



Association of American Universities

Executive Vice President

Via Electronic Submission

December 18, 2002

David Carson
Office of the General Counsel
U.S. Copyright Office, Library of Congress
P.O. Box 70400
Southwest Station
Washington, DC 20024-0400

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

Dear Mr. Carson:

I write on behalf of the Association of American Universities, the American Council on Education, and the National Association of State Universities and Land-Grant Colleges (collectively, the "Higher Education Associations") in response to the Copyright Office Notice of Inquiry, "Exemption to Prohibition on Circumvention of Copyright Systems for Access Control Technologies," 67 Fed. Reg. 63578-582 (Oct. 15, 2002) ("2002 NOI"). Combined, the Higher Education Associations represent one of the largest groups of copyright users (and creators) in the nation, with a longstanding and critical interest in access to and use of copyrighted materials for scholarly research and education.

The Higher Education Associations were active participants in the first triennial rulemaking, submitting extensive written comments and providing witness testimony. That rulemaking culminated in the October 27, 2000 Final Rule, 65 Fed. Reg. 64556-574 ("2000 Final Rule").

The Higher Education Associations remain concerned, as discussed during the 2000 rulemaking, that Section 1201 is adversely affecting, and will continue to adversely affect, the ability of the educational community to access copyrighted works for the purpose of engaging in lawful uses of those works and/or using uncopyrighted materials integrated in those works. Furthermore, as explained

herein, we believe that the legal standards recommended by the Copyright Office and adopted by the Librarian in the 2000 rulemaking are inconsistent with the statute and legislative history, and create a “catch-22” for copyright users virtually assuring that no meaningful exemptions ever will be adopted. The 2000 Final Rule and 2002 NOI indicate that, for all practical purposes, proponents of exemptions must present concrete evidence of actual, substantial adverse effects, not (as the statute would permit) “likely” harm. However, building the kind of evidentiary record apparently contemplated by the Copyright Office simply is not practical for most institutions (particularly large, public institutions such as universities and libraries). If access to allow fair use of a copyrighted work is prevented by an access control technology and the use of that technology truly is causing or threatening to cause significant harm to an institution, the institution will, as a practical matter, agree to the conditions imposed for such access (which usually means paying increased royalties or license fees) rather than suffer the “substantial adverse effects” of foregoing such access. This is precisely the scenario that Congress intended the triennial rulemaking to prevent. *See, e.g.*, Committee on Commerce, House of Representatives, Digital Millennium Copyright Act of 1998, H.R. Rep. No. 105-551 at 26 (1998) (“House Commerce Committee Report”) (commenting that the rulemaking is intended to address “the risk that enactment of the bill [codified as section 1201] could establish the legal framework that would inexorably create a ‘pay-per-use’ society.”).

Accordingly, the Higher Education Associations urge the Copyright Office to reexamine the standards set forth in the 2000 Final Rule regarding (1) the burden placed by the Copyright Office on proponents of exemptions, and (2) the limitations imposed by the Copyright Office on how a “class of works” may be defined.

The Higher Education Associations also urge the Copyright Office to work with the Department of Commerce in developing the recommendations in this rulemaking. The statute requires the recommendation regarding section 1201 exemptions to be developed by *joint consultation* of the Copyright Office and the Assistant Secretary for Communications and Information in the Department of Commerce. It is not clear from the 2000 Final Rule to what extent the Copyright Office complied with its statutory obligation to “consult” with the Department of Commerce, but it appears that the Copyright Office rejected the Department’s views in their entirety. The Higher Education Associations believe that the Commerce Department’s recommendations in 2000 (as described in the 2000 Final Rule) reflect a sound balancing of the considerations of copyright owners and users, and are consistent with the statute and legislative history. Moreover, the Copyright Office should give effect to Congress’ express instruction in the statute that the triennial recommendation result from joint consultation. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 585 (1992) (Stevens, J., concurring) (“[i]f Congress has required consultation between agencies, we must presume that such consultation will have a serious purpose that is likely to produce tangible results.”); *id.* at 603 (Blackmun, J., dissenting) (“Consultation is designed as an integral check on federal agency action, ensuring that such action does not go forward without full consideration of its effects.”). Accordingly, the Higher Education Associations urge the Copyright Office to develop the recommendations in this Rulemaking jointly with the Department of Commerce.

Proposed Exempt Classes of Works

The Higher Education Associations propose that the following classes of works be exempt from the Section 1201 access circumvention prohibitions for the present three-year period:

1. “Per se Educational Fair Use Works” – This class of exempt works shall consist of the following subcategories of literary works, musical works, pictorial, graphic, and sculptural works, audiovisual works, and sound recordings: (a) scientific and social science databases, (b) textbooks, (c) scholarly journals, (d) academic monographs and treatises, (e) law reports, and (f) educational audiovisual works.

Summary and Argument: The above types of works fall within a category set forth in section 102, and thus fall within the 2002 NOI’s stated preference that section 102 constitute a “starting point” for the exempt class. “Per se” Educational Fair Use Works, due to their nature and the users who typically use them, are highly likely to be used in educational environments for fair use purposes such as teaching and scholarly research. Thus, application of TPMs that prevent access to such works will adversely affect the ability of users to engage in such fair use. If the Copyright Office is concerned about potential abuses of the exemption, a “user and environment” restriction could be placed on this “per se” list, as described in proposed exemption no. 2.

2. “Fair Use Works” – This class is meant to be a more flexible version of proposed exemption no. 1 above. The exemption would apply to “any lawfully acquired copy or phonorecord including a copyrighted work falling within any category in section 102 that, due to its nature and the users who typically use it, is likely to be lawfully used in particular environments under the fair use doctrine. The exemption shall apply only to such users in connection with such fair use” (*e.g.*, the exemption would protect a university professor who circumvents a lock on a lawfully acquired e-book to use a short excerpt in a classroom setting, but would no longer protect the professor from suit under section 1201 if the professor then posts the (unlocked) e-book on the public Internet).

Summary and Argument: Contrary to the Librarian’s determination as reflected in the 2000 Final Rule, the relevant section 1201 “classes of works” may be defined with reference to the *users* of such works as well as the *type of use* to which such works are put. The statute, in defining the scope of the exemption, expressly references the “persons who are users” of the copyrighted work at issue, 17 U.S.C. § 1201(a)(1)(B). Similarly, the statutory provision that provides for this rulemaking refers to the “users” who are adversely affected in their ability to make “noninfringing uses,” 17 U.S.C. § 1201(a)(1)(C), and the provision that provides for publication of exempt classes of works refers to the “users” to whom the prohibition shall not apply. 17 U.S.C. § 1201(a)(1)(D).

This proposed category of “Fair Use Works” does nothing more than permit users to engage in their legal right of fair use, unimpeded by access control technologies. As Congress expressed throughout the legislative history, the triennial rulemaking was specifically meant to permit such activity.

3. “Per se Educational Thin Copyright Works” – Thin Copyright Works are works that contain limited copyrightable subject matter, and which derive significant value from material in the public domain, such as facts, processes, ideas, or other elements that are beyond the scope of copyright protection. To satisfy concerns of vagueness, the Copyright Office should recommend a specific list of types of works that are subject to the exemption, *i.e.*, a “per se” list. The list proposed herein is focused on those works most often lawfully used in research and education. Thus, this class of exempt works consists of “particular subcategories within section 102 and 103, namely databases, histories, statistical reports, abstracts, encyclopedias, dictionaries, and newspapers.”

Summary and Argument: Works in the above category most likely derive significant value from material in the public domain, such as pure facts, or other elements beyond the scope of copyright protection, such as ideas. Thus, the application of an effective TPM to such works would preclude users from obtaining access to elements of a work that are not protected by copyright law. While the Librarian noted in the 2000 Final Rule that such works also include copyrightable elements, the use of such elements remain subject to copyright law remedies (*e.g.*, infringement suits) notwithstanding the proposed exemption. Copyright owners should not be able to preclude the public from *accessing* non-protectible features of a “Thin Copyright” work. The scope of 1201 was not meant to extend beyond copyrightable features of a work, and it is well established that the raw facts and ideas in a work may be copied at will. *See, e.g., Feist Pubs., Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 348, 350 (1991).

4. “Thin Copyright works” – This category consists of “works that contain limited copyrightable subject matter, and which derive significant value from material in the public domain, such as facts, processes, ideas, or other elements that are beyond the scope of copyright protection.”

Summary and Argument – Because the “*per se*” list in exemption no. 3 could leave out significant categories of Thin Copyright works, this more flexible exemption also should be adopted. Although not necessary, a limitation as to the types of users (professors, staff, and students) and context of use (education and research) could be applied to this category.

5. “Any work to which the user had lawful initial access (i) during the period of lawful access, or (ii) after any period of lawful access if the user has physical possession of a copy of the work.”

Summary and Argument: Congress intended to distinguish between access control and use control TPMs. The content community has made clear that it intends to use technologies that it classifies as “access control” to implement use control, effectively eliminating the distinction Congress intended to preserve. Recent multi-industry consortia concerned with protection of content on CDs (“Secure Digital Music Initiative” (SDMI)), DVDs (“DVDCCA Call for Proposals” on a watermarking technology), and digital broadcast television (“Broadcast Protection Discussion Group” (BPDG)) confirm the major content owners’ goals of end-to-end technological control over all uses of their content. The proposed exemption no. 5 prevents this result and preserves the rights of users to engage

in lawful uses of lawfully acquired content. The scope of the exemption is appropriate, because the exemption does not apply after the initial, *lawful* access unless the user possesses a physical copy (in which case the user should be entitled to continue *accessing* the work, while his *use* thereof will be subject to copyright law and, in appropriate cases, license).

The Appropriate Legal Criteria and Additional Comments

In evaluating the proposed exempt classes of works, the Copyright Office should consider the scope and purpose of this rulemaking as expressed in the statute and legislative history. While section 1201 benefits copyright owners, Congress made clear that the *rulemaking* was intended to temper the effect of section 1201, to ensure that access controls would not be used to impede users' rights to use copyrighted works lawfully. The Rulemaking originated in the House Commerce Committee and was thereafter adopted with only procedural changes in Conference.¹ According to the Commerce Committee:

[T]he Committee was concerned that [the then-current version of the bill] would undermine Congress' long-standing commitment to the principle of fair use. Throughout our history, *the ability of individual members of the public to access and to use copyrighted materials has been a vital factor in the advancement of America's economic dynamism, social development, and educational achievement.* In its consideration of [the bill], the Committee on Commerce paid particular attention to how

¹ Accordingly, the House Commerce Committee Report is the definitive legislative history with respect to the rulemaking legislation, not the document referred to as the "House Manager's Report" in the 2000 Final Rule. That "House Manager's Report" actually is not a "manager's" report (or committee or conference report), but is simply a committee "print" that was drafted by the staff of the House Judiciary Committee after the relevant bill was passed by the House. See Staff of House Committee on the Judiciary, 105th Cong., Section-by-Section Analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4, 1998 (Rep. Coble) (Comm. Print Serial No. 6, Sept. 1998). As such, this document formed no part of the material considered by Congress in crafting this legislation, is not relevant "legislative history," and should be irrelevant to this rulemaking. See, e.g., *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 110-111, 118 (1980) ("even when it would otherwise be useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment."); *Sullivan v. Finkelstein*, 496 U.S. 617, 631-32 (1990) (Scalia, J., concurring) ("The legislative history of a statute is the history of its consideration and enactment. 'Subsequent legislative history' – which presumably means the post-enactment history of a statute's consideration and enactment – is a contradiction in terms. The phrase is used to smuggle into judicial consideration legislators' expressions not of what a bill currently under consideration means (which, the theory goes, reflects what their colleagues understood they were voting for), but of what a law previously enacted means. . . . Arguments based on subsequent legislative history, like arguments based on antecedent futurity, should not be taken seriously, not even in a footnote.").

While the Copyright Office at first acknowledges the questionable weight of the "House Manager's Report," see 65 Fed. Reg. at 64558 n. 4, it goes on to rely upon that document extensively in support of its determination of legal standards such as the burden of proof and the meaning of "classes of works," citing to the report at least *eighteen times* throughout the 2000 Final Rule. This reliance was arbitrary and contrary to law, and the legal standards adopted in the 2000 Final Rule are *not* supported by the statute and the House Commerce Committee Report.

changing technologies may affect users' access in the future. Section 1201(a)(1) responds to this concern.

The growth and development of the Internet has already had a significant positive impact on the access of American students, researchers, consumers, and the public at large to informational resources that help them in their efforts to learn, acquire new skills, broaden their perspectives, entertain themselves, and become more active and more informed citizens *Still, the Committee is concerned that marketplace realities may someday dictate a different outcome, resulting in less access, rather than more, to copyrighted materials that are important to education, scholarship, and other socially vital endeavors.*

House Commerce Committee Report at 35-36 (emphasis added). Thus, fair use (and other lawful uses) of copyrighted works, and continued access to uncopyrighted materials, should constitute a *foundation* to the legal framework for this rulemaking, not a secondary consideration.

The Higher Education Associations further believe that, in light of the legislative history's clear expression of fair use concerns, as well as the express language of the statute, the Copyright Office's prior (2000) assessment of the burden of the showing of "adverse effects" and the definition of acceptable classes of works should be reconsidered. Applying the correct burden, and acknowledging the proper scope of acceptable "classes of works," are both essential to realizing Congress' intent that section 1201 not impede lawful uses of works.

A. Applicable Burdens

Section 1201(a)(1) expressly states that the scope of this rulemaking is to determine "whether persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, *adversely affected* by the prohibition . . . in their ability to make noninfringing uses . . . of a particular class of copyrighted works." (Emphasis added). Significantly absent from the statute is the phrase "*substantially* adversely affected," yet that is the standard that the Copyright Office applied and the Librarian adopted in the 2000 Final Rule.

The Copyright Office's adoption of the "substantial adverse effects" requirement appears to be based solely on statements in the post-passage "House Manager's Report," which should not have standing as legislative history (*see* n. 1 herein). Even if the "House Manager's Report" is legitimate legislative history, which it is not, it cannot be used to effect such a sweeping change in the language of the statute. If Congress desired proponents to be required to show "substantial" adverse impact, the statute would have said so. In fact, the appropriate legislative history is full of statements (such as those quoted above) expressing concern about users' ability to continue fair uses. These statements refute the conclusion that Congress intended proponents of the exemption to be required to show "substantial" adverse effects in order to be able to continue to exercise their fair use rights. Moreover, contrary to the implication in the 2000 Final Rule, 65 Fed. Reg. 64558, nothing in the House Commerce

Committee Report requires a showing of “substantial” adverse effects contrary to the express terms of the statute.

In addition, the 2000 Final Rule and 2002 NOI both reflect an erroneous skepticism that “likely” adverse effects, rather than actual adverse effects, should lead to adoption of exemptions. Again, both the statute and relevant legislative history expressly state that the rulemaking should determine whether copyright users “are, *or are likely to be* . . . adversely affected” by the prohibitions. The statute imposes no more extensive showing for “likely” effects than it does for actual effects. Yet the Copyright Office, again relying upon the “House Manager’s Report,” stated that “the determination [of an exemption] should be based upon anticipated, rather than actual adverse impacts only in *extraordinary circumstances*.” 2000 Final Rule, 65 Fed. Reg. 64559 (emphasis added). There is simply no “extraordinary circumstances” requirement for showing likely adverse effects.

The Higher Education Associations therefore urge the Copyright Office to reconsider the standards set forth in the 2000 Final Rule. The combination of (1) a burden of showing “substantial” adverse effects, (2) the implicitly-higher standard applicable to “likely” effects, and (3) (as discussed below) the narrow interpretation of how “classes of works” can be defined, essentially assures that there will never be meaningful exemptions to the section 1201 prohibitions on circumvention. This is directly contrary to Congress’ clear directive in section 1201(a).

Accordingly, the Copyright Office in its recommendations, and the Librarian in his Final Rule, should apply the standard set forth in the statute, *i.e.*, examining the arguments and evidence as to “adverse effects” of the prohibition on circumvention, not “substantial” adverse effects, and applying the same “preponderance of the evidence” standard to allegations of likely effects as to demonstration of actual effects.

B. Acceptable “Classes of Works”

The NOI states that the “starting point for identifying a particular ‘class of works’ to be exempted must be one of the section 102 categories.” 67 Fed. Reg. 63580. The Copyright Office apparently meant to include section 103 as well, given that one of the exempt categories in the 2000 Final Rule consisted of compilations. While it might be true that section 102 and 103 can provide a meaningful starting point for “classes of works,” such classes can and should further be defined based upon attributes of users or intended or common uses of the works therein.

In the 2000 Final Rule, the Librarian rejected several classes of exempt works proposed by educational associations and libraries that were defined partly based upon attributes of users or intended use of the works. One prominent example is the “Fair Use Works” class similar to that proposed herein. Another is the class that was favored by the Department of Commerce – “Works embodied in copies that have been lawfully acquired by users or their institutions who subsequently seek to make noninfringing uses thereof.” Both of these classes necessarily cut across several (perhaps all) section 102 categories as well as section 103. Thus, the proponents at that time did not deem it necessary to,

as a “starting point,” define the proposed class based upon section 102 or section 103. To avoid dispute, the Higher Education Associations have done so in the present Comments.

Classes such as “Fair Use Works,” defined in part based upon the attributes of users or the context of use, are entirely consistent with the language of the statute and reflect Congress’ specific intent, reiterated throughout the legislative history, *see supra* p. 5-6, that section 1201 not impede users’ fair use rights. The 2000 Final Rule acknowledges that the statute is “ambiguous” as to how a “class of works” may be defined. While the Copyright Office cited legislative history in which Congress seemed to use the terms “class of works” and “categories of works” interchangeably, 65 Fed. Reg. 64560, such statements do not support the further conclusion that a “class of works” necessarily be tethered to a particular section 102 category. Indeed, the two exemptions adopted in the 2000 Final Rule both further define a “class of works” based upon additional attributes of the works. Moreover, at least one of the exempt classes (literary works protected by malfunctioning access controls) contemplates the inclusion of multiple categories of works, unified by a characteristic related to usability of the work. The Copyright Office’s reasoning in recommending this class indicates that, were users to show that damage or malfunctions were preventing access to protected CDs or DVDs, for example, the category appropriately would be expanded to, *e.g.*, “literary works, *musical works, sound recordings, and motion pictures and other audiovisual works . . .* protected by access control mechanisms that fail [due to malfunction, etc.]” In other words, certain “classes of works” clearly can and will cut across section 102 “categories. The same logic would apply to the Higher Education Associations’ “Fair Use Works” (and *per se* list) classes of works herein – although one can list section 102 categories as a starting point, such classes necessarily will cut across section 102 categories.

Moreover, there is simply no reasonable support for the 2000 Final Rule’s conclusion that “classes of works” cannot be further defined based upon attributes of users or environment of use. The type of user or use are core factors in determining the right of fair use, which is at the core of this rulemaking. More importantly, the rulemaking provision in the statute itself expressly refers to the particular “user” and “noninfringing uses” of the works. *See supra* p. 3; 17 U.S.C. § 1201(a)(1)(B)-(D). The 2000 Final Rule’s main support for finding that “classes of works” cannot be defined based upon attributes of users or uses, was that “Congress could have said so” if it so intended. 65 Fed. Reg. 64560. A more reasonable conclusion, however, was that the choice of using the word “class” rather than “category” in the statute, as well as the references to users and uses in subparagraphs (B) – (D), did in fact reflect Congress’ conclusion that “classes of works” be amenable to flexible definitions that fit the given circumstances necessitating the exemption. If Congress had intended each “class of works” simply to be a subcategory of a section 102 (or 103) category, and defined *only* based upon certain attributes of the work,² it certainly “could have said so.” However, such a straightjacket would have made no sense in light of the extensive legislative history referring to the intent to preserve fair *use*, and in light of the statutory framework’s reliance on “users” and “noninfringing uses.”

² The typical user of a work and the typical environment (or intended environment) and nature of use of a work *are*, in fact, “attributes of the work,” consistent with the 2000 Final Rule’s framework.

In the 2000 rulemaking, nearly every major institution having an interest in fair use proposed at least one “class of works” defined in part by user attributes or attributes of use or intended use. The Department of Commerce also believed that a “class of works” could be defined in that manner. In light of the significant public and governmental support for classes such as “Fair Use Works” (or other classes attempting to preserve the meaningful ability to make noninfringing uses), and in light of the legislative history’s emphasis on fair use, the Higher Education Associations urge the Copyright Office to reconsider its policy announced in the 2000 Final Rule that “classes of works” cannot (even partly) be defined based upon attributes of users or use.

Conclusion

The Copyright Office is faced in this proceeding with the critical task of preserving the meaningful exercise of fair use and other lawful uses of copyrighted works and material in the public domain. This is not a task that should be put off for yet another three years. We therefore urge the Copyright Office to recommend, and the Librarian of Congress to adopt, the exemptions set forth in these comments. We also urge the Copyright Office to reconsider the legal positions it took in the 2000 rulemaking, as described herein.

Thank you for your consideration of this request.

Sincerely,

A handwritten signature in black ink, appearing to read "John C. Vaughn". The signature is fluid and cursive, with the first name "John" being the most prominent part.

John C. Vaughn
Executive Vice President
Association of American Universities

and on behalf of

American Council on Education
National Association of State Universities and Land-
Grant Colleges