Before the Copyright Office
Library of Congress

In the Matter of Rulemaking	)	
Exemption to Prohibition on	)	
Circumvention of Copyright Protection Systems	)	Docket No. RM 99-7A
For Access Control Technologies	)	

Reply Comments of Library Associations Following Public Hearings

These reply comments are submitted on behalf of the American Library Association, Association of Research Libraries, American Association of Law Libraries, Medical Library Association and Special Libraries Association (the "Libraries") following the public hearing phase of this rulemaking proceeding.

Pursuant to the requirement of the U.S. Congress in the Digital Millennium Copyright Act ("DMCA"), Section 1201(a)(1)(B-D), the Copyright Office has conducted a rulemaking proceeding to determine whether persons who are users of copyrighted works are or are likely to be adversely effected in their ability to make noninfringing uses of a particular class of works and to publish any class of copyrighted works for which the prohibition in Section 1201(a)(1)(A) should not apply to such users. Extensive public commentary has been submitted and the Office conducted several days of public hearings. In the course of the public debate, several issues recurred in the questioning by the Office. The Libraries would like to address these issues in their reply comments.

I. Should the Copyright Office consider "licensed uses" as "noninfringing uses" under the statute?

This issue, posed in reply comments and by certain witnesses, is whether a "licensed use" should be considered to offset the impact of technological measures on other "noninfringing uses." Although licensees who use works consistent with their licenses are not infringers – just as a copyright owner who exploits its own work is a "noninfringer" - to suggest that the Copyright Office needs to assess licensed uses in its consideration of the adverse effect on "noninfringing uses" is a perversion of the intent of Congress. The exemption being considered by the Copyright Office is *not* about the availability of licenses to use works. *See* H.R. Rep. No. 105-551 (105th Cong. 2d Sess. 1998) at 25-26. The motivation for the exemption from the anti-circumvention provision is clear:

> *The Committee considers it particularly important to ensure that the concept of fair use remains firmly established in the law*. (*Id*. at 26, emphasis added.)

The drafters of Section 1201(a)(1)(B-D) "devoted substantial time and resources to analyzing the implications of this broad prohibition on the traditional principle of 'fair use.'" *Id*. at 25. The legislators intended the exemption for "noninfringing uses" in Section 1201(a)(1)(B) to include fair use and all relevant Chapter One limitations. As a practical matter, the "licensed use" argument creates mischief, not enlightenment. It serves no useful purpose to assess whether the capacity of licensees to use works counterbalances the inability of non-licensed, but permissible users to exploit works for educational, scholastic, research and other noninfringing uses. In this rulemaking proceeding, Congress wanted the Copyright Office to focus on preserving the reality of balance in copyright law and the interests of the public, not on further advancing the pay-per-use licensing goals of particular copyright owners.

II. Does the identification of a "particular classes of works" mean that all uses of such works are exempt?

Witnesses had different reactions to this question. The Libraries believe that the answer lies in the express language in Section 1201(a)(1)(B-D), and that the exemptions apply only to persons making noninfringing uses, not everyone using the particular class of works. Only "persons who are users of a copyright work which is in a particular class of works" are covered by the exemption, "if *such persons* are, or are likely to be in the succeeding 3-year period, adversely affected by virtue of such prohibition in their ability to make *noninfringing uses* of that particular class of works." Section 1201(a)(1)(B) (emphasis supplied.) The prohibition in Section 1201(a)(1)(A) does not to apply to "*such* users with respect to *such* class of works." Section 1201(a)(1)(D) (emphasis supplied).

For example, if a digital work falls into a particular class of works, and the user intends to quote a passage for purposes of a scholastic work, the circumvention of a technical measure blocking access should not be a violation of law. By contrast, if a different user intends to copy the entire work for purposes of selling copies for commercial gain, and circumvents controls in order to gain access, the exemption should not protect that user from an action for breach of Section 1201(a)(1)(A). "Such user" only applies to persons making a noninfringing use.

This is an important point, because this reading properly narrows the reach of the exemption, and a narrow exemption is consistent with expectation of Congress in fashioning rulemaking as a remedy restricting undesirable effects of Section 1201(a)(1). The House Commerce Committee never suggested the exemption should be a scheme for insulating piracy from claims for violation of the anti-circumvention restriction. At the same time, the exemption is designed to reach all measurable adverse effects as well as those that are likely to occur during the ensuing three years. Thus, the Office should not be deterred in fulfilling its statutory obligations by providing effective relief.

The Libraries also recommend that the exemption recognize the initial lawful access of a user as a relevant factor. While opponents of any exemption stress that the Congress rejected "initial lawful access" as a statutory basis for blanket relief, it does not follow that initial lawful access should be ignored in fashioning an exemption. The initial lawful access requirement provides a crucial link to the goals of the regulation. Specifically, it supports a user's justification for fair use: if a person had lawful access and therefore knows what is contained in the work, it is more reasonable to expect that circumvention for a noninfringing purpose will be focused and responsible. It also establishes that the user has satisfied the copyright owner's baseline condition for access and supports a presumption that such user is less likely to be merely engaging in a digital fishing expedition or circumvention solely for the sake of piracy.

III. Have the proponents of an exemption made an adequate showing that relief in the form of rulemaking is required?

A sufficient showing has been made. First, the Libraries flatly reject the suggestion that Congress imposed an extraordinarily high hurdle and "substantial" showing requirement. The House Manager's Report is cited by certain opponents of an exemption to support the proposition that the required showing must be of substantial, actual harm. The House Manager's Report was never adopted by both Houses and cannot be cited as authority for the proposition that an inadequate showing has been made by proponents. See *National Association of Greeting Card Publishers v. United States Postal Service*, 462 U.S. 810, 833 n. 28 (1983) (citing *Vaughn v. Rosen*, 523 F.2d 1136 (D.C. Cir. 1975) (The House Manager's statements do "not have the status of a conference report, or even a report of a single House available to both Houses.") In *Vaughn*, the court noted that the House sponsors had been unable to achieve their objectives in the

legislation and thus used the floor statements to achieve their aims indirectly. The *Vaughn* opinion goes on to say that in interpreting legislative history a court should be "wary" of relying upon a House report, or even statements of House sponsors, where their views differ from those expressed in the Senate. Quoting Prof. Davis, author of a leading treatise on administrative law, the Appellate Court noted, "The content of the law must depend upon the intent of both Houses, not of just one." *Id*. at 1142.

Here, of course, we emphasize that the House Commerce Committee, not the House Judiciary Committee, introduced this rulemaking language. Individual member statements notwithstanding, the statute is clear: the prohibition should not apply to users who "are, or are likely to be in the succeeding 3-year period, adversely affected … in their ability to make noninfringing uses under this title." There is no requirement of "substantial" in that provision. There is only the need to show "adverse effects" or the "likelihood of adverse effects." Crucially, Congress' decision to permit a showing based on "likely adverse effects" meant that proponents of an exemption could present their views on reasonably anticipated impacts, not actual harm.

Second, the statutory scheme is necessarily burdened by constitutional limitations. The First Amendment, as well as the constitutional underpinnings of copyright law, require that works in any format, subject to technological measures or not, be available for research, comment, criticism and scholarship. The obligation to obtain authorization from the copyright owner is inconsistent with these purposes. The comments and witness statements, particularly Profs. Julie Cohen and Peter Jaszi, support the conclusion that there can be a chilling impact on permitted uses of works caused by fear of civil or criminal liability and that such chilling impact can be an adverse effect. The broad authority granted to the Librarian to fashion an exemption is intended to counterbalance these adverse results.

Third, fair use applies to all copyrighted works, without exception. Other limitations, such as those that provide for other uses by libraries (Sec. 108) and educators (Sec. 110(1-2)), set forth certain statutory requirements. These noninfringing uses do not require permission of the copyright owner and may be exercised without resort to a system of authorization. The obligation to seek such permission to use works represents the kind of chilling impact and adverse effect that can harm one's ability to use works as intended by the Copyright Act.

Fourth, librarians, educators and the public provided specific, concrete examples how persistent access controls restrict the flow of information. See Testimony of Prof. Cohen, Dr. Siva Vaidhyanathan, Prof. Sarah Wiant and Frederick Weingarten. Others explained how current technological restraints can impede archiving and preservation of digital works, exacerbate the "digital divide" and diminish classroom teaching. *See* Testimony of Sarah Wiant, James Neal and representatives of CCUMC.

Finally, specific testimony addressed problems that are encountered and will be encountered with regard to first sale and library lending, as well as computer software. *See* Testimony of Aline Soules, Betty Landesman and Joseph Montoro. The fact that the Copyright Office has recently initiated an inquiry to prepare a report to Congress on Sections 109 and 117 should not prevent this rulemaking proceeding from addressing these vital concerns. Indeed, it would be contrary to the mandate in Section 1201(a)(1)(D) to ignore first sale, library loans and computer software in any consideration of adverse effects and classes of works.

IV. How should the Copyright Office define "a particular class of works?"

There was debate within comments and by witnesses regarding what is "a particular class of works" to be defined by the Office's recommendations. Any rule published by the Librarian should contain the following elements:

- A clear statement that only works protected by copyright law are covered; in other words, *works in the public domain, works of the federal government and fact-based databases are outside the scope of Title 12*.
- A clear statement that a "particular class of works" is not limited to any category of copyrighted works. There was no dispute on this point in the hearings.
- The need for preservation and archiving of digital works should be specifically addressed and creative solutions to the loss of digital content allowed.
- "Particular class of works" should be defined in terms of criteria, including these:
  - *Works that exist **only** in a digital format with technological measures attached are "a particular class of works."* Fair use and educational uses are impossible without circumvention. The Libraries propose two safeguards or requirements that are consistent

with the statutory intent: 1) some form of initial, lawful access must have been acquired by the user; and 2) the uses themselves must be noninfringing.

– *In the case of works that exist in protected and non-protected versions, the non-protected version must be the functional equivalent of the protected version*. "Functional equivalent" means that a user must be able to capture the elements of a work useful to that person so that it can be the subject of scholarship, research, teaching, comment, criticism, preservation, etc. The Copyright Office should not ignore the fact that digital works, by their nature, are in many instances "different" from their analog counterparts and, thus, are not equivalent. For example, in the case of a film, the VHS version (with no technological protection measures) may be the functional equivalent of the DVD version if the user wants to quote a scene. However, if the DVD version has additional elements, such as content (interviews or scenes) that is not available in the VHS version or search and retrieval capabilities, and that information or capabilities are necessary for the noninfringing use, then the two are not functionally equivalents. Such a determination must, of necessity, be addressed on a case-by-case basis, with the user having the obligation, if challenged, to demonstrate either that the non-protected work is not the functional equivalent so that resorting to circumvention is appropriate to avoid adverse effects, or that the non-protected version is inferior in ways material to the use.

– *The uses made of the works should be an integral part of the exemption.* This approach is inherent in the charge to the Copyright Office to look at the likelihood of adverse effects over the next three years. The purpose of the use is relevant to any exemption under Title 12, just as it is under Title 1. In assigning to the Librarian the task to identify particular classes of works for which users may bypass technological measures, Congress intended to permit persons who engage in noninfringing uses of certain works to escape liability under the statute, despite the impediments of technology that block access. The nature of the use is at the heart of the exemption. Conversely, uses that exceed the scope of copyright limitations are not exempt from the prohibition on circumvention.

– *Conditions for an exemption may include requirements that there be initial lawful access, that use controls cannot be camouflaged as access controls, and that uses made of the works be noninfringing.* The statutory scheme, which affords the Librarian broad discretion and allows consideration of "such other factors as the Librarian considers appropriate," Section 1201(a)(1)(C)(v), ultimately does not require that the regulation identify each and every work; rather, it permits the Librarian to set the standards that guide lawful behavior in circumventing technological measures.

In sum, as the Libraries and educators explained in their written comments and oral testimony, the Office should publish an exemption that permits persons who initially and lawfully access a work to engage in circumvention in order to facilitate noninfringing uses. The burden should be placed on such users to support their activities, if challenged. For the content proprietors who view Section 1201as a new weapon in the anti-infringement arsenal, the force of the law remains on their side. The burden remains for a user to support his or her use. However, it is the good faith determination made by a person, aware of the consequences of misuse, which should guide these endeavors, not the determination of those who want to eliminate non-licensed uses of works.

On behalf of:

American Library Association
American Association of Law Libraries
Association of Research Libraries
Medical Library Association
Special Libraries Association

Respectfully submitted,

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