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Dear Mr. Carson:

I appreciate this opportunity to respond, on behalf of the Joint Reply Commenters, to your letter dated May 18, 2006, regarding the testimony of Mr. Joseph Montoro.

I. Existing Exemption

Mr. Montoro's reply comments (R13) supported the recognition of an exemption to the prohibition on the act of circumvention of access controls for the following "particular class of works": "Computer programs protected by dongles that prevent access due to malfunction or damage and which are obsolete."[1] This class is identical to one of the classes recognized by the Librarian in the 2003 rulemaking proceeding. 2003 Rec. at 34-41. In their reply comments, the Joint Reply Commenters noted that neither of the first round submissions that proposed this class of works "adduces any evidence whatsoever that an exemption is warranted, nor that the existing exemption has even been used." R11 at 14. In our view, this statement was equally true after Mr. Montoro's reply comments had been submitted.

As you know, at the public hearing on March 31, Mr. Montoro submitted hundreds of pages of documents in ostensible support of the proposed class.[2] He also provided oral testimony. In our view, the oral testimony provided little, if any, support for the proposed class.

[1] For the purposes of this letter, I will use the following abbreviations for official materials: 2005 NOI – Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Notice of Inquiry, 70 Fed. Reg. 57,526 (Oct. 3, 2005); 2003 Rec. – The Recommendation of the Register of Copyrights in RM 2002-4; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies (Oct. 27, 2003), which is available at http://www.copyright.gov/1201/docs/registers-recommendation.pdf. In referring to the comments and hearing materials, I will use the following abbreviations: C - Initial Comment; R - Reply Comment; Tr.-Transcript. All transcript references refer to the transcript of the March 31, 2006 hearing.

[2] A question was raised at the March 31 hearing whether this evidence, which it appears could have been submitted during the initial or reply round of the rulemaking proceeding, would even be considered as part of the record. We understand from your letter that, with slight alterations to protect confidentiality, this material will be made part of the record and will be considered in this proceeding. The Joint Reply Commenters take no position on the propriety of this decision.

Most of it, and much of the written documentation as well, describe situations that fall outside the scope of the proposed class.

A computer program falls within the proposed class (or within the identically-worded existing exemption) only if the dongle that controls access to it is both inoperative (due to malfunction or damage) and obsolete. This is not the case for most of the scenarios to which Mr. Montoro's evidence refers. Many seem to describe situations in which the dongle is not actually malfunctioning or damaged, but appears inoperative due to user error, system incompatibility, or incorrect installation. Other users who wrote to Mr. Montoro complained that they did not like to use multiple or staked key configurations; that the dongle was inconvenient to use; that a replacement dongle was on order but the user did not want to wait until it arrives; that the dongle was lost or stolen and the user did not wish to pay to replace it; or that the user feared that the dongle would fail in the future. Finally, in many cases the user could have retained access to the program by upgrading to a more current version, but did not wish to do so. In none of these situations does it appear that the program falls within the "particular class of works" for which Mr. Montoro seeks recognition, and they provide no support for his position.

Nor can any support be derived from complaints originating from users outside the United States (a large proportion of Mr. Montoro's submission). Since this rulemaking affects only U.S. law, which is essentially territorial in nature, no decision by the Librarian in this proceeding would, as a rule, have any impact on acts of circumvention occurring outside the United States.

However, the noise generated by Mr. Montoro's submission is accompanied by some signal. A handful of the pages in his documentary material seem to describe situations that would be covered by the proposed exemption that he seeks. See, e.g., the e-mails from alex@aapost.com (dongle "stop working," and the software company "is not in business anymore")[3]; signman6567@charter.net ("system quit recognizing the dongle" and "current owners will not support dongle replacement"); and steve9221@hotmail.com (dongle damaged by lightning strike and "the software developer already shut down their company"). Since this information is now part of the record it is appropriate for the Copyright Office (and ultimately the Librarian) to evaluate it to determine whether it fulfills the burden imposed on proponents of exemptions in this proceeding. The Joint Reply Commenters continue to take no position on that question.

II. New Proposed Exemption

On the last page of the statement which he read into the record at the March 31 hearing, Mr. Montoro stated:

> I foresee over the next 10 years, an exemption that needs to be a bit broader….. I respectfully suggest a class of works. Computer programs protected by dongles that prevent access due to malfunction or damage or hardware or software incompatibilities or require obsolete operating systems or obsolete hardware as a condition of access.

[3] This e-mail appears twice in the stack of documents provided by Mr. Montoro at the hearing.

Tr. at 179. In response to a question from the Register, Mr. Montoro clarified that he was advocating that such a "particular class of works" be designated in the current proceeding, not 10 years from now. Tr. at 188.

The Joint Reply Commenters do not believe this proposal should be entertained. Mr. Montoro had ample opportunity to propose this additional "particular class of works" in the initial round of this proceeding, and/or to advocate it in the reply round as a variation on similar proposals made by others. He chose to do neither, but to raise it for the first time at the March 31 hearing. The Notice of Inquiry established a petition procedure (based on "unforeseen developments") to accommodate untimely proposals in some circumstances. 2005 NOI at 57531. Mr. Montoro did not choose to invoke it. In our view it is not appropriate for the Copyright Office to entertain this new proposal at this point.

If the Office determines to consider Mr. Montoro's new proposed class of works, the Joint Reply Commenters do not believe that the evidence in the record supports the recognition of this proposed exemption.

To some extent this new proposed class of works overlaps with one of the proposals made by the Internet Archive: "computer programs and video games distributed in formats that require obsolete operating systems or obsolete hardware as a condition of access." C4 at 1. [4] Mr. Montoro's new proposed class of "Computer programs protected by dongles that …. require obsolete operating systems or obsolete hardware as a condition of access" is a subset of the Internet Archive's proposal. To that extent, we do not believe that Mr. Montoro's evidence adds anything significant to the record already made regarding this proposed exemption, which the Joint Reply Commenters oppose for the reasons stated in the Joint Reply Comments (R11) at pages 36-8., and in the testimony at the hearing on March 23.

The non-overlapping portion of Mr. Montoro's proposed new exemption would make Section 1201(a)(1)(A) temporarily inapplicable to circumvention of access controls on "computer programs protected by dongles that prevent access due to malfunction or damage or hardware or software incompatibilities." In contrast to the existing exemption, there would no longer be any requirement that an inoperative dongle be obsolete before it could be circumvented; and even a fully operative dongle could be circumvented if there were "hardware or software incompatibilities."

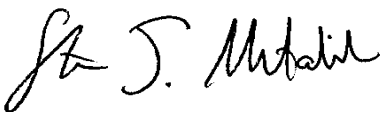
Proposed exemptions that cover most of this territory were thoroughly considered and rejected by the Register in 2003. The 2003 Recommendation concluded that:

[4] The letter of May 18 states that Mr. Montoro "spoke in favor of two additional proposed exemptions" which are then quoted in a form identical to the proposals of the Internet Archive. Our review of the transcript and of the text of the statement Mr. Montoro delivered orally indicates that this is inaccurate, and that his proposed new exemption, while overlapping with one of the Internet Archive proposals, is not identical to either of them. If we are mistaken about this, and Mr. Montoro is not proposing anything beyond what the Internet Archive proposed, then we are satisfied to rest upon the comments we have previously made regarding the Internet Archive proposals.

- "The record does not support an exemption for computer software protected by dongles that are working properly." 2003 Rec. at 38.
- "Nor does the Register believe that an exemption is warranted simply when a dongle is malfunctioning or damaged, but where a replacement is reasonably available" (i.e., where the dongle is not "obsolete"). Id. at 40. An exemption for non-obsolete dongles "would have the potential of adversely affecting the market for and value of a significant portion of the market for computer programs protected by dongles." Id. at 41.

We do not believe that the evidence and testimony submitted by Mr. Montoro, which largely recapitulates the evidence he presented three years ago, is sufficient to demonstrate that any of these conclusions is unfounded or should be modified due to a dramatic change in circumstances in the market. Much of the evidence submitted involves users who have updated their hardware in order to improve operations, but who refuse to take the same steps to upgrade their software, by, for instance, migrating from software that uses a parallel-port-based dongle to the improved program that uses a USB-based dongle. In these circumstances the vendor appears ready to provide the upgrade path that would solve the problem of inability to access due to "hardware or software incompatibilities," but the user, for whatever reason, declines to follow this path. Mr. Montoro seems to acknowledge that this situation is commonplace in the market but apparently believes it represents a marketplace failure that must be remedied by providing an exemption to the otherwise applicable prohibition on circumvention of access controls. He notes that providing this exemption would enable corporate and government end users to more easily manage their budgets, presumably because the services that he offers are less expensive than the upgrade paths offered by the copyright owners or other legitimate vendors.[5] Tr. at 195-96. We urge the Office to decline this invitation to further bolster Mr. Montoro's business at the expense of copyright owners in computer programs protected by dongles.

Respectfully submitted,



Steven J. Metalitz
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cc: Joseph Montoro

[5]It is worth noting once again that even were the exemption proposed by Mr. Montoro to be recognized, it would only lift the ban (temporarily) on the act of circumvention of computer programs falling within the "particular class of works" he proposes; it would not legitimize the trafficking in any service to others to perform such acts. 17 USC § 1201(a)(2).