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June 30, 2003

David O. Carson, Esquire
General Counsel
U.S. Copyright Office
Library of Congress
James Madison Memorial Building
Room LM-403
101 Independence Avenue, S.E.
Washington, D.C. 20559-6000

Re: Docket No. RM 2002-4
Exemption to Prohibition on Circumvention of Copyright
Protection Systems for Access Control Technologies

Dear Mr. Carson:

Thank you for your letter of June 5, 2003 raising two additional questions following up on my testimony in the above-captioned proceeding. I am pleased to provide the further information set forth below:

Are the concerns expressed by webcasters in their proposal (Comment No. 41) addressed sufficiently by 17 U.S.C. §112(e)(8)? Why or why not?

Yes, 17 U.S.C. § 112(e)(8) sufficiently addresses the concerns expressed by webcasters in their proposal, and since there has been no material change in circumstances since Congress addressed precisely the issue raised by the webcasters, it would be inappropriate for the Office to second-guess Congress in this proceeding.

In Comment No. 41, the Digital Media Association ("DiMA") proposes "Copy-protected Red Book Audio format Compact Discs" as a class of works to be exempted from Section 1201(a)(1). At the Office's hearing on April 11, Mr. Greenstein sought to broaden the proposed class further to "sound recordings that are used for making of ephemeral recordings." Tr. 136. Both DiMA's original broad proposal and Mr. Greenstein's untimely even broader proposal request an exemption for a class of works that is not properly defined under the ground rules for this proceeding. That would be a sufficient reason to reject DiMA's proposal, but even if the Office were willing to try its hand at framing a proper class of works, its doing so would not be justified by the concerns expressed by webcasters.

The only concern originally expressed by DiMA in Comment No. 41 was that while Section 112(a)(2) provides a process for transmitting organizations to obtain access to recordings to make exempt ephemeral reproductions, "[n]o equivalent exemption currently applies explicitly to the multiple ephemeral recordings made pursuant to section 112(e)." Comment No. 41, at 4. That concern is fully addressed by 17 U.S.C. § 112(e)(8), because, as Mr. Greenstein acknowledged at the hearing, "112(e)(8) does provide an equivalent exemption." Tr. 146.

Indeed, in 1998 broadcasters and webcasters expressed precisely the concerns that webcasters have expressed now: "that if use of copy protection technologies became widespread, a transmitting organization might be prevented from engaging in its traditional activities of assembling transmission programs and making ephemeral recordings permitted by section 112 . . . ." H.R. Conf. Rep. 105-796, at 78 (1998). In response to those concerns, Congress, after discussions among RIAA, broadcasters and webcasters, enacted substantially the same language in both Section 112(a)(2) and 112(e)(8) to address those concerns in the context of both the ephemeral recordings exemption and statutory license. These provisions reflect a carefully crafted political compromise tailored to provide an exemption only to a limited community of transmitting organizations and only in specified circumstances.

Webcasters still profess to be concerned about the same possibilities they were concerned about in 1998, and issues that were evident in 1998, but as Mr. Greenstein conceded at the hearing, there has been no actual harm to webcasters to date. Tr. 165. Similarly, Mr. Leavens indicated that he has "no reason to believe" that his company won't be able to work out satisfactory arrangements with its content providers. Tr. 112.

At the hearing, DiMA's representatives attempted to explain why Congress' response to their concerns was not sufficient. The reasons offered related primarily to timing, quality and format. Tr. 148. (DiMA's representatives also expressed concerns about competitiveness, but these seemed to concern only whether webcasters had access to recordings at the same time as their competitors, and so are just a species of the timing concerns.) As to timing, in 1998 webcasters and Congress were aware that from the perspective of a webcaster, it is better to have access to a recording earlier than later. Congress took that into consideration and specifically addressed the timing issue by providing a mechanism for webcasters to obtain access "in a timely manner in light of the transmitting organization's reasonable business requirements." 17 U.S.C. § 112(e)(8). No developments since 1998 warrant the Office's second-guessing Congress' judgments as to timing.

As to quality and format, webcasters speculate that they will get access to higher quality recordings and more readily be able to use diverse formats through circumvention than through the product offerings generally made available by record companies or through the process prescribed by Section 112(e)(8). In the ground rules for this proceeding, the Office specified that such considerations are irrelevant, stating "[t]he fact that a work is available in a format without technological protection measures would allow the public to make noninfringing uses of the work even if that is not the preferred or optimal format for use." 67 Fed. Reg. at 63,580.

But even if considerations of quality and format are deemed relevant, it could not have escaped the attention of webcasters or Congress that from the perspective of a webcaster, it is better to have access to higher quality recordings than lower. It certainly did not escape Congress' attention that webcasters use multiple formats – that is a primary reason for Section 112(e). *See* H.R. Conf. Rep. 105-796, at 90 (1998) ("a webcaster might wish to reproduce multiple copies of a sound recording . . . to make transmissions at different transmission rates or using different transmission software"). It was against this background that Congress made the judgements it did concerning a process calculated to meet the needs of webcasters. The record does not reflect a single instance in which the process adopted by Congress in Section 112(e)(8) has ever been invoked. Tr. 154-55. Speculation concerning what might happen if hypothetical protected products became available and the Section 112(e)(8) process were invoked cannot provide the basis for second-guessing the wisdom of Congress' judgments concerning issues squarely before it.

And there have been no other developments suggesting that Congress was wrong in the judgments it made about the issues presented then and now. As I explained at the hearing, it is not clear that record companies will apply technological protection measures to CDs in significant numbers. And even if they do, it is not clear whether those measures will affect the making of ephemeral recordings by webcasters, and how 112(a)(2) and 112(e)(8) will work in practice. DiMA's proposal is simply an effort to get a better deal than Congress gave webcasters in 1998, just in case that should prove convenient in the future.

As the Register of Copyrights noted in her Recommendation to the Librarian in the 2000 rulemaking, "[w]hen Congress has specifically addressed the issue by creating a statutory exemption for [a defined activity] in the same legislation that established this rulemaking process, the Librarian should proceed cautiously before, in effect, expanding the [existing] statutory exemption by creating a broader exemption pursuant to section 1201(a)(1)(C)." Final Rule 2000, at 64,571. That caution should be applied here and it should constitute a further element of the burden of persuasion that the proponent of an

exemption in this proceeding must carry. Here, where there has admittedly been no harm, and no real change in circumstances, since Congress enacted an exemption addressing precisely the concerns raised by webcasters, there is no reason why the Librarian, "proceed[ing] cautiously," should second guess the judgments and the political compromises made by Congress in 1998.

Is there a basis in 17 U.S.C. §1201(a)(1)(B)-(D) or in the legislative history to conclude that an exemption could be limited to a particular group of users or to a particular type of use? Wouldn't the class proposed in DiMA's comment allow any noninfringing user to circumvent the access measures on all Red Book CDs? Please explain.

As I testified, any exemption that is granted must be for a proper class of works. Tr. 191. I believe that the Librarian's decision in the 2000 rulemaking was correct in its conclusion that defining a class of works "in terms of the status of the user or the nature of the intended use appears to be untenable" under the statute and its legislative history. 65 Fed. Reg. at 64,559. I agree with the Librarian's conclusion in 2000 that he must "identify a 'class of works' based upon attributes of the works themselves, and not by reference to some external criteria such as the intended use or users of the works." *Id.* As the Librarian stated, a class should be "defined primarily, if not exclusively, by reference to attributes of the works themselves." A proper class of works also must be narrow and focused. H.R. Rep. 105-551 Part 2, at 38 (1998) ("The Committee intends that the 'particular class of copyrighted works' be a narrow and focused subset of the broad categories of works of authorship . . . .").

Here, DiMA originally proposed an exemption for "Copy-protected Red Book Audio format Compact Discs." That class does not purport to be limited to particular users (*e.g.*, webcasters), and so it would allow any noninfringing user to circumvent the access measures on all Red Book CDs. At the hearing, Mr. Greenstein proposed a broader exemption for "sound recordings that are used for making of ephemeral recordings," Tr. 136, that would then be limited to "those who engage in the act of webcasting and who have that need to make ephemeral recordings," Tr. 139. Mr. Greenstein made this proposal because "[o]bviously, a generalized exemption to circumvention is not going to be something that is good for the recording industry or for our industry." *Id.*

I do not believe that a class of works encompassing the entire Section 102(7) category of sound recordings is a proper class of works, because a Section 102 category can only be the "starting point" in defining a proper class. *See* 65 Fed. Reg. at 64,560. Nor do I think a class encompassing an entire Section 102 category can be made proper

by a limitation to the use of webcasting or to users who are webcasters. Such a proposed class suffers from precisely the defects in the "use-oriented" classes rightly rejected by the Librarian in the 2000 proceeding. *See* 65 Fed. Reg. at 64,562. Just as the Librarian found that he would exceed his authority by granting an exemption with respect to those "use-oriented" classes, he would exceed his authority if he were to grant the exemption proposed by DiMA. *See id.*

If DiMA had proved its case that Section 112(e)(8) was not working as Congress had intended (which DiMA has not done), it might be permissible (as a matter of proper class definition, assuming it were supported by the record) to define a narrow and focused class of sound recordings appropriately limited by reference to genre, the availability of the recordings in unprotected formats, distribution subject to the particular types of access controls found to be problematic, the copyright owner's other distribution practices (*e.g.*, whether it has a practice of providing to webcasters, on request and in a timely manner, the necessary means of making licensed ephemeral recordings), and such other limitations as may be necessary to narrowly tailor the class to the record. However, that is not DiMA's proposal, and the mere speculation that DiMA offered in support of its proposed class does not provide a sufficient basis to draw the kinds of fine distinctions that the Librarian is required to draw in defining a proper class of works.

In light of the foregoing, it should not be necessary for the Office to reach the question of whether the benefits of an exemption for a proper class of works could be further limited to a particular group of users. However, if an exemption for a narrow and focused class of works were warranted by the record, I believe that the Librarian can, consistent with 17 U.S.C. § 1201(a)(1)(D), conform the exemption to the record by limiting the benefits of the exemption to users that the Librarian has determined are, or are likely to be, adversely affected by the application of access controls to that class of works. In addition, one can read 17 U.S.C. § 1201(a)(1)(B) as permitting a person to avail him or herself of an exemption as a defense to a charge of circumvention only if that person is one making a noninfringing use that the Librarian has determined to be adversely affected by the application of access controls to a properly-defined class of works. It is to be emphasized, however, that in the structure of Section 1201, which requires identification of a proper class of works, these further limitations are not a substitute for defining a proper class of works in the first instance.

It also should be noted that DiMA's proposed class of works and any related class of works that the Office might consider must be evaluated in light of the factors set forth in Section 1201(a)(1)(C) and the other considerations relevant to this proceeding, including availability of copyrighted works and "the harm that would result from an exemption." 67 Fed. Reg. at 63,581; *see also* 17 U.S.C. § 1201(a)(1)(C). As I testified,

today's greatest threat to the availability of sound recordings is piracy, and the application of technological protection measures may be a way of assuring continued availability of recordings. An exemption for a class of works of the scope proposed in DiMA's comment, or any other exemption that would effectively allow anyone to circumvent any and all technological protection measures applied to sound recordings, could only diminish the availability of sound recordings (which would be to the harm of webcasters and the public) and the market and value of sound recordings, to the great harm of recording artists, record companies and other music industry stakeholders. As Mr. Greenstein testified, it would "not . . . be something that is good for the recording industry or for our industry." Tr. 139. Because the harm caused by any such exemption would greatly outweigh any speculative and theoretical harm to webcasters from not getting a better deal than Congress gave them in 1998, any such exemption must be rejected.

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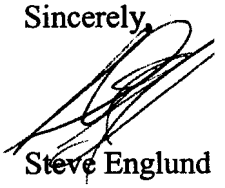
I would be pleased to provide any further information that might be helpful to you as you move toward a determination this proceeding.

Best regards.

Sincerely,



Steve Englund