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Submitted via [www.copyright.gov/1201/comment forms](http://www.copyright.gov/1201/comment_forms)

Re: Section 1201(a) Rulemaking

Dear Mr. Carson:

I am the Executive Director of the Kernochan Center for Law, Media and the Arts at Columbia Law School. In connection with the Center's Program on Intellectual Property Studies and Law Reform, I have been engaged in a study of laws that prohibit circumvention of technological protection measures. I submit these reply comments in connection with the pending §1201(a) rulemaking.<sup>1</sup> For purposes of these comments, I have used the term "access controls" to mean technological measures that effectively control access to a work as defined in 17 U.S.C. §1201 (a)(3)(B).

A. Exemptions Recognized in the October 27, 2000 Final Rule

Classes: "Compilations consisting of lists of websites blocked by filtering software applications;" and "literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage or obsolescence." (Comments #29, 31, 32, 33)

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<sup>1</sup> Notice of Inquiry, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 67 Fed. Reg. 63,578 (Oct. 4, 2002).

I have not attempted to respond to all of the proposals for exemptions to §1201(a), and no inference should be drawn from these comments concerning the merits of any proposed class not discussed here.

Summary of Argument/Position: I support an exemption for the proposed classes for the reasons set forth in the earlier Final Rule. There are no apparent marketplace or other changes that enhance the availability of these works.

Argument: In the Final Rule issued on October 27, 2000, 65 Fed. Reg. 64,556, the Copyright Office exempted two classes of works: 1) compilations consisting of lists of websites blocked by filtering software applications; and 2) literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage or obsolescence. *Id.* at 64,561. A number of comments have argued that these classes should continue to be exempt for the next three-year period (Oct. 28, 2003 to Oct. 28, 2006). See, e.g., Comments of Shawn Hernan, CERT Coordination Center (#29); Comments of Seth Finkelstein (#31); Comments of Samuel Greenfeld (#32); Comments of Arnold Lutzker (on behalf of five major library associations) (#33). It appears, based on the information in the record so far, that these exemptions are warranted for the same reasons they were recognized in the current rule. There appear to have been no marketplace or other changes that enhance the availability of these materials or obviate the need for the exemptions.

#### B. Public Domain Works

Class: “Audiovisual works that are in the public domain in the United States and that are released solely on DVDs, access to which is prevented by technological protection measures.” (Comment #35; see also Comments #2, 14)

Summary of Argument/Position: I oppose an exemption for public domain works; under the statute, no exemption is necessary. I also oppose an exemption for copyrighted works “bundled” with public domain works, because there is no evidence of such bundling in the record. However, I support such an exemption in principle and have proposed a modified exemption if such bundling is demonstrated in the course of this proceeding.

Argument: Some comments raised the issue of public domain works protected by access controls, distributed either individually or in combination with other works not in the public domain. (See, e.g., Comments of Eric Eldred (#2); Comments of Michael A. Rolenz (#14); Comments of Electronic Frontier Foundation and Public Knowledge (“EFF Comments”) (#35)). However, §1201(a)(1)(A) prohibits circumvention of access controls only on “a work protected under this title.” When public domain works are distributed individually, no exemption is necessary, since the statute by its terms does not prohibit circumvention of access controls on public domain works. However, since the comments demonstrate some uncertainty concerning this issue, it would be helpful if the Copyright Office would make a clarifying statement.

Where public domain works are distributed with works protected under Title 17, and the same access controls apply to both, the statute is less clear. There are two conflicting imperatives: the prohibition on circumventing access controls on copyrighted works, and the freedom to use – and to circumvent access controls on – public domain works. Public policy suggests that where public domain and non-public domain works are

distributed together in such a way that one cannot gain access to the public domain work without circumventing the access controls that apply also to the protected work, such circumvention should be lawful. This might occur, for example, where a public domain film is released on a DVD together with a short subject or an interview with the filmmaker that is still copyright-protected.

While conceptually this exemption is appropriate, the record to date does not establish the need for an exemption at the present time. The discussion of public domain motion pictures on DVDs in the EFF Comments does not provide examples of instances in which the DVDs that contain public domain movies also contain copyright-protected works; the same is true for the discussion of literary works in the Eldred and Rolenz Comments. Assuming that evidence elicited at the hearings demonstrates that such “bundling” is currently occurring or reasonably likely to occur in the next few years, one still must question whether there is really a need to circumvent access controls on protected works to see public domain movies on DVDs. One might, for example, argue that audiovisual works on DVDs are readily available since “anyone with the proper equipment can access (view) the work.” 65 Fed. Reg. 64,567. However, there is no reason why a consumer should not be able to play a foreign public domain film, access to which might be restricted in the U.S. by region coding.<sup>2</sup>

The conceptual starting point for crafting a class, however, would be works protected under Title 17 (or, more appropriately, some subset of those works) that are distributed with public domain works, where circumventing access controls on the public domain works necessarily entails circumventing the access controls applicable to the protected work.

Any such exemption should be carefully designed to reach only works distributed with public domain works that are entirely independent of the accompanying protected works, and not public domain material or works embodied in copyright-protected works.<sup>3</sup> Otherwise, the exemption could potentially swallow the rule. All works contain public domain material, and an exemption that permitted circumventing technological protection on a copyright-protected work in order to have access to its public domain ideas or facts would effectively nullify §1201(a)(1)(A). Similarly, if a copyrighted motion picture on a DVD features a scene at the Louvre in which the Mona Lisa is visible, the public domain status of the Mona Lisa should not be grounds for circumventing the access controls on the DVD.

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<sup>2</sup> The view expressed above that technological controls such as region coding should not restrict access to public domain films does not necessarily extend to copyright-protected films. There may be valid reasons for region coding on DVDs containing copyright-protected works (see, e.g., 65 Fed. Reg. 64,569 at n.15), and the record is not fully developed on issues such as whether it is possible to circumvent only region coding and leave other access controls in place. Accordingly, I do not currently take a position on whether region coding on a DVD containing a copyright-protected audiovisual work not available in the U.S. justifies an exemption.

<sup>3</sup> Obviously, the contours of such an exception could and should be revisited in future rulemakings.

The Copyright Office in its earlier rule refused to define a “class” of works solely by reference to external features rather than to intrinsic qualities of the works.<sup>4</sup> While the issue of public domain works bundled with copyrighted works potentially cuts across all classes, it has been raised in this rulemaking proceeding principally with regard to two classes of works: works (presumably audiovisual works) on DVDs, and literary works. In light of (i) the Copyright Office’s view that the category “literary works (including computer programs and databases)” as modified by the phrase “protected by access control mechanisms that fail to permit access because of malfunction, damage or obsolescence” represents the outer limits of a permissible “class” of works (65 Fed. Reg. 64,561); (ii) the lack of evidence in the record concerning literary works bundled with PD works;<sup>5</sup> and (iii) the fact that public domain literary works appear to be more readily available than public domain movies, one possibility is to limit any exemption to the DVD situation, possibly along the following lines:

Copyright-protected audiovisual works released solely on DVDs that are packaged with and protected by the same technological access controls that protect audiovisual works that have fallen into the public domain, unless the contents of the DVD are marked in such a way as to identify and distinguish the public domain works, and the protection mechanism permits circumvention only of the access controls for those works.

#### C. Exemption for Library Copying/Archival Purposes

Class: “Literary and audiovisual works embodied in software whose access control systems prohibit access to replicas of the works.” (Comment #25)

Summary of Argument/Position: I oppose the proposed exemption since it would open the door to circumvention on a potentially broad group of works for all purposes, not just for preservation and archiving. I support in principle an exemption to facilitate preservation and archiving, but a purpose-based exemption must be sought from Congress.

Argument: The Internet Archive seeks an exemption for “literary and audiovisual works embodied in software whose access control systems prohibit access to replicas of the works.” (#25) Its comments explain its role as a digital archive and the inhibiting effect of the prohibition on circumventing access controls on its archiving functions.<sup>6</sup> Specifically, it seeks to reproduce donated copies of works before the original media on which those works are recorded become obsolete.

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<sup>4</sup> See Fed. Reg. 64,565 (rejecting description of class as “works protected by access control mechanisms that fail to permit access because of malfunction, damage or obsolescence”).

<sup>5</sup> This may change in the course of the hearings.

<sup>6</sup> Archiving websites and making archived material from any source available over the Internet can have significant copyright implications, but I assume for purposes of these comments that the Internet Archive’s preservation and archiving activities are authorized by §108 and the fair use doctrine.

In the first rulemaking, a number of library groups expressed concerns about the possible effect of §1201(a)(1)(A) on archiving and preservation. The Copyright Office concluded that “[b]ecause materials that libraries and others desire to archive or preserve cut across all classes of works, these works do not constitute a particular class.” 65 Fed. Reg. 64,572 (footnote omitted).

Unfortunately, the class suggested by the Internet Archive suffers from the same flaw, although perhaps not to quite the same degree. And while the Internet Archive’s purposes for and intended use of its proposed exemption may be laudable, the exemption it seeks is so broad that it would effectively nullify §1201(a)(1)(A) protection for all works protected by such access control systems, regardless of the reasons for which the circumvention is done.

The Internet Archive’s proposed exemption illustrates the limits of the Copyright Office’s authority to grant exemptions to §1201(a)(1)(A). As the Office has recognized, “[C]lassifying a work by reference to the type of user or use (e.g., libraries, or scholarly research) seems totally impermissible when administering a statute that requires the Librarian to create exemptions based on a ‘particular class of works.’” 65 Fed. Reg. 64,560. Yet in some circumstances the purposes of the user are highly relevant to whether circumvention should be permitted. Access controls that limit the ability of libraries and archives to make reproductions authorized by §108 present a sympathetic case for such an exemption.

The impact of access controls (as opposed to copy controls, which can legally be circumvented) on archival and preservation functions of libraries and archives other than the Internet Archive is, at the present time, unclear.<sup>7</sup> But one can readily imagine circumstances in which a library or archive has valid possession of a copy of work but cannot access or copy it for archival or preservation purposes because of access controls. This might arise, for example, if the library purchases a DVD containing a foreign film not generally available in this country and not coded for this region. However, an exemption for library archival and preservation purposes should be defined not just (if at all) by the classes or categories of works to which it should apply but also by the purpose for which the circumvention is done. Such an exemption should be sought from Congress, which has created other exemptions based on the nature of the use or the user in §1201 (see, e.g., §1201(d), §1201(g)).

#### D. CDs Whose Access Controls Malfunction

Class: “Sound recordings released on compact disc (‘CDs’) that are protected by technological protection measures that malfunction so as to prevent playback on certain playback devices.” (Comment #35)

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<sup>7</sup> The library associations did not request such an exemption in their comments filed in December 2002, but one cannot infer that they do not require such an exemption; it may simply reflect the limitations on the Copyright Office’s ability to grant such an exemption, as explained at 65 Fed. Reg. 64,572.

Summary of Argument/Position: I oppose the proposed exemption because it is unclear whether such an exemption is necessary at this time, and the exemption as drafted is overbroad. However, further evidence in this proceeding may demonstrate the need for such an exemption, in which case I would support it, with a modification of the description of the proposed class.

Argument: The EFF Comments (#35) suggest a class consisting of “Sound recordings released on compact disc (‘CDs’) that are protected by technological protection measures that malfunction so as to prevent playback on certain playback devices.” There is some question as to whether an exemption for this category is required. The EFF Comments observe that “Although announcements of copy-protected titles have fallen off in the U.S. in recent months, no major record label has renounced the use of protection technologies on CDs in the U.S. market.” *Id.* at 6. Reply comments and hearing testimony may provide further information on this point. In the event that the Office is persuaded that copy-protected CDs will become more prevalent, I will address the proposed exemption.

At first blush, it appears to be an extension of one of the classes exempted by the Copyright Office in its earlier rule. However, EFF’s proposal is potentially broader in scope than the analogous one granted by the Copyright Office in the last round of rulemaking. The crux of the issue is whether CDs can be said to “malfunction” whenever they fail to play on certain playback devices. In the earlier rule, the Office defined “malfunction” as applying “to any situation in which the access control mechanism does not function in the way in which it was intended to function.” 65 Fed. Reg. 64,565. Presumably the reference is to the intent of the rightholder, or someone who affixed the protective measure to the work under the authority of the rightholder. In the case of CDs, a “malfunctioning” CD may be working as intended; it may not work with certain devices (such as those connected to computer hard drives) because such devices facilitate copying or otherwise fail to support the copy protection scheme.<sup>8</sup> On the other hand, there are also situations in which there is a genuine malfunction.

The nature of a protective mechanism can limit the platforms on which the media can be played. This is true, for example, of DVDs protected by CSS. This is not a malfunction, but a limitation inherent in the protective mechanism. The DVD situation is distinguishable, however, in that it was a newly-introduced medium, and consumers had no reasonable expectation of being able to play DVDs on existing playback platforms. The EFF Comments point out that protected CDs were only recently introduced into the marketplace, and they upset “settled expectations” of consumers who have been used to playing CDs on the device of their choice. *Id.* at 12. To the extent that consumers purchase a CD with the reasonable expectation that they will be able to play it on a particular platform and are unable to do so (and are unable to return the CD once it has been opened), the EFF raises a valid concern.

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<sup>8</sup> Whether attaching copy protection to phonorecords designated as “CDs” or “compact discs” violates any license obligations is an issue that the Office need not address.

The solution to these conflicting concerns (limitation of platforms versus satisfying consumers' reasonable expectations) is to ensure that consumers are apprised of potential playback limitations of the CDs they purchase. If CDs are appropriately labeled to indicate that they will not work in certain devices or categories of devices, then a consumer will not be in the unhappy position of unwittingly buying something that he or she is unable to play. And if the CD can be played on some but not all of the consumer's playback devices, the consumer will be able to make an informed judgment about whether to purchase it, and the CD's limitations can hardly be said to violate "reasonable expectations."

I am not suggesting that the Copyright Office try to define precisely an appropriate notice, since it will depend in substantial part on the circumstances of the particular CD and the protective measures it contains. But if the Copyright Office believes that distribution of copy-protected CDs has reached (or will soon reach) the point where an exemption is warranted, I would suggest adding to the class description advanced by EFF: "provided, however, that failure to play on a particular device shall not be deemed a malfunction if the packaging/labeling for the CD reasonably informs consumers of possible limitations on playback devices."

E. Copyrighted Works Whose Access Controls Limit Use to a Particular Machine or Platform

Class: Copyrighted works protected by access controls that limit their use to a particular machine or platform. (Various formulations of this exemption were proposed in Comments #20, 30, 34.)

Summary of Argument/Position: I oppose granting an exemption for works whose use is limited to a particular platform. There is no evidence of significant adverse effect; such an exemption would undermine many protection mechanisms currently in use; and it appears to be beyond the exemption-granting authority of the Copyright Office, as interpreted in the earlier Final Rule. No significant adverse effect has yet been demonstrated in "tethering" works to a particular machine, and the Office should be reluctant to interfere where markets are developing.

Argument: Several comments have suggested an exemption for copyrighted works protected by access controls that limit their use to a particular machine or platform. (See, e.g., Comments of IP Justice (#20); Comments of John T. Mitchell (#30); Comments of Computer & Communications Industry Association (CCIA). (#34)) The IP Justice Comments refer to all such works as "tethered." However, in the Copyright Office's DMCA Section 104 Report the Office uses the term "tethered" to refer to "works tethered to a particular device."<sup>9</sup> I believe it is helpful to analyze works whose technological controls confine them to use on particular platforms separately from those whose access controls confine them to use on a particular machine or machines, and will use the term "tethered" to refer to the latter group of works.

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<sup>9</sup> U.S. Copyright Office, DMCA Section 104 Report (August 2001) at xvi.

I note at the outset that the requests for an exemption for all works, or for multiple categories of works, whose access controls require that they be played on a specific platforms, would seem to exceed the exemption-granting authority as interpreted by the Office in its earlier rule. Nevertheless, I will address the proposed exemption on its merits.

As discussed above, many technological protection schemes require that the protected work be played on a particular platform, to ensure that the playback device will recognize and respond to the technological measures that accompany the copy of the work. Such schemes include, for example the SCMS system, many videogame technological protection systems, the CSS protection on DVDs, RealPlayer, etc. See Dean S. Marks and Bruce H. Turnbull, “Technical Protection Measures: The Intersection of Technology, Law and Commercial Licenses,” WCT-WPPT/IMP/3 (WIPO 1999).<sup>10</sup> Granting an exemption to permit users to circumvent technological access controls on any work that requires a particular platform for playback would completely undermine §1201(a)(1)(A).

Nor is there sufficient basis to conclude that consumers’ ability to make noninfringing uses of such works is being limited in any meaningful way at the present time, or is likely to be so over the next three years. If there were evidence of specific protected works (or a class of such works) available only in digital form and protected by access controls that limit their use to playback devices not generally available in the marketplace, there would be grounds for an exemption.<sup>11</sup> But there is no evidence that the platforms to which the protected works have been restricted are not reasonably available.<sup>12</sup> As the Office observed in the earlier rule, “[T]here is no unqualified right to access works on any particular machine or device of the user’s choosing.” 65 Fed. Reg. at 64,569.

Finally, there is the issue of works “tethered” to a particular device or devices. Again, requiring that a copy of a work be played on a particular device may be an integral part of a technological protection system. If the device is readily available in the market and the consumer is reasonably apprised of the restriction, it does not appear that users are being adversely affected in their ability to make noninfringing uses.<sup>13</sup>

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<sup>10</sup> Available at <[www.wipo.int/eng/meetings/1999/wct\\_wppt/](http://www.wipo.int/eng/meetings/1999/wct_wppt/)>.

<sup>11</sup> Though if the reason for the lack of playback devices is obsolescence, it may fall under the Office’s earlier rule (and that proposed above in Section A).

<sup>12</sup> In the earlier rule, in rejecting the proposed exemption for DVDs to permit them to be used on Linux operating systems, the Office observed that other operating systems were reasonably available, as were dedicated players. 65 Fed. Reg. 64,569.

<sup>13</sup> Some comments have requested exemptions to allow use on platforms that would facilitate use by the disabled. If an exemption could be crafted based on category of users rather than intrinsic nature of works, it might be appropriate. However, allowing circumvention of a class of works for certain purposes would open the door to circumvention of that class for all purposes (the analysis is not unlike that for proposed exemptions for archival purposes, discussed above). A purpose-based exemption must be sought from Congress. In the meantime, §121 of the Copyright Act may provide a means by which use of protected works by the blind and disabled can be achieved.

The Mitchell Comments object to services like Movielink and Sightsound.com that “tether lawfully made reproductions to the hardware upon which they are first accessed.” Id. at 14. Such services appear to be precisely the new kinds of distribution that §1201 of the DMCA was designed to encourage.<sup>14</sup> There is nothing inherently troubling about pay-per-view or distribution mechanisms with restrictions. On the contrary, they can be a real boon to those consumers who (like myself) may prefer to pay a lower price for limited access, since for many books and movies, once is enough.

It is likely that the market will develop to allow broader use of downloaded works on different devices within the home or family, once copy protection can be maintained.<sup>15</sup> Many people would probably prefer that use of downloaded movies were not limited to a single machine, but on balance still prefer the convenience of that service to going out to rent or buy a movie.

“Tethering” works to a particular machine or machines can potentially have an adverse effect on privileges under the first sale doctrine. But as the Office observed in the DMCA Section 104 Report, this practice is not yet widespread, at least outside the context of electronic books.<sup>16</sup> As long as consumers understand the restrictions, and have available alternatives, the potential adverse effect appears minimal. There do appear to be available alternatives: in the case of movies, renting or buying a DVD to play on any licensed device; in the case of literary works, buying the work in hard copy or audiobook form. Without more evidence of harm, the Copyright Office should be reluctant to interfere in an area where the market is developing. Of course this issue can and should be considered in light of any evidence introduced at the hearings, and revisited again in the next triennial rulemaking procedure.

Thank you for the opportunity to submit these comments.

Sincerely,

June M. Besek

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<sup>14</sup> See, e.g., H.R. Rep. No. 105-551, Part 2, 105<sup>th</sup> Cong., 2d Sess. (1998) at 23 (“[A]n increasing number of intellectual property works are being distributed using a ‘client-server’ model, where the work is effectively ‘borrowed’ by the user (e.g., infrequent users of expensive software purchase a certain number of uses, or viewers watch a movie on a pay-per-view basis). To operate in this environment, content providers will need both the technology to make new uses possible and the legal framework to ensure they can protect their work from piracy.”)

<sup>15</sup> See, e.g., Jeffrey P. Cunard, “Technological Protection of Copyrighted Works and Copyright Management Systems: A Brief Survey of the Landscape,” in *Adjuncts and Alternatives to Copyright: Proceedings of the ALAI Congress June 13-17, 2001* (2002) 24, 31-33 (discussing the Digital Transmission Content Protection System (DTCP)).

<sup>16</sup> DMCA Section 104 Report at 76.