The Post-Hearing Comments
Regarding 1201(a) of:

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Dated June 24, 2000

An Appropriate Framework

I will keep my comments brief and straightforward.

In the comments and hearings to date, many organizations worked hard to frame the issue and then use that framework to project a future harm or benefit. I intend to provide a plain framework for this rulemaking that does not rely on its own hypothetical future results. By the end of this comment, I will have described explicitly which works must be exempted from the anti-circumvention provision, not just for the next three years, but for every year the DMCA stands as law.

The Mandate

As alluded to by Mr. Simon in the May 19th hearings, your role is not to make this law, but to shape it. The Library of Congress' role in the rulemaking is explicit: to determine for which classes of works the anti-circumvention provision of 1201 would adversely affect their non-infringing use, and to classify those works as exempt from the provision. The mandate does not include consideration of subsequent harm or benefit to all use as a result of market or fashion, and I am certain you have been reminded of this in many ways.

Thus, if your decision brings about a Pay-Per-Use economy where no copies of works are sold on the open market without strings attached, eviscerating the purpose of copyright, crippling fair use and eliminating the concept of non-infringing use, so be it. It will be the public's responsibility to address the faulty law that necessitated the outcome.

Having determined this, arguments that defend or attack legitimate PPU systems are irrelevant. Granted, a PPU economy is antithetical to libraries, fair-use and non-infringing uses. The Library of Congress, however, must ignore the arguments that center on legitimate PPU, as it exists now or may in the future. In fact, properly executed PPU systems are the only ones that should *not* be exempted from the anti-circumvention provision.

Pay-Per-Use

Pay-Per-Use, as it has been presented thus far, is a red herring. A properly executed PPU system such as a satellite service or web site subscription could not hinder non-infringing use by its own definition. A "properly executed PPU system" is one in which an authorized distributor and a consumer enter into a contract that explicitly defines

authorized access, and the consumer waives the right to make non-infringing use of unauthorized-to-access material. Every party to the agreement understands which access rights are granted, which rights are explicitly denied, and when during the term of the contract these occur. Therefore, non-infringing use cannot be made of material that is unauthorized for access within the PPU system by agreement.

Put simply, by agreement, the consumer has no legal interest in material s/he is not permitted to access. The same can be said of individuals not entered into the legitimate agreement.

Because the adverse effect on non-infringing use is not an issue in these circumstances, the Librarian of Congress should allow properly executed PPU systems to remain protected by the anti-circumvention provision.

There remains, however, the possibility of an *improperly* executed PPU distribution system. An example of this would be a PPU system that implicates a waiver of an unwaivable right (civil rights, for instance) or fails to meet the strict definition of a PPU system above. For instance, suppose it is a legal impossibility to waive the right to make non-infringing use of legitimately accessed works under the first amendment. If a PPU system requires this, it is improper. Therefore, improper PPU systems must be exempt from anti-circumvention provision because the systems would be a *de facto* hindrance to non-infringing use by means of an illegitimate contract. Failing to exempt these improper systems would give the power of this federal law to that illegitimate contract—an untenable situation.

Because of this caveat, a proper PPU system must meet strict definitional, terms-disclosure, and first amendment stipulations to qualify for non-exemption.

All Remaining Works

This leaves consideration of all copyrighted works not provided on a PPU basis. Let's call these "First Sale"-type items.

First Sale-type items are, inclusively, all copyrighted works distributed which a) do not require consumers explicitly waive rights to non-infringing use upon purchase or b) do not require consumers enter a contract that explicitly defines when or what type of access will be authorized or unauthorized. This definition is the converse of a proper PPU system. Such distributions of copyrighted material must be exempted from the anti-circumvention provision of 1201.

Examples include books, VHS tapes, DVDs, CDs, ordinary web pages and newspapers.

When the consumer enters no contract or license with the authorized distributor at First Sale that explicitly states when access would be authorized or dis-authorized, the copyright holder may not express any right to determine authorized access after the sale—regardless of whether the distributor integrated a protection measure with the copy. To assert such a right in the absence of an explicit agreement at First or subsequent sales would be ludicrous. No less than complete rights to access the work were granted at the time of sale.

Apply the same argument to waiver of non-infringing use rights. The consumer does not waive the right to make non-infringing use of a good purchased in the absence of a contract or license, nor should such a voluntary wavier ever be the expectation. Complete rights to make non-infringing use of the work were granted at the time of sale. This is the First Sale doctrine.

Because—in a First Sale-type distribution—either the rights to make non-infringing use are not waived or there exists no explicit agreement about when and what access will be authorized, the rights to access and make non-infringing use of the work at any time must be maintained; therefore, all works distributed in this manner must be exempted from the anti-circumvention provision. Should a copy of a work ever sell in the marketplace with an integrated protection measure and in the absence of an explicit agreement (e.g.: DVDs), the ability of the consumer to make rightful non-infringing use of the work will necessarily be adversely affected. Thus, the consumer must be allowed to circumvent.

If the copyright holder wishes to stipulate when access is authorized or dis-authorized and that consumers waive non-infringing-use rights, those claims must be made at First Sale. Even then, the consumer must concur and the agreement must be valid. Such circumstances would move the distribution of the work from this category into the legitimate Pay-Per-Use category.

Your Decision

My background is not one of law, but I am a dear fan of logic. Through the above posited premises, the factual natures of which exist independent of the DMCA and your ultimate decision in this rulemaking, the only valid conclusion is clear. You must exempt all First Sale-type distributions of works from the anti-circumvention provision.

You also must exempt improper PPU systems from the anti-circumvention provision, such as those whose terms implicate the waiver of unimpeachable rights. Improper PPU arrangements are not entitled to federal protection and to grant them circumvention protection would be an inexcusable hindrance of non-infringing use. Because it is unreasonable for the Librarian of Congress to imagine all improper PPU licenses, a strict definition of a proper PPU system should be enforced. This would include requiring explicit disclosure of all rights waived and a strict explanation of what access and uses are authorized.

The burden to demonstrate the legal validity of a PPU system that wishes to enjoy the anti-circumvention provision should be on the petitioner, just as in all legal constructs that would adversely effect established first amendment rights.

This framework (Proper PPU / everything else) suits the Librarian of Congress' mandate far more cleanly than to identify "newspapers" or "DVDs" as exempt because industry lobbyists could justifiably argue that such pinpoint classes of distribution may someday be distributed in a legitimate PPU fashion. Conversely, no distributor of copyrighted works should be permitted to hinder non-infringing use *a priori* by including a protection measure absent a clear and valid agreement with consumers on what access is authorized and what is not. Your mandate in this rulemaking is to prevent exactly this abuse.

If you are not in a position to break out these distribution models in your mandate to identify "classes of works," then you must exempt <u>all</u> classes of works that include these violative distribution methods from the anti-circumvention provision to prevent adverse effects on non-infringing use.

If I were to speculate what manner of marketplace for copyrighted works this decision would bring about, I would be fairly confident in saying "an ugly, Pay-Per-Use-only one, void of all non-licensed distributions of mass market copyrighted works, one highly detrimental to the public good." I may well be wrong. However, as previously expressed, your mandate does not include such speculation on future harms or benefits. If such a future came to be, it would be a direct result of the DMCA. One could argue that such a marketplace is a necessary conclusion to the DMCA premise. Addressing the flawed DMCA would be the public's obligation.

In any event, your course of action is clear. All First Sale-type and improper PPU distribution systems must be exempt from 1201(a) in this and all future rulemakings.