December 18, 2002

Via Fax
Ms. Marybeth Peters
Register of Copyrights
Library of Congress
Copyright Office
101 Independence Avenue, S.E.
Washington, D.C. 20559-6000

Dear Ms. Peters:

The undersigned are writing to express our deep concern over the extremely narrow scope of the *Notice of Inquiry on the Exemption to Prohibition on Circumvention of Copyright Protection for Access Control Technologies*, 67 Fed Reg. 63578 (October 15, 2002) (*NOI*). As discussed below, the strict rules for Written Comments set forth in section 3 of the *NOI* have the effect of stifling legitimate comment and debate over the proper implementation of the anti-circumvention provisions of the Digital Millennium Copyright Act, 17 U.S.C. §1201(a).

I. The Scope of This Rulemaking Should Address Circumvention of Access Controls Whose Purpose Is To Protect Rights in Copyright.

The *NOI* correctly notes that the only subsection at issue in this proceeding is 17 U.S.C. §1201(a)(1)(C), pointing out that there is no comparable prohibition on circumventing technological measures that merely protect the Section 106 rights of the copyright holder as opposed to controlling "access" to the copyrighted work. *NOI at 63579.* The *NOI* also notes that traditional Copyright Act limitations are not defenses to the act of circumvention of an access-control technology. *Id.* We applaud the clarification that Congress did not intend to create an additional layer of liability (beyond liability for copyright infringement) where, for example, copy-control technologies rather than access are circumvented.

We are concerned, however, that in addressing the confusion over whether Section 1201(a)(1)(A) applies to copy-control or other copyright-protection technologies, the *NOI* may have gone too far in distancing the Section 1201(a)(1)(C) inquiry from all such technologies. It leaves the unfortunate impression that the scope of Section 106 rights, the limitations upon those rights, and the use of technologies to secure those limited rights are irrelevant to this proceeding.

We believe that they *are* relevant. Certainly, it is true that Section 1201(a)(1)(A) does not prohibit the circumvention of technological measures that protect the rights of the copyright owner but do not control "access," but the effect of access controls upon noninfringing uses cannot be considered in a vacuum. Specifically, to evaluate them we must consider whether those access controls are put in place for the purpose of protecting copyrighted works from infringement. We believe the *NOI* is incorrect to suggest that the use of access controls protected by Section 1201(a) (1) (A) does not have any copyright-protection nexus. Indeed, if there were no policy connection between the prohibition of circumventing access controls and

the protection of copyright interests, this would necessarily raise the question of whether Congress had the authority to enact such a prohibition.

A. A Copyright-Protection Nexus is constitutionally Mandated.

Congress' authority to enact Section 1201(a)(1)(A) must derive from its power under Article I, Section 8, either in the power to give exclusive rights to authors (the Copyright Clause) or under the Commerce Clause. Congress understood its authority in this instance to be pursuant to the Copyright Clause. The legislative history indicates that the DMCA was enacted purely for reasons of intellectual-property protection and in furtherance of international copyright treaty obligations.[1]

If Section 1201(a) is intended to protect access controls that are wholly unrelated to the protection of copyrights and lack any interstate commerce nexus, all of Section 1201(a) would be exposed to a legal challenge on the basis of lack of constitutional authority.

B. Congress Itself Intended That There be a Copyright-Protection Nexus.

As the *NOI* points out, "This anticircumvention rulemaking is authorized to monitor the effect of the prohibition on 'access' circumvention on noninfringing uses of copyrighted works." *NOI* at 63579. In Section 1201(c), Congress expressly provided that none of the entire panoply of lawful uses set forth in the Copyright Act should be affected by the prohibition upon circumvention of access control technologies as set forth in Section 1201(a)(1)(A). Clearly, Congress must have intended for Section 1201(a)(1)(A) to further the Constitutional objectives of the Copyright Act, which *a fortiori* must include both the rights granted in Section 106 and the limitations placed upon those rights. Indeed, Section 106 cannot be read without reference to its limitations because, by Section 106's own terms, the rights granted are "subject to" Sections 107-122.

So, while it may be a technical truism that "traditional Copyright Act limitations are not defenses to the act of circumvention," the purpose of Congress' authorizing the Copyright Office to carve out exceptions was to ensure that no access-control technology be used in a way that undermines the rights, remedies, limitations or defenses in the Copyright Act, as outlined in Section 1201(c). In other words, what Congress intended to place at issue in this proceeding was whether "access" controls intended to protect copyrights from infringement should nevertheless be open to circumvention because of their adverse effect upon noninfringing uses. Indeed, it is unlikely that Congress intended to create criminal and civil liability for the circumvention of

[1] The two WIPO treaties themselves have such a nexus. Section 1201 was enacted to comply with United States obligations under Article 11 of the WIPO Copyright Treaty and Article 18 of the WIPO Performances and Phonograms Treaty, which both require "adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by [copyright owners] *in connection with the exercise of their rights* . . . and that *restrict acts* . . . which are *not* authorized by the [copyright owners] concerned *or permitted by law*." (Emphasis added.) Quite simply, the WIPO treaties do not require legal protection against circumvention of technological measures that restrict acts permitted by law. The *NOI*, in contrast, incorrectly suggests that only access controls unrelated to copyright protection are the subject of Section 1201(a).

control technologies employed capriciously by a copyright owner seeking control over lawful, noninfringing uses that fall beyond the scope of the copyright owner's rights.

C. A Copyright-Protection Nexus is a Practical Reality.

Whether a particular technological control is intended to protect the rights of the copyright owner or to protect "access" is not an either/or question. In practice, access controls may be used to protect rights from infringement just as copyright protection technologies may be used to deny access. A technological access control that prevents playback of a lawful copy or phonorecord just as readily prevents a noninfringing private performance as it does an infringing public performance. Congress would have an interest under the Copyright Act in prohibiting the circumvention of access controls to make an infringing public performance. Because the Copyright Act does not prohibit private performances, however, Congress has no interest in prohibiting circumvention of access controls to make a private performance.

Accordingly, there is a substantial basis for expanding the rules for Written Comments to accept and consider comments relating to all technological controls without eliminating those that, in the Copyright Office's judgment, appear to relate to copyright protection rather than pure "access". We note the Copyright Office's own observation at http://www.copyright.gov/1201/comment_forms/index.html that "Most of the comments we have received appear to address only technological measures that prohibit or limit 'copying' rather than measures that prevent unauthorized access or limit access to copyrighted works." We believe that the line between technologies limiting "copying" and those limiting "access" is too blurred for this distinction to be a reliable one, and in any case is difficult for lawyers, much less ordinary citizens, to parse. We further believe that no harm can come from accepting all comments for review, and indeed, the Copyright Office would be better able to make a decision that is in the public interest by having more information before it.

II. The Burden of Proof Insisted on By the Copyright Office Is Too High.

Relying upon the position taken by the Register in the last rulemaking, the *NOI* provides that "proponents of an exemption bear the burden of proof that an exemption is warranted for a particular class of works." *NOI* at 63579. The *NOI* then sets out a high burden of proof on the part of exemption proponents (but not opponents) to support the conclusion that adverse effects are "likely." *Id*. Finally, assuming a proponent meets its "burden of proving that the expected adverse effect is more likely than other possible outcomes," the *NOI* goes on to add that the harmful effect must be "substantial." *Id.* at 63580.

The plain text of Section 1201(a) (1) (B) does not require such a heavy burden. Given the plain-language clarity of Subparagraph (B), it is difficult to justify the use of legislative history to support a more restrictive approach favoring copyright holders. Furthermore, by raising the public's burden of proof to such levels, the careful balance between public and private

benefits in the Copyright Act is heavily skewed against the public interest and in conflict with recent Supreme Court authority on this issue.[2]

Accordingly, we respectfully request that the *NOI* and the process the Copyright Office follows in evaluating submissions be amended to retain that balance insisted upon by the Supreme Court, and which is consistent with the clear Congressional authority delegated to the Librarian of Congress to make the exemption stated in Section 1201(a)(1)(C) upon a showing that users are, or are likely to be, "adversely affected" by the prohibition against circumvention of access controls "in their ability to make noninfringing uses."

III. The Availability of Works in Unprotected Formats Does Not Mitigate the Prohibition of Circumvention of Access Controls in Cases of Noninfringing Use.

Section 1201(a) (1) (C) (i) instructs the Librarian to examine "the availability for use of copyrighted works." On the strength of this language, the *NOI* reaches two conclusions that, we believe, are unsupported by the Copyright Act.

A. Availability in Other Formats

The *NOI* equates "availability for use" with being "available in a format without technological protection measures." *NOI* at 63580. Curiously, the only example given is that of the availability of motion pictures in analog formats (VHS tapes) as a "balancing consideration" to the claim that technological measures on DVDs restrict noninfringing uses. *Id.* This is puzzling for two reasons. First, many commercial VHS tapes also contain restrictions against copying, a fact Congress itself recognized when enacting Section 1201(k). Second, the *NOI* itself states that "[t]his rulemaking addresses only the prohibition on the conduct of circumventing measures that control 'access' to copyrighted works" and not the circumvention of measures that, like Macrovision on VHS or the Content Scrambling System (CSS) on DVD "protect the 'rights of the copyright owner,' *e.g.,* the Section 106 rights to reproduce, adapt, distribute, publicly perform, or publicly display a work." *Id.* at 63579. Since the CSS on DVDs is as much a copy-control technology as it is an access-control technology, this example appears

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[2] In *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994), the Supreme Court emphasized the public's interest in "access" to copyrighted works: "Because copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible. To that end, defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement." 510 U.S. at 527 (concluding that courts should give equal consideration to requests for attorneys fees to the prevailing party regardless whether the successful party was supporting a finding of infringement or non-infringement). The monopoly privileges in the Copyright Act "are limited in nature and must ultimately serve the public good." *Id.* at 526 (citing *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984)). The Court went on to stress, quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975), that the "private motivation [of copyright] must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts" and that "the ultimate aim" of copyright law is serve the general public good.

misplaced.[3] (This further underscores the difficulty of insisting on a reliable distinction between "access-control" and "copy-protection" technologies.)

This misplaced example serves to underscore the fact that the availability of a work in other formats may have little bearing upon the central question of whether noninfringing uses are or will be adversely affected by the prohibition against circumvention of an access control technology. For example, a sound recording or motion picture lawfully reproduced onto a medium that is tethered to a particular computer would certainly have an adverse effect upon myriad noninfringing uses, such as transferring possession of the copy or phonorecord, and noninfringing use by any number of individuals who might enjoy non-public performances of the work from the tethered copy but for the fact that access is denied (unless it is being performed in the equipment to which it is tethered).

Given the fact that Section 202 of the Copyright Act distinguishes the physical media from the work itself, it is reasonable to conclude that Congress did not intend for copyright holders to gain control over noninfringing uses of the physical media owned by others and upon which their works are recorded merely because they could point to the availability of other copies or phonorecords containing the same work, perhaps at a premium price or in a less convenient format.

B. *Whether the Measure Supports a Model That is Likely to Benefit the Public*

Similarly, the *NOI* reaches the unsupported conclusion (without the benefit of any inquiry or public comment) that it may be legitimate to, in effect, "look the other way" where an access control technology adversely affects noninfringing use of certain classes of works if the Librarian of Congress concludes that, notwithstanding the adverse impact the technology has on noninfringing use, the technology supports a business model that is "likely to benefit the public." *NOI*, 63580. There is simply nothing in the Copyright Act to suggest that the Librarian of Congress may set aside the process called for in Section 1201(a)(1)(C) if the offending technology supports a business model of some benefit to the public. Such an assessment is best left to Congress.

The specific example that the *NOI* gives of a public benefit that might trump a showing that certain circumvention must be permitted demonstrates further the danger of allowing a speculative "public benefit" surmised by the Copyright Office to jeopardize the entire Section 1201(a)(1)(C) process. The *NOI* suggests that timed out copies and phonorecords – that is, lawfully made copies and phonorecords owned by consumers – may be "use facilitating" and thus benefit the public by allowing users to gain access at a lower cost, and if so, consumers should not be permitted to circumvent access control technologies that prevent them from playing their own copies and phonorecords.

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[3] It is perhaps instructive to recall that the Content Scrambling System (CSS) is licensed by DVDCCA, a trade association of businesses in the movie industry. The organizational acronym stands for "DVD *Copy Control* Association" (emphasis added).

We respectfully urge that the Copyright Office view with suspicion any claim of public benefit from giving the copyright holder greater control over others' lawful noninfringing uses of the copyrighted works, especially control over lawful copies and phonorecords of their works owned by others. There may indeed be valuable services offered by persons other than the copyright holder that provide time-limited access (lending libraries, rental stores, or even personal video recorders that record over older files when space is unavailable for a new reproduction), but the only proof that such controls are in fact "use-facilitating" and for the benefit of the public is to ensure that they are provided in a competitive market, offered independently by parties other than the copyright holders.

IV. The Scope of the Term "Class of Works" Should Be Broadened.

The *NOI* states that since Congress has not acted to change the Register's narrow definition of "class of works" announced at the conclusion of the previous rulemaking, interested parties should presume that the same narrow view will apply. *NOI* at 63580. We believe that the wiser approach is the one suggested by National Telecommunications and Information Administration (NTIA) in its September 29, 2000 letter to the Register of Copyrights. As the Assistant Secretary for Communications and Information explained at page 4 of the letter, "the definition of classes of works is not bounded by limitations imposed by Section 102(a) of the Copyright Act, but incorporates an examination of 'noninfringing uses' of the copyrighted materials."

Accordingly, we respectfully ask that the *NOI* be revised to invite descriptions of classes of works without any pre-determined bias or restraint. Proponents should be invited to express "in plain English" that the proponent or other users are or are likely to be adversely affected (by the illegality of circumventing access control technologies) in their ability to make non-infringing uses of any works. The ultimate burden of (a) determining whether, in the aggregate, the comments from all sources, including unsophisticated *pro se* submissions, are sufficient to establish that noninfringing uses as to some works are being affected and (b) delineating precisely what classes of works comprise the universe of those for which noninfringing use is affected, is one best placed where Congress left it – on the shoulders of the Librarian of Congress (upon your recommendation and consultation with the Assistant Secretary for Communications and Information of the Department of Commerce).

This is particularly advisable in light of the fact that proponents are asked to make first-hand actual experience a top priority, and thus, such proponents may not be in a position to comment on or draw class definitional lines which would encompass similar works for which others have experienced impairment in making noninfringing uses. The Copyright Office will be in a better position to review and analyze all submissions, and draw parallels and distinctions which would lead to a more informed development of classes of works that should be exempted.

Conclusion

In light of these concerns, we ask that you relax the rules applicable to the Notice of Inquiry and permit unfettered comments; that, in the interest of the public, the burden of proof be balanced equally between those who wish to limit access and those who wish to gain it; that all comments be reviewed without any predisposition to exempt certain business models; and that the scope of the term "Class of Works" follow the recommendation of the NTIA.

Respectfully submitted,

Public Knowledge
American Foundation for the Blind
Consumers Union
Electronic Frontier Foundation
Hal Abelson, Class of 1922 Professor of Computer Science and Engineering, Massachusetts Institute of Technology
David Bollier, Author, *Silent Theft: The Private Plunder of Our Common Wealth*
Marc Cooper, Research Director, Consumer Federation of America
Dr. Linda Garcia, Director, Communication, Culture & Technology Program, Georgetown University
Mary Minow, California Association of Library Trustees and Commissioners
Aline Soules, Associate University Librarian, California State University, Hayward

cc: Dr. James H. Billington, Librarian of Congress
Ms. Nancy J. Victory, Assistant Secretary for Telecommunications and Information, U.S. Department of Commerce
Senator Orrin Hatch
Senator Patrick Leahy
Senator John McCain
Senator Ernest Hollings
Representative James Sensenbrenner
Representative John Conyers
Representative Howard Coble
Representative Howard Berman