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101 Independence Avenue S.E.
Washington, D.C. 20540

Submitted via www.copyright.gov/1201/comment forms

Re: Section 1201(a) Rulemaking; Petition of Static Control Components, Inc.

Dear Mr. Carson:

I am the Executive Director of the Kernochan Center for Law, Media and the Arts at Columbia Law School. In connection with the Center's Program on Intellectual Property Studies and Law Reform, I have been engaged in a study of laws that prohibit circumvention of technological protection measures. I submit these reply comments in connection with the petition of Static Control Components, Inc. ("SCC") in the pending §1201(a)(1) rulemaking.[1] For purposes of these comments, I have used the term "access controls" to mean technological measures that effectively control access to a work as defined in 17 U.S.C. §1201 (a)(3)(B).

SCC has proposed three classes of copyrighted works for exemption. I have listed each of the three below, together with a summary of my position and argument. The argument – which relates to and explains my position on all three of the proposed exemptions – follows.

[1] Notice of Inquiry, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 68 Fed. Reg. 6,678 (Feb. 10, 2003).

Proposed Class 1: "Computer programs embedded in computer printers and toner cartridges and that control the interoperation and functions of the printer and toner cartridge."

Summary of Argument/Position: I support the proposed exemption; however, I believe that a broader exemption is appropriate, and within the Office's statutory authority.

Proposed Class 2: "Computer programs embedded in a machine or product and which cannot be copied during the ordinary operation or use of the machine or product."

Summary of Argument/Position: I oppose an exemption so formulated. The proposed exemption is broader than necessary to satisfy SCC's concerns about circumventing access controls in violation of §1201(a)(1)(A). If adopted, it could open the door to circumvention in circumstances where the computer programs are, or serve to protect, the types of works whose dissemination Congress meant to encourage in passing the DMCA.

Proposed Class 3: "Computer programs embedded in a machine or product and that control the operation of a machine or product connected thereto, but that do not otherwise control the performance, display or reproduction of copyrighted works that have no independent economic significance."

Summary of Argument/Position: I oppose the proposed exemption as formulated, since I believe it would promote confusion as to scope of the exemption. However, I would support a modification of this exemption, as discussed below.

Argument (with respect to all three proposed classes): The anti-circumvention provisions of the DMCA were designed to encourage copyright owners to disseminate their works in digital form over the Internet. As the Senate Report accompanying the DMCA explains:

> "With this constant evolution in technology, the law must adapt in order to make digital networks safe places to disseminate and exploit copyrightable materials. The legislation implementing the [WIPO] treaties, Title I of this bill, provides this protection and creates the legal platform for launching the global digital online marketplace for copyrighted works. It will also make available via the Internet the movies, music, software, and literary works that are the fruit of American creative genius."[2]

The anti-circumvention provisions represent a difficult balance between the rights of authors and copyright owners, on one hand, and the privileges of users, on the other, in order to provide to both groups the benefits of digital dissemination of copyrighted works.

[2] See, e.g., S. Rep. No. 105-190, 105th Cong., 2d. Sess. (1998) at 2.

Allowing equipment manufacturers to leverage the protection provided to copyrighted works by §1201 to preserve monopolies in replacement parts or maintenance and repair services upsets this delicate balance and undermines the DMCA.

Congress apparently did not consider the possibility that §1201 might be used in this manner, but I firmly believe it would not have intended this result.[3] The Copyright Office can, however, provide some relief to SCC and similarly situated parties under the §1201(a)(1) rulemaking authority. SCC's petition demonstrates that an exemption is warranted.

SCC's first proposed class is "computer programs embedded in computer printers and toner cartridges and that control the interoperation and functions of the printer and toner cartridge." This class is unobjectionable, and is supported by SCC's petition. However, the problem SCC cites is one that apparently exists in other contexts as well,[4] and I believe a broader exemption could be granted by the Copyright Office consistent with its authority under §1201(a)(1).

SCC's second proposed class consists of "computer programs embedded in a machine or product and which cannot be copied during the ordinary operation or use of the machine or product." This language, apparently derived from 17 U.S.C. §109 (b)(1)(B), is not readily transferable to this context. The description fails to take into account the attributes and functions of the class of programs subject to circumvention. It could be read to allow circumvention of access controls on computer programs that have value or significance other than controlling the function of a machine or product, or programs that protect access to or use of other copyrighted works, thus undermining protection of precisely those types of digital works whose dissemination the DMCA was designed to encourage.

SCC's third proposed class is "computer programs embedded in a machine or product and that control the operation of a machine or product connected thereto, but that do not otherwise control the performance, display or reproduction of copyrighted works that have no independent economic significance." This class description, in particular the term "independent economic significance," invites controversy. Specifically, what does it mean to have "independent economic significance," and on what basis would such a determination be made? Adopting this formulation might result in disputes over the value of copyrighted works and the circumstances under which they are marketed. Moreover, it is potentially problematic to enumerate some but not all of the rights of a copyright owner in describing the function of the exempt class.

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[3] Consider, for example, that at the same time it passed the anti-circumvention provisions, Congress in Title III of the DMCA amended §117 of the Copyright Act to ensure that owners of computer operating systems could not exercise exclusive control over the market for computer maintenance and repair services merely because the operating system programs were reproduced in the computer's random access memory when the computer was activated. Congress granted independent service providers an exception from liability for the copying necessarily occasioned by activating the computer for maintenance and repair.

[4] See, e.g., *The Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, Civ. No. 020 6376 (N.D. Ill. Filed Sept. 6, 2002).

As an alternative, I suggest the following formulation of the exempt class:

"Computer programs embedded in a machine or product and that control the operation of a machine or product connected thereto, but that do not control access to or use of any copyrighted work other than the embedded computer program itself."

Thank you for the opportunity to submit these comments.

Sincerely,

June M. Besek