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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:

This responds to your letter of June 24, to Steven Marks of RIAA and me, posing additional questions with regard to the subject matter of the public hearing in this proceeding held on May 14.

The response of even date by Mr. Marks fully responds to the questions posed, and on behalf of the Joint Reply Commenters I have nothing to add to it. The data submitted by Mr. Marks conclusively demonstrate that the issue raised by the proponents of an exemption to allow circumvention of access controls on copy-protected music CDs is entirely *de minimis*, and that the prohibition against circumvention of access controls has not had any cognizable adverse impact on the ability of members of the public to make non-infringing uses of the sound recordings embodied in those CDs.

The evidence demonstrates that, as far as RIAA has been able to determine, a total of no more than about 43,500 CDs (of a total of five titles) have ever been distributed in the United States with a technological protection measure that is intended to prevent their being played on the CD drives of personal computers.<sup>1</sup> Of course, this constitutes a microscopic percentage of the total number of discs released in the U.S. market during the same time period. Every one of those copies, it appears, was intended to be fully playable on a conventional CD player, a device that is ubiquitous in the U.S. market and that is both less expensive than, and currently much more common in American households than, a

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<sup>1</sup> It cannot be denied that an extremely small percentage of CDs released in the U.S. market do not play properly on particular devices (whether or not part of a personal computer), for the simple reason that neither the CD manufacturing and distribution process, nor the ability of members of the public to properly operate consumer electronics and computer hardware, has yet achieved 100% perfection. This inescapable fact no doubt goes far to explain the thirty or so CD titles, never released in protected format in the U.S., that were cited by individual reply commenters in this proceeding. But of course this is an issue totally unrelated to the use of a technological protection measure, and it must be addressed outside this proceeding.

personal computer. At most a handful of individuals have been frustrated in their desire to listen to one of these CDs because it could not be played on a device upon which it was not intended by its producer that it be played. It remains open to these individuals to listen to the CDs on a CD player, or (in most cases) to buy a cassette version of the album. This evidence shows neither the type nor the quantum of harm that would justify recognition of an exemption.

Even if the use of this technological protection measure were much more widespread than it has been, the Librarian recognized in the 2000 proceeding that, under the governing statute, there was no basis for recognizing any exemption that simply asserted an “unqualified right to access works on any particular machine or device of the user’s choosing.” 2000 Final Rule at 64,569. In essence, that is all that is being asserted here. Case law under the DMCA is in accord with the Librarian’s conclusion in 2000, and dictates the same result here. See *Universal City Studios, Inc. v. Corley*, 273 F.3d 479 (2d. Cir. 2001); *U.S. v. Elcom*, 203 F. Supp.2d 1111 (N.D. Cal. 2002).

The case for demonstrating harm is even wispier with regard to the other category of TPM, in which users access essentially the same sound recording in either of two “sessions” on the same disc, depending upon whether they are using a conventional CD player or a CD drive in a computer. In this situation, if there is any meaningful distinction between the access accorded to these two categories of users, it is one that the copyright owner is fully entitled to make, and one as to which the existence of section 1201(a)(1) does not create any harm that is cognizable in this proceeding.

Regarding the likelihood of future harm, it is clear from the RIAA submission that the first category of TPM (intended to be unplayable on computers) is essentially obsolete, for the very reason that it risks excluding even a handful of customers from maximizing their choice about which device they will use to enjoy recorded music. The proponents’ case about future harm thus boils down to little more than a few press clippings about the desire of some labels to employ in the future some kind of copy control technologies, presumably those in the second (non-obsolete) category that have virtually no adverse impact on the ability of members of the public to access recordings. This falls short of satisfying the burden of the proponents to marshal “evidence of likelihood of future adverse impact during [2003-2006 that] is highly specific, strong, and persuasive.” House Manager’s Report at 6. See also NOI, 67 Fed. Reg. at 63,579 (“the burden of proving that the expected adverse effect is more likely than other possible outcomes is on the proponent of the exemption”).

Given this evidentiary record, the Librarian does not even need to enter into the complex question of whether or not a particular TPM (including some that may, as a practical matter, be obsolete, or at least are no longer in use) constitutes an access control mechanism. Even if it does, it is clear that the proponents of an exemption to section 1201(a)(1) to allow circumvention of the TPM over the next three years have not met their burden of persuasion in this proceeding.

Respectfully submitted,

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On behalf of Joint Reply Commenters