology are allowing them to introduce product activation in their software products in ways that are consumer friendly. Product activation ensures that the software is used in accordance with the license agreement that accompanies the software. The documented, factual problems and inconveniences experienced by end users can, will and are being addressed by those companies that use product activation codes.

Several notable software companies are using product activation technology today.[16] To the extent the concerns raised by Comments 13 and 20 are real, these companies are taking steps to address those concerns. For example, Comment 13 (page 1) alleges problems with transferring tethered works to a new machine. Similarly, Comment 20 (page 1) claims that tethered works creates problems for those who upgrade their computers or change operating systems. These arguments are simply not true. Users who purchase a new computer or hard disk, can contact the software company's technical support agents to get assistance in reinstalling and reactivating the program protected by the product activation code at no

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[15] In the Software as a Service model, the application, or service, is deployed from a centralized data center across a network – Internet or private network – providing access and use on a recurring fee basis. Users "rent," "subscribe to," "are assigned," or "are granted access to" the application from a central provider. Business models vary according to the level to which the software is streamlined, to lower price and increase efficiency, or value-added through customization and additional services to further improve digitized business processed."

[16] For informational purposes, we direct you to the Microsoft and Intuit websites at : http://www.microsoft.com/piracy/basics/activation/, http://www1.turbotaxsupport.com/servicesupport/default.asp?platform=0&formName=&pd=&fs=&ver=&sku=category1=&category1=&categoryid=119&DocID=212. These sites describe how their particular product activation codes work and how many of the problems complained of in Comments 13 and 20 are being addressed. Additional information on product activation codes can also be found at the Novell and Citrix websites at: http://www1.novell.com/products/activation/main.jsp and http://www.citrix.com/activate/login.asp.

additional cost. In addition, if the user reformats his hard disk or replaces his current operating system, in most cases reactivation will take place without that person needing to contact the software company at all.

Counter to the post-sale transfer arguments made in Comment 30, product activation technology does not prevent users from giving a tangible copy of the software to someone else. In fact, in many instances, a second user can install the software on his or her computer and then follow the simple instructions to pay by credit card to purchase a product license or use a trial version of that software. Moreover, certain software products that require product activation may be activated free of charge, allowing anyone to install the software on any computer without needing to purchase a product license.

Certainly, as with any first-generation technology, there may be some kinks in the technology that need to be worked out or education of users that needs to take place. However, more often than not these problems can be rectified by contacting the company directly about the problem. In addition, software companies presently using product activation technologies often proactively communicate the use of product activation to existing and potential customers: (1)·on the outside of the product box so that potential buyers are aware before they purchase the product; (2) in direct mail packages; (3) on their website; and (4) within the product itself, including the software license.

It is important to recognize that several software and information companies use product activation codes today, and numerous other companies intend to introduce product activation codes of their own in the coming years. By way of example, product activation codes are presently being, or may be used in the future, to: (1) ensure that academic version of software (which are sold to the educational community at a significant discount) are retained by the educational institutions that they were meant to benefit; (2) ensure that OEM[17] software is used only in connection with the hardware it was sold with, in compliance with the license agreement accompanying the software; (3) prevent piracy of large scale enterprise software; and (4) implement database interface authentication software (used to ensure privacy and prevent illegal access). Creating an exemption for tethering or post-sale transfers would destroy these business models before they have the opportunity to be successful and obtain wide consumer acceptance.

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[17] Original Equipment Manufacturer.

## IV. General Description of Proposed Class

Copyrighted works made available subject to license terms and conditions.

### A. Specific Classes Proposed That Fall Within This General Class

*Comment 3:*     *"[O]pen source" and "free" software and other works licensed under licenses such as the GNU GPL (General Public License).*

*Comment 30:*    *Class #4: Sound recordings, audiovisual works and literary works (including computer programs) protected by access control mechanisms employed by or at the request of the copyright holder which require, as a condition of gaining access, that the prospective user agree to contractual terms which restrict or limit any of the limitations on the exclusive rights of that copyright holder under the Copyright Act.*

                  *Class #5: Sound recordings, literary works (including computer programs and databases), and audiovisual works (including motion pictures), protected by access control mechanisms by or at the request of the copyright holder which require, as a condition precedent to granting access, that the user directly or indirectly disclose personally identifiable information to the copyright holder other than such information as is reasonably necessary to complete a bona fide business transaction.*

### B. SIIA Position

SIIA opposes the class exemptions identified above as proposed by Comments 3 and 30.

### C. Summary of the Argument

The licensing models discussed in the comments do not result in the section 1201(a)(1) prohibition having an adverse effect on substantial noninfringing uses of a particular class of works. The commentators fail to prove that they were unable to obtain access under a particular license or could not obtain access to the "restricted" material in some other way or place. Moreover, the alleged problems complained of in these comments have no bearing whatsoever on section 1201(a)(1), and therefore, must be disregarded.

The commentators who contest the legitimacy of shrinkwrap and click-through agreements point to the alleged adhesive nature of such agreements, and particularly those used in the mass market. However, these commentators fail to recognize that the chance that any contract term relating to a limitation on exceptions contained in the copyright law will be important enough to an average consumer to warrant prolonged study, or even cursory

review, is trivial. Consequently, broadly prohibiting all contractual limitations placed on the exceptions in the copyright law would do nothing but increase transactional costs that shrinkwrap and click-through agreements and GPLs are designed to reduce.

## D.  Factual and Legal Support For Argument

Comments 3 and 30 fail to meet the burden of proof necessary to establish an exemption. It is clear from these comments that the licensing models discussed do not result in the 1201(a)(1) prohibition having an adverse effect on substantial noninfringing use of a particular class of works.[18] Specifically, the commentators fail to prove that they were unable to obtain access under a particular license or could not obtain access to the "restricted" material in some other way or place. Moreover, the alleged problems complained of in these comments have no bearing whatsoever on section 1201(a)(1), and therefore, must be disregarded.

Users of software and information products will be able to take advantage of new technologies and business models only to the extent that the law does not inhibit the creation and use of new technologies and business models. If the law creates undue burdens on copyright owners that raise transactional costs, without producing any corresponding tangible benefits to users, in the end, only the users' interests will be harmed.

Licensing experts have suggested that if every consumer who purchased software in a retail outlet was met at the checkout register with a sign informing the consumer of the limitations that contract placed on the copyright law's exceptions, and asking the consumer to initial the card, the average consumer almost certainly would comply. Quite simply, the average consumer of software and informational products does not decide whether to buy a product or service based on what limitations on the exceptions in the copyright law are or are not contained in a contract. Rather, the consumer will ultimately decide whether to purchase a product or service based on factors such as price, compatibility, or brand loyalty.[19] Accordingly, broadly prohibiting all contractual limitations placed on the exceptions in the copyright law would result in the sorts of increased transactional costs that shrinkwrap and click-through agreements are designed to reduce.

Educated users wield so much more power today because of new technologies and business models that certain legal requirements, especially those relating to limitations found in shrinkwrap and click-through licenses and GPL's, may actually work to their disadvantage.

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[18] SIIA offers no view as to whether the licenses referenced in these comments violate privacy laws or state contract laws, as those matters are not relevant to these proceedings.

[19] *See* Maureen A. O'Rourke, Drawing the Boundary Between Copyright and Contract: Copyright Preemption if Software License Terms, 45 Duke L.J. 479, 516 (1995) (stating that it "is questionable whether the end user wishes to purchase anything more than the functionality that is obtained by running the object code.")

For example, the origins and the continued existence of the open source code movement is dependent upon the abilities of those who share their code with others to disclaim warranties. Because open source software is the product of hundreds, if not thousands, of developers contributing code, the risk of liability is extremely high. An individual developer would stop sharing code – and a distributor would cease supplying the result -- if she thought she could be sued and held liable for any and all faults. Bruce Perens, an OSI advocate, was quoted as saying "[i]f free software authors lose the right to disclaim all warranties and find themselves getting sued over the performance of the programs they've written, they'll stop contributing free software to the world."[20] This is just one case where the ability to limit certain abilities of an end user benefits these users. Similar reasoning can be applied to those software publishers who believe in the need to contractually prohibit reverse engineering or circumvention of their access controls.

SIIA supports the principle that freedom of contract must be preserved. Many who contest the legitimacy of shrinkwrap and click-through agreements point to the alleged adhesive nature of such agreements, and particularly those used in the mass market, but fail to recognize that the chance that any term contained in these agreements will be important enough to an average consumer to warrant prolonged study, or even cursory review, is trivial. It is therefore clear that it is inappropriate to create an exemption under section 1201(a)(1) for these agreements, particularly where doctrines such as unconscionability, unfair surprise and other consumer protections exist to police abuse.


## V. General Description of Proposed Class

Copyrighted works employing "original-only" access controls.

### A. Specific Classes Proposed That Fall Within This General Class

*Comment 25: Literary and audiovisual works embodied in software whose access control systems prohibit access to replicas of the works.*

### B. SIIA Position

SIIA opposes the class exemption identified above as proposed by Comment 25.

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[20] *See* "Open Sources: Voices from the Open Source Revolution" (1999) and
http://www.theregister.co.uk/content/4/26564.html

## C. Summary of the Argument

The class exemption for so-called "original-only" access proposed by the Internet Archives (Comment 25) fails to provide the factual basis and the legal arguments that support an exemption. The proposed class exemption must be rejected because it is not limited to a particular category of works or a subset of categories of works and because the benefits to copyright owners and to users of works employing "original-only" access controls far outweigh any shortcomings resulting from use of "original-only" access technologies.

The Internet Archives attempts to provide a couple of examples of alleged adverse effects caused by the section 1201(a)(1) prohibition. One alleged problem relates to the difficulty of archiving the works contained on CD-ROMs and floppy disks "donated" by Macromedia. The other deals with archiving of J.D. Salinger letters on CD-ROM. Both these example suffer from numerous factual and legal errors, as outlined in detail below.

## D. Factual and Legal Support For Argument

At first blush, Comment 25, submitted by the Internet Archives, raises some potentially plausible arguments in support of an exemption for works employing "original-only" access controls. However, upon further scrutiny and investigation into the so-called factual basis used by Comment 25 to justify this exemption, it becomes clear that the Internet Archives' comment fails to provide both the factual basis and the legal arguments that would support such an exemption.

The first problem with the class exemption proposed by the Internet Archives is that it is not limited to a particular category of works or a subset of categories of works. Since "original-only" access control measures can be used to protect literary works, motion pictures, sound recordings and other copyrighted works, this class fails the requirement that the proposed exemption be limited to a class of works.

This class also fails because the benefits to copyright owners and to users of works employing "original-only" access controls far outweigh any shortcomings resulting from use of original-only access technologies. There are many good reasons for using "original-only" access protection. Publishers often use "original-only" access technologies to ensure that publication of a work is limited to a specified group or audience. For instance, a publisher may donate a work to a university, library or charitable or religious organization for that organization's use, and employs "original-only" access technologies to ensure that access to the work is limited to that organization. Other examples of beneficial uses of "original-only" access technologies on copyrighted works include: (1) beta testing software to ensure that the software is not widely distributed or distributed to non-beta testers; (2) ensuring that academic versions of software are retained by the educational community the software is meant to serve; (3) personalizing different versions of a work for different individuals or

organizations; (4) protecting privacy of individuals identified in a copyrighted work (such as certain medical records); (5) protecting a trade secret contained in a copyrighted work; or (6) enforcing contract terms.

The Internet Archives attempts to provide a couple of examples of alleged adverse effects caused by the section 1201(a)(1) prohibition. One alleged problem relates to the difficulty of archiving the works contained on CD-ROMs and floppy disks donated by Macromedia. It should be pointed out that Macromedia does not own the works it allegedly "donated" and thus, has no authority to donate the works or to authorize anyone to reproduce or distribute the works. In fact, the Internet Archives website makes this clear:

> Macromedia and the Internet Archive are working together to provide an online catalog of the names, titles, publishers, and release dates of more than 10,000 CD-ROM titles developed with Macromedia products and published under the Made with Macromedia program. These titles are not available for download, except when an individual developer or publisher has expressly granted permission to the Internet Archive. Should you wish to make your title available for download, please contact info@archive.org.

The Macromedia CD-ROM Forum found on the Internet Archives website clarifies the relationship further:

> I work with the Internet Archive, and I would like to correct some confusion. Short answer: people can not download the CDROM contents from the Internet Archive. There are 5 that are available because the Internet Archive got permission from the rights holder.
>
> *Our statement that Macromedia donated 10,000 CDROMs is incorrect. What Macromedia graciously did was to let us use their catalog of the CDROMs sent to them through the Made With Macromedia program. They [sic] also let our staff examine the CDROM's so that we can ensure the catalog is correct and facilitate contacting rightsholders to see if they would be interested in access to their materials.*[21] (emphasis added)

After searching the Internet Archives website based on the limited information provided in their comments, it would appear that the Internet Archives does in fact provide access to the materials on the Macromedia disks:

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[21] http://www.archive.org/iathreads/post-view.php?id=4171

- Guide to the Berkshires found at:
  http://www.archive.org/cdroms/cdroms-details-db.php?collection=macromedia&collectionid=2145
- Totem Pole Guide found at:
  http://www.archive.org/cdroms/cdroms-details-db.php?collection=macromedia&collectionid=6964
- Might Morphin Power Rangers found at:
  http://www.archive.org/cdroms/cdroms-details-db.php?collection=macromedia&collectionid=4952
  and http://www.archive.org/cdroms/cdroms-details-db.php?collection=macromedia&collectionid=6721
- "I Spy Spooky Mansion" found at:
  http://www.archive.org/cdroms/cdroms-details-db.php?collection=macromedia&collectionid=00006

Since the Archives' website provides the copyright owner's name and contact information, any user of the site can easily contact the copyright owner to request a copy of the works on the Macromedia disk.

There are numerous other problems with this example. First, this website fails to meet several of the requirements necessary to qualify for the archiving exception under section 108 or the back-up copy exception under section 117 of the Copyright Act. The Archives clearly fails to meet the requirements of section 108(a)(3), (b), (c), (d), (e), or (g). Specifically, with regard to 108(a)(3), we could not find any reference to section 108 anywhere on the Internet Archives' website (with the exception of the copy of the Copyright Act found in the Archives). Section 117 does not apply since the works at issue are (according to the Internet Archives) "literary and audiovisual works," not computer programs. However, even if section 117 did apply, as the Copyright Office recognized in its section 104 study: the impact of section 1201(a)(1) on section 117 "appears to be minimal, since licenses generally define the scope of permissible archiving of software, and the use of CD-ROM reduces the need to make backup copies."

Second, and most alarmingly, the site provides free, unimpeded downloads of many of the materials found on the website. Thus, if the works on the Macromedia CDs and disks were not protected by "original-only" access controls, the Internet Archives would have presumably made them available for anyone to freely download, in clear violation of the copyright owner's rights in those works.

Third, in complete contradiction to the Internet Archives arguments about being unable to verify what is on the disks, they admit on their Macromedia CD-ROM forum that "[Macromedia] also let our staff examine the CDROM's so that we can ensure the catalog is

correct and facilitate contacting rightsholders to see if they would be interested in access to their materials."

The Internet Archives also cites the fabricated example of a CD-ROM containing J.D. Salinger letters that is protected by "original-only" access controls and was donated to the Archives. They complain that, unlike the analog world, "archives cannot use donations from legitimate owners of works who do not also hold their copyrights." Contrary to their comments, however, the Internet Archives does not distinguish between archival of analog and digital works. One need look no further than the terms and conditions on the Internet Archives website to prove this point. These terms and conditions specify that:

> While we collect publicly available Internet documents, sometimes authors and publishers express a desire for their documents not to be included in the Collections (by tagging a file for robot exclusion or by contacting us or the original crawler group). *If the author or publisher of some part of the Archive does not want his or her work in our Collections, then we may remove that portion of the Collections without notice….* (emphasis added)

> The Internet Archive respects the intellectual property rights and other proprietary rights of others. *The Internet Archive may, in appropriate circumstances and at its discretion, remove certain content or disable access to content that appears to infringe the copyright or other intellectual property rights of others.* (emphasis added)

According to its own terms and conditions, regardless of whether a work is in analog or digital form, the copyright owner of that work need only request that the Internet Archives prevent access to the work and the work will be removed. Consequently, if the Salinger letters were donated by someone other than Salinger (the copyright owner), these letters would be removed by the Internet Archives upon Salinger's (or his successor's) request – regardless of whether those letters were contained on CD-ROM or paper. In sum, access to the Salinger letters or any other work via the Internet Archives website depends, not on the form of the work or any technological protections that attached to the work, but on the basic tenet of copyright law that requires authorization from the copyright owner to reproduce, distribute or publicly display a work.

Lastly, it is worth noting that the Salinger example is entirely fictitious and the issues raised, to the extent there are any, relate more to the archiving of unpublished works as opposed to published works than issues relating to the use of access control protection measures.

In conclusion, the Internet Archives has failed to provide any factual basis or legal arguments to support their proposed class exemption. Therefore, the Internet Archives class exemption must be rejected.

## VI.   General Description of Proposed Class

Literary works protected by access-control measures that fail to permit access via text-to-speech or text-to-Braille device by an otherwise authorized person with a visual or print disability.

### A.  Specific Classes Proposed That Fall Within This General Class

*Comment 9:*   *Literary and Educational text contained in ebooks.*

*Comment 13:*   *Electronic books (literary works, possibly also containing pictorial works in the form of illustrations, in electronic form).*

*Comment 26:*   *The American Foundation for the Blind proposes an exemption for the class of works defined as "literary." We propose this exemption because currently deployed anti-copy technology does not support fair use of this class of works intended by Congress.*

*Comment 33:*   *Class #2:  Literary works, including eBooks, which are protected by technological measures that fail to permit access, via a 'screen reader' or similar text-to-speech or text-to-braille device, by an otherwise authorized person with a visual or print disability."*

### B.  SIIA Position

SIIA opposes the class exemptions identified above as proposed by Comments 9, 13, 26 and 33.

### C.  Summary of the Argument

Many of the comments raise concerns that fall squarely outside the scope of this rulemaking because they deal with interoperability issues or issues relating to use rather than access. Because many of the concerns raised relate to technological measures that protect against illegal *performance* of a work and section 1201(a)(1) only applies to circumvention of technological measures that protect against illegal *access* (not performance), these concerns likewise fall outside the scope of this rulemaking and must be disregarded.

To the extent the comments address issues relevant to section 1201(a)(1), they focus not on bottom-line access to works, but on cost, inconvenience, and timeliness issues relating to access.  Contrary to the comments submitted, there is no right to obtain access to a copyrighted work or to obtain access when and how you want it.  If a copyrighted work is

available in a form accessible to the blind and visually impaired– whether in Braille, audio or other assistive format -- then that form should generally suffice for purposes of this rulemaking.  As a result, these comments fail to allege substantial adverse effects necessary to support an exemption.

## D.  Factual and Legal Support For Argument

The class exemptions proposed by Comments 9, 13, 26 and 33 are much too broad to justify codification into an exemption.  Many of the comments raise concerns that fall outside the scope of this rulemaking because they deal with interoperability issues, issues relating to use (rather than access), or issues relating to circumvention tools (rather than acts of circumvention).  To the extent the comments address issues relevant to section 1201(a)(1), they focus not on bottom-line access to works, but on cost, inconvenience, and timeliness issues relating to access.  As a result, these comments fail to allege the substantial adverse effects and do not meet the burden of proof required to establish the need for an exemption.

Several of the comments point to a more systematic issue – beyond the scope of this rulemaking – relating to the interoperability of IT products (including software) and assistive technologies.  The assistive technology issue is particularly problematic, as there are many different assistive technology products operating using disparate operating systems on the market.  Electronic and information technology (EIT) products are normally designed to operate within a specific operating system environment.  From this perspective, any limitation imposed by anti-circumvention devices may not be the source of the frustration.

SIIA and SIIA member companies support efforts to improve accessibility to software and electronic content for blind and visually impaired individuals.  A number of industry-supported standards efforts are ongoing to enable these works to be both directly accessible as well as interoperable with assistive technology devices.  Exempting classes of works for the blind and visually impaired will disrupt these ongoing standards efforts.

Exempting these classes will also adversely affect businesses and emerging technologies that serve the blind and visually impaired community.  The market for digital works suitable for blind and visually impaired individuals is still in its nascent stages.  Time is needed for the market for these works to develop and for market forces to determine how these works will be delivered to their customers.  Time is also needed for the blind and visually impaired community to educate itself and choose how it wants these works to be delivered.

There is no shortage of businesses, based on different models and offering a variety of technologies, competing for this market.  Significantly, none of the comments allege that copyright owners have not cooperated with requests from the blind and visually impaired community or that the exception in section 121 of the Copyright Act does not fully address their needs.  Accordingly, SIIA strongly believes that market forces, rather than regulation by

a Government body, such as the Copyright Office, presents a better approach for resolving any issues raised by these comments. Any action by the Copyright Office here could have significant and long-term adverse effects on the market for works suitable for the blind and visually impaired.

Comment 13 (top of page 2) argues that an exemption is necessary to allow researchers who use programs to do textual analysis to create concordances or to analyze similarities between works to determine which writers influenced or plagiarized each other. At the bottom of page 2 though, this commentator acknowledges that researchers wishing to do textual analysis can still do the analysis by hand. As an Association that promotes technological innovation, we can certainly see the great advantages to having a technological solution that makes life easier for users. While we appreciate the arguments here, we do not agree that the arguments justify a class exemption, and certainly do not justify a class exemption as broad as "Electronic books (literary works, possibly also containing pictorial works in the form of illustrations, in electronic form)." SIIA believes that (so long as the Copyright Office does not codify the requested exemption) businesses and technology will develop to address the issues raised by Comment 13.

Comment 26 (page 5) states that "[n]owhere do the Amazon pages state that this content is only for sighted readers." While we do not doubt that this may be a problem for the blind and visually impaired, it is not one that falls within the ambit of this rulemaking. The same is true for the complaints of the content being "very costly" on page 6. Both of these concerns are entirely unrelated to the section 1201(a)(1) prohibition and must be disregarded.

With regard to the arguments made by Comment 33, many of the noted problems relate to technological measures that protect a *right* of a copyright owner -- often referred to as copy-control technologies. The right implicated in the examples provided in Comment 33 is the copyright owner's performance right. Section 1201(a)(1) does not apply to acts of circumventing so-called copy-control technologies. Therefore, many of the concerns raised by Comment 33 fall outside the scope of this rulemaking and must be disregarded.

Even if the Copyright Office disagrees with SIIA and concludes that the problems are related to access-control technologies, we strongly believe that the potential harms caused by circumventing these technological measures will far outweigh any adverse effects on the blind and visually impaired community. For example, as recognized by Comment 33, at page 9, "[i]n many instances, the author or publisher of a copyrighted work sells the right to produce and distribute an audio version of that work apart from the right to produce a print eBook version" Therefore, if an exemption were created to allow for circumvention, such an exemption could injure a market for copyright owners who license the right to produce audio versions.

Comment 33 (page 8) also argues that the need for an exemption is justified by the need for "right off the shelf access." Specifically, they argue (on page 11) that "it often takes many months for a work to be made available in such a [audio or Braille] format. These delays present particular difficulty for students." We recognize the concerns of blind and visually impaired students in timely obtaining copyrightable works in suitable form, however, this does not justify an exemption to ensure immediate access or to ensure that they are able to obtain a work in any format they desire or that is most convenient. If the work is available in a form accessible to the blind and visually impaired– whether in Braille, audio or other assistive format -- then that form should suffice for the purposes of this rulemaking.

We reiterate that we are working to address the unique concerns of the blind and visually impaired and the challenges that accompany software and electronic content developed for educational purposes. However, we believe that the section 1201(a)(1) exemption is not the proper means for addressing these remaining concerns. SIIA and its member publishers are working to support more convenient and timely access of content in alternative formats for their blind and visually-impaired customers that we hope will fully address and alleviate the concerns relating to timely access raised in these comments.

SIIA notes, and in fact Comment 33 also recognizes, that there are potential alternative solutions to many of concerns raised here. For example, Comment 33 describes the launching of Bookshare.org, a not-for-profit organization which aims to provide shared access to scanned books. Like many new ventures Bookshare.org still needs to work out some technical glitches, such as those caused when the character recognition technology they use does not correctly translate complex characters. This argues for giving Bookshare.org and others more time to develop appropriate standards and technologies, rather than creating an exemption that may have the effect of destroying their market entirely and ultimately making it more difficult for those without technical savvy to disable access-control technologies to gain access to software and electronic content. Also, there is little reason to believe that Bookshare.org's technology might not be comparable to text-to-speech synthesizers or readers. It is essential that the Copyright Office give these relatively new ventures, standards efforts, and associated technologies time to develop, and not create an overbroad exemption that will destroy them.

An exemption could also have a significant adverse effect on the market for audio books. Although there is certainly a difference between the current technology for synthetic speech sounds and the human readings used in audio books, the two compete with each other now as they provide the same content in the same format. Continued improvement in the quality of synthetic speech will make the competition even more direct. The creation of an exemption now could put publishers of audio works at a significant disadvantage.

Lastly, and very significantly, many of these issues and others mentioned by Comment 33 are presently being discussed by the Open Electronic Book Forum (OeBF). It would be unwise

to preempt that discussion by establishing a broad exemption to section 1201(a)(1) for eBooks directed at the blind and visually impaired.

## VII.    General Description of Proposed Class

Works implementing access control measure that contain security flaws.

### A.  Specific Classes Proposed That Fall Within This General Class

*Comment 12:    Written, human readable documents explaining the means of operation of and potential defects in a technical protection measure.*

*Comment 19:    Source code - human readable description and/or definition [sic] of the behavior of a computer program that can be transformed into a format executable by computer hardware but effectively unreadable by humans.*

*Comment 40:    Literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access to recognize shortcomings in security systems, to defend patents and copyrights, to discover and fix dangerous bugs in code, or to conduct forms of desired educational activities.*

### B.  SIIA Position

SIIA opposes the class exemptions identified above as proposed by Comments 12, 19 and 40.

### C.  Summary of the Argument

The exemption proposed by Comments 12, 19 and 40 are not necessary because the concerns raised by these comments are adequately addressed by the DMCA provisions relating to security testing (section 1201(j)), reverse engineering (section 1201(f)), and encryption research (section 1201(g)).  In addition, to the extent the concerns raised are legitimate and are not otherwise addressed by these provisions of the DMCA, the concerns are certain to be addressed in the software licenses accompanying the products or the state licensing law.

### D.  Factual and Legal Support For Argument

The class exemption proposed by Comments 12, 19 and 40 are not necessary because the concerns raised by these comments are adequately addressed by the DMCA provisions relating to security testing (section 1201(j)), reverse engineering (section 1201(f)), and encryption research (section 1201(g)).

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.

To the extent the Copyright Office or others believe the existing exemptions in the law do not adequately address the concerns raised in Comments 12, 19 and 40, it is for Congress to decide to amend these provisions. The Copyright Office should not create any exemption that might alter the delicately balanced exceptions for security testing, reverse engineering, and encryption research found in the law.

In addition, several of the concerns raised by Comment 40 are likely to also be addressed in the software licenses accompanying the products. For instance, it is commonplace for a license to include a warranty of noninfringement, which would address any and all concerns regarding "patent and licensing violations in the code itself." Furthermore, the Uniform Computer Information Transactions Act (UCITA) provides for numerous warrantees that would address the commentator's concerns here, such as warrantees of noninfringement, noninterference, and system integration. Therefore, in states where UCITA has been passed and the contract is silent on the applicability of these warrantees, these warrantees would apply to the transaction.

The concerns raised in Comment 19 that are not addressed by the exceptions for security testing, reverse engineering, and encryption research in the DMCA have nothing to do with access-control technologies, but rather address the difficulties in deciphering binary code. As such, (to the extent these concerns need to be addressed at all) this rulemaking is not the proper avenue to address these concerns.

## Other Proposed Classes

In addition to the classes identified above, several of the comments propose class exemptions that fail to meet one or all of the requirements set forth in the Copyright Office regulations or raise issues currently being litigated.

- The class exemptions proposed by Comment 16 for "tools that circumvent access protection" that "already exist" and "happens to be able to circumvent access protection on a newly created device," is not within the scope of this rulemaking. Section 1201(a)(1) applies to *acts* of circumvention, not to *tools* used for such circumvention, which are covered by section 1201(a)(2) and are not the subject of this rulemaking. Moreover, the tools referenced in Comment 16 would not violate the

section 1201(a)(2) prohibition because the tools are not "primarily designed or produced for the purpose of circumventing" an access control measure or "marketed . . . for use in circumventing" an access control measure.[22] Nor would these tools have "limited commercially significant purpose or use other than to circumvent" an access control measure.[23] This point is bolstered by the Elcomsoft example described by Comment 16. Consequently, an exemption for such tools would not be in order in any event.

- The class exemptions proposed by Comments 7, 14 (class 2) and 30 (class 5) for works used for criminal purposes or that allegedly violate a person's privacy are not necessary because the concerns raised by these comments are adequately addressed by the exceptions for law enforcement activities (section 1201(e)) and privacy (section 1201(i)) in the DMCA. 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. Creating the proposed exemption would upset this balance.

- SIIA neither opposes nor supports renewal of the existing exemption for filtering software, which was recommended by many of the comments. While it does not appear that any of these comments provide any new factual evidence to support the exemption, there may be some justification for renewing this exemption simply because there is pending litigation involving this exemption and any change in the exemption might unduly and adversely affect the parties involved. Given this unique situation, should the Copyright Office decide to renew this exemption for the next three years in the interests of letting the court decide the issue, SIIA would not oppose such a renewal.

- For the same reasons outlined in the above paragraph, we also do not believe that the class exemptions proposed by Comment 51 should be codified. Given our understanding of the facts in the Lexmark v. Static Control Components (SCC) case, we believe plaintiff's section 1201(a)(1) claims are highly suspect. This may be a misuse of the DMCA and not how Congress, the Copyright Office or the stakeholders intended for section 1201(a)(1) to apply. Nevertheless, we do not think it would be proper for the Copyright Office to codify these exemptions at this time. If in fact the 1201(a)(1) claims do not apply or have been raised frivolously, it is our hope that the court will recognize this and dismiss those claims. The court should have the opportunity to hear the evidence and legal arguments and render a decision

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[22] *See* 17 U.S.C. 1201(a)(2)(A) & (C).

[23] *See* 17 U.S.C. 1201(a)(2)(B).

accordingly without having the legal process preempted by the Copyright Office rulemaking. If in fact, the Copyright Office concludes that the court has not reached the correct conclusion in the case, the Copyright Office will have ample opportunity in the next rulemaking – with the full record before it – to create an exemption. In fact, given the pendency of DMCA anti-circumvention cases[24] and the complex nature of this case, it is highly likely that a final decision may not have been reached in this case at the time of the next rulemaking begins.

In the event the Copyright Office chooses to grant an exemption in this case, we would strenuously object to classes 2 and 3 as being much too broad and having significant adverse affects on certain software products. The first class, which deals exclusively with "computer programs embedded in computer printers and toner cartridges and that control the interoperation and functions of the printer and toner cartridge" is the only one of the proposed exemptions that warrants further consideration to address the issue at hand.

### Request to Testify

According to the Federal Register Notice, we understand that the Copyright Office will hold a hearing to solicit comments on the subject of the rulemaking. SIIA hereby requests that it be allowed to testify at the hearing(s).

### Conclusion

In closing, we would once again like to thank the Copyright Office for giving us the opportunity to provide our comments. 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 testifying at the upcoming hearings on this matter.

Respectfully submitted,

Ken Wasch
President
Software & Information Industry Association

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[24] For instance, the DMCA case brought by MPAA against Corley et. al. lasted for about two and half years from start to finish (measured from the date the complaint was filed to the final decision not to appeal the ruling further).