June 23, 2000

David O. Carson
General Counsel
Copyright GC/I&R
P.O. Box 70400
Southwest Station
Washington, D.C. 22024

Re: SIIA Post-Hearing Comments Filed Pursuant to Copyright Office Notice of Inquiry Relating to Section 1201(a)(1)

Dear Mr. Carson:

The Software & Information Industry Association ("SIIA") would like take this opportunity to thank the Copyright Office for conducting the hearings on section 1201(a)(1) last month in Washington, D.C. and Palo Alto, CA and for allowing SIIA to testify and submit these post-hearing comments.

When we first learned that we would have an opportunity to file post hearing comments, we were pleased that the Copyright Office would provide us with a chance to review and respond to the counter arguments made by our detractors and proponents of exemptions to the section 1201(a)(1) prohibition. Upon completing our review of all the reply comments submitted and testimony (in transcript form) provided since our reply comments were submitted to the Copyright Office on March 30th, we found, to our surprise, that there were very few, if any, counter arguments made in the reply comments or testimony that addressed or attempted to refute the statements made in SIIA's March 30th reply comments.

Having no counter arguments to address we will take this opportunity to re-emphasize our conclusions and to make some additional general points that the Librarian should consider in the course of this rulemaking. After reviewing all the comments, oral and written, we conclude that none of them, either individually or taken as a whole, provides sufficient evidence to justify the creation of an exemption to section 1201(a)(1).

The first point we would like to address relates to the scope of the rulemaking. Despite the attempts by librarians, universities and others, this rulemaking process was not intended to be an open-ended discussion on the effect that new technologies have on the way copyrighted materials are created, produced, marketed and distributed or whether copyright owners can or should have the right to use technological measures to control access or manage access to their

works. Nor is it intended to be an investigation into the relationship between creators, intermediaries, customers and other parties. The sole issue that the Librarian is authorized to address here is whether anyone has suffered adverse effects by not being able to access a work in order to make non-infringing use of it. The answer to that question is a resounding "no."

Quite simply, no adverse effects have been shown. In fact, at least one commentator admitted to such when, (in response to Marybeth Peters question whether libraries have suffered any adverse effects) he stated: "[w]e don't have that now."[1]

It is not that proponents haven't tried to show adverse effects, but the fact of the matter is that they have no evidence of adverse effects. So in lieu of actual evidence they proffer misdirected arguments and conjecture in the hopes that one of their arguments will find a sympathetic ear. Each of the so-called adverse effects advanced by the libraries and universities generally fall into one or more of the following categories relating to:

(1) the potential impact caused by the prohibition on circumventing *copy-control* technologies in section 1201(b)—not the impact caused by the prohibition on circumventing access-control technologies in section 1201(a), which is the subject of this rulemaking;

(2) the inconvenience (such as from limitations placed on concurrent access) or expense of having to obtain a copy of a work through legitimate channels, rather than circumventing access control measures;

(3) dislike of the licensing practices of the copyright owner;

(4) the need for exemptions, such as for reverse engineering and security testing, that are already in the law; or

(5) the belief that proponents of an exemption should be able to misappropriate the copyright owner's property merely because there is a demand for it.

As explained in SIIA's reply comments and testimony and the comments and testimony of others, none of these categories of complaints satisfies the adverse effect standard established by Congress because they are irrelevant to the rulemaking inquiry or they fail to clear the "adverse effects" hurdle.

In the comments and testimony, many commentators argued that Pandora's box would open if technological protections could be used to control access. These arguments fail to recognize that the use of such measures is not a new development. Notably, even though access control technologies have been used for quite some time, the library associations and the universities cannot cite to even one instance where they have had to circumvent an access control measure to make fair use of a work. This lack of evidence says volumes about the actual harm (or more accurately the lack of actual harm) caused by access control technologies.

[1] See testimony of Fred Weingarten on May 19, 2000 representing the American Library Association.

Moreover, even if the Librarian ultimately disagrees with SIIA's conclusions as to whether adverse effects have been proven, we respectfully urge him not to forget that even to the extent that he believes that any real harm has been established it must be balanced against evidence that use of access control measures has increased -- not decreased -- the availability of works for noninfringing uses. This is especially important in the software and database area, where software and database companies have been using access control measures for years to disseminate their products to consumers. Without such technologies, the general availability of many of these very valuable works would be significantly restricted.

The second point we would like to make relates to how the Librarian ought to define a "class of works." It was evident from the questions of the Copyright Office panelists during the May hearings that the Copyright Office is quite concerned about having to define this amorphous term. We understand these concerns and sympathize with the Copyright Office's plight and have a very simple recommendation for how the Librarian ought to deal with this issue. We recommend that the Librarian not define "class of works."

The justification for this recommendation is quite simple. The metes and bounds of a "class of work" for which an exemption is appropriate cannot be defined until the scope of the harm is known. The two -- harm and class of works -- are inextricably intertwined. You cannot define a class of works without knowing the harm that you are trying to address. Once you know the harm, you can then determine what "classes of works" are subject to this harm. Because there is no harm that has been proven, it is therefore impossible to accurately define a class of works. Consequently, should the Librarian attempt to define a "class of works" he will be setting himself for inevitable failure.

The final view we would like to express with regard to "class of works" relates to the panels' discussion of databases as a potential class of works. SIIA is extremely concerned that whenever an example of a database was given at the hearing the panel inevitably cited the Lexis-Nexis database or the Westlaw database. We understand that this was done because, as lawyers, the panelists were most familiar with these databases. The Librarian and panelists should recognize, however, that these databases are just two examples of the types of databases being produced. There are many other databases and they are very different than the two mentioned by the panelists. Yet, there did not seem to be a great deal of understanding about what these other databases are, how they are selected, arranged and coordinated, what level of creative expression they involve, how they handle facts and public domain materials (to the extent that they actually do), and whether public domain materials included in a database are available elsewhere and in what form. If it would help the Librarian and other decision-makers in the Copyright Office to better understand the various databases that exist and their differences and to form an opinion of why databases should not be exempt from section 1201(a)(1) we would be happy to provide a demonstration and/or samples of different databases at a time and place of your convenience.

The third point we would like to discuss is the characterization of databases as "thin copyright works." We are the first to admit that the protections afforded by the courts to databases may not be as strong as the protections afforded to many other works. But it is very important to understand that this applies to only one aspect of copyright law -- the infringement aspect. The copyright protections afforded to databases -- other than determining whether a database has

been infringed -- are no less than those provided to other works. For example, a database is afforded the same term of protection and the same exclusive rights as all other works. In fact, if databases are considered to be "thin copyrighted works," one has to wonder whether sound recordings or nondramatic literary or musical works, for instance, could be likewise so classified because there is no exclusive right to control the non-digital public performance of a sound recording or because nondramatic literary and musical works are subject to certain exceptions in section 110. We therefore urge the Librarian not be seduced into thinking just because databases may be characterized as "thin copyrighted works" that they should be treated differently than other copyrighted works in determining whether to exempt them from the reach of section 1201(a)(1).

There is absolutely no reason that databases should be treated any differently than any other copyrighted work with regard to the prohibition contained in section 1201(a)(1). In fact, one could argue that the section 1201(a)(1) is even more important to consumers and producers of databases. Because of the more limited protections against infringement afforded by copyright to databases and other fact-intensive works, there is less of an incentive for their owners to widely disseminate these works to the general public unless they can use technological protections to protect against widespread piracy. As a result, there is a real risk that databases could become less widely available, especially in electronic form, if they are exempted from the section 1201(a)(1) prohibition. As noted above, this is something that the Librarian must take into account when deciding whether a class of works should be exempted.

The fourth point we would like to raise is the issue of pay-per-use. In the comments and testimony pay-per-use is portrayed as the black sheep of the copyright world. We are troubled by the evil characterization by the libraries and universities of the pay-per-use system (a.k.a. metered system) and believe that it is terribly misguided. Inside and outside the marketplace for copyrighted works a tremendous amount of commercial activity is based on the pay-per-use system. Rental cars and telephone service come immediately to mind. It is especially surprising that the libraries, universities and museums hold so much animosity toward a pay-per-use system given that their business models are based on similar schemes.[2]

It has been assumed that pay-per-use schemes cost consumers more money because they are being charged per use rather than a flat rate. In this regard it is important to recognize that in a pay-per-use system, licensees pay for the direct value and benefit they receive from use of a work.[3] As a result, pay-per-use may often be less expensive and, in most cases, is a more

[2] For example, universities require students to pay per course taken, museums require their patrons to pay to enter the museum, and libraries require their users to check out books for a brief period of time only after obtaining a library card (which could be considered to be an access control measure itself). Another good example is the OCLC, which is an organization that builds library catalogs as a cooperative effort of many libraries. OCLC offers an online service call FirstSearch. OCLC has long offered its FirstSearch online service to academic libraries and their patrons on a pay-per-use basis, which made FirstSearch one of the first online services to be affordable to college students

[3] For example, compare the book on the library shelf to the pay-per-use book. If the book is never checked out, the amount paid for the book greatly exceeds the value obtained by the library and its users (which is nil). If the book is checked out constantly, the amount paid for the book may be significantly less than the value obtained by the library and its users. In a pay-per-use situation, however, the value is directly tied to the amount paid.

efficient means for libraries and universities to serve their customers and users. Technological protections that allow copyright owners to control access to their works are integral to making this possible.

The final issue we would like to raise relates to the use of technological protections to control access to a copyrighted work that contains public domain elements. Section 1201(a)(1) should not -- and in fact, cannot -- be used to protect against circumvention of a technology that controls access to material that has fallen into the public domain. However, 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 and are not in the public domain.

Before closing, we feel it necessary to reiterate that the whole pay-per-use issue itself is outside the scope of the rulemaking inquiry. As noted above, the licensing mechanisms by which copyright owners choose to make their works available to the public is not within the purview of this rulemaking.

Once again, we would like to thank the Librarian and the Copyright Office for conducting this rulemaking and for providing us with a forum to express our views on this very important issue. We strongly urge the Librarian to leave things as they are and let section 1201(a)(1) come into force on October 28, 2000 without any exemptions other than those presently in the law.

Sincerely,

Ken Wasch
President
Software & Information Industry Association