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United States Copyright Office
Copyright GC/I&R
P.O. Box 70400
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June 23, 2006

Dear Mr. Carson:

Thanks very much for allowing the Internet Archive some additional time to respond to the specific question posed in your inquiry of June 7, concerning the relevance of 17 U.S.C. 1201(f) to the practices that would be covered by the two exemptions that the Internet Archive has requested in the current DMCA Section 1201 Rulemaking. These practices are essential to our ongoing non-infringing archiving program, and we would be delighted if 1201(f) were found squarely applicable to them. Not only would that make it unnecessary to trouble the Copyright Office with new requests every three years, but it would give us the legal security we need to continue preserving our collective digital heritage. However, we are concerned that (for reasons described below), the issue of coverage under 1201(f) is -- and may remain -- uncertain. This uncertainty may best be resolved through the renewal of the exception that was granted at our request in the last triennial proceeding and its extension along the lines we have suggested in the current round. As detailed in our prior submissions, the cultural benefits that would flow from the clear resolution of these issues are considerable, and the costs of such a clarification are minimal.

As you know, the Internet Archive engages in extensive archiving of a variety of endangered digital artifacts, including video games and other software products. Where these objects are protected by copyright, our activities with respect to them are undertaken in strict compliance with the law. In particular, we work to transfer the content of these older digital objects from their original formats to newer and more stable ones, and (as necessary) from time to time migrating those archival copies to new and improved storage media. In order to accomplish these objectives, however, it is necessary to check the archival copies in question for completeness and accuracy.

Here, we encounter two related sets of practical difficulties, which are addressed in the two exceptions we have requested. In some cases, the original and now obsolete formats of the works in question incorporate access controls (such as “original only” restrictions) that are persistent in archival copies. In order to check these copies, it is necessary to run the


software they embody, and this can be accomplished only by circumventing these (and similar) controls. In other cases, the original formats are designed to run successfully only on certain obsolete platforms; again our archival copies can be checked only if these limitations on access can be successfully avoided. In both situations, the activity we seek to perform consists of running existing software which has been stored in a new format. It does not – and the point may be an important one – lead to the creation of new products for the software marketplace.

At a minimum, the "reverse engineering" exception incorporated in Sec. 1201(f)(1) clearly was intended by the Congress to cover situations where circumvention was essential to the process of developing new freestanding software that would function in relation to existing products or platforms. In other words, we understand that it was intended to assure a safe harbor within the DMCA for the practices that had been approved as "fair use" in such decisions as *Sega v. Accolade*, 977 F.2d 1510 (9th Circ. 1993), where the defendant had analyzed the security software of plaintiff's game deck in order to write code with equivalent functionality that it could incorporate into its own new non-infringing games. This background may be reflected in the requirement that permitted circumvention be in aid of the development of "independently created" software. Thus, it is possible to understand Sec. 1201(f) as being limited to circumvention for the purposes of determining the characteristics of preexisting software so as to be able to write new interoperable software with new functionality.

Such a narrow understanding of 1201(f)'s reach is not inevitable. But it is at least consistent with recently decided cases and authoritative commentary addressing the provision's purposes and coverage.. See *Lexmark Int'l, Inc. v. Static Control Components, Inc*., 387 F.3d 522, 551 (6th Cir. 2004) and *Nimmer on Copyright*, Sec. 12A.04. **And under such an understanding, Sec. 1201(f) might not extend to the situations of archival practice that fall under the two exceptions we are requesting in this proceeding. To reiterate, this is because the games and other programs we wish to preserve in run-tested archival copies could be characterized as preexisting works rather than "independently created" software.**

It would be most welcome if the Recommendation of the Register of Copyright in the current rulemaking were to conclude that Sec. 1201(f) should properly be understood more broadly. But however persuasive such a conclusion might be, we understand that it would not be binding on the courts. Nor would it necessarily deter the filing of complaints alleging unauthorized circumvention against the Internet Archive – especially in the polarized environment of contemporary copyright law. At least in the short term, we believe that the exceptions we have requested are essential


to establish a climate of relative legal certainty in which our archival activities can go forward.

We hope that this is a helpful response to your specific question. We are concerned, however, that Mr. Metalitz's earlier answer to your June 7 note reintroduces issues that are not responsive to the inquiry. While we do not wish to be drawn into a full-scale discussion of his extraneous concerns, we would like to restate here a point made in our earlier submissions: **There is no well-founded basis for fear for that exceptions designed to enable archival preservation will contribute to the piracy of "classic" video games.** The exceptions would create no defenses for those who seek to profit by distributing or otherwise making available unauthorized copies of protected works. Were the exceptions to be granted, owners of copyrighted software would retain all the rights they currently enjoy to proceed energetically against such infringers. As we have demonstrated, the "obsolete formats" exception granted in 2003 has contributed substantially to our archiving activities. On the other hand, **no evidence has been offered to suggest that the exception has encouraged infringement or complicated enforcement.** And in the unlikely event that such evidence should develop under the requested exceptions, the Register and the Librarian of Congress would, of course, be free to reconsider their appropriateness during the next rulemaking.

Please let us know if we can provide you with any further information.

Sincerely,

Brewster Kahle
Digital Librarian