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ON BEHALF OF THE

AMERICAN ASSOCIATION OF LAW LIBRARIES

**IN THE MATTER OF RULEMAKING
EXEMPTION TO PROHIBITION ON CIRCUMVENTION OF COPYRIGHT
PROTECTION SYSTEMS
FOR ACCESS CONTROL TECHNOLOGIES**

**BEFORE THE U.S. COPYRIGHT OFFICE,
LIBRARY OF CONGRESS**

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I am Sarah K. Wiant, Director of the Law Library and Professor of Law, Washington and Lee University School of Law. Among other subjects I teach intellectual property courses including copyrights. I appreciate the opportunity to testify this morning on the Section 1201(a) anticircumvention provisions of the *Digital Millennium Copyright Act*. This is an issue critical to the future of copyright law because it determines whether public policy such as fair use and other exemptions will survive in fact in the digital world.

I am here today as a representative of the American Association of Law Libraries. The American Association of Law Libraries was founded in 1906 to promote and enhance the value of law libraries to the legal and public communities, to foster the profession of law librarianship, and to provide leadership in the field of legal information. Today, with more than 4,800 members, the Association represents law librarians and related professionals who are affiliated with a wide range of institutions: courts; local, state and federal government agencies; law schools; corporate legal departments; and law firms.

While I am primarily here on behalf of AALL, I am pleased to be speaking for several other major library associations, and in a very real sense, for the American public. The AALL has participated in this rulemaking proceeding with the other major library associations, the American Library Association, the Association of Research Libraries, the Medical Library Association, and the Special Libraries Association. We jointly submitted initial comments in response to the Copyright Office's Notice of Rulemaking dated November 24, 1999 and filed responses to those comments.

Law libraries serve their constituencies--law students and faculty, researchers, the general public, the legal community, and the bar--in our nation's 1900 law libraries. We have witnessed many changes over the past decade, including the expansion of legal research into many different subject disciplines, and we have been on the cutting edge of the rapid growth of electronic information. The digital environment has permitted our historically specialized libraries to expand their collections far beyond what would be economically possible in the print world. In addition, our members are committed to the principles of public access to government information that are a fundamental requirement of our democratic society. For most American citizens, their local law library is the only source of access to comprehensive federal, state and local law and law-related materials. Many of these important publications are becoming increasingly available only in electronic formats.

I appreciate this opportunity to provide our perspectives on the important issues that fall within the scope of this rulemaking on anticircumvention. My statement this morning will focus on three key areas.

First, I will describe the adverse effects of the new anticircumvention prohibitions on faculty, students and legal researchers in their ability to make non-infringing uses of works legitimately acquired by our institutions.

Second, I will highlight the legal community's concerns regarding limitations on access to government publications for which no copyright protection is available.

Third, I will discuss our concerns that, as more and more information becomes available only online, the ability of libraries to provide permanent access to some publications, and to preserve and archive them, has been and will continue to be adversely affected.

As to the first point, in the formal comments provided by the library associations, we explained the unique role of our nation's libraries in serving the information needs of the American public. Millions of users walk into libraries each day looking for information across a broad span of topics and academic disciplines, and their needs are met through a wide variety of formats, including print, microfiche, video, sound recordings, computer discs, CD-ROMS, DVDS, and the Internet.

Federal copyright law has for more than 200 years provided the historic balance between the rights of copyright owners and users. We believe a broad exemption from the §1201(a) restriction against accessing and using copyrighted works protected by technological measures is essential to ensure that the public continues to enjoy uses of information provided by libraries. The anticircumvention technologies now in place and those under development have a purpose beyond that of controlling unlawful access--they are a mechanism for controlling all uses of a work. For both libraries and our users, they will limit use of legally acquired digital information by effectively destroying the first sale doctrine; they will prevent libraries from fulfilling their mission to archive and provide long-term access to information resources; and they will impede all other non-infringing activities that advance the fundamental public good purposes of copyright law.

Allow me to briefly summarize from the joint library communities' initial comments three key concerns we have about the adverse effects of the new prohibition on education and research.

The role of libraries is to ensure fair access to copyrighted works and bridge the digital divide. Every community and population across the nation is served by libraries that collectively expend billions of dollars annually to provide their users with access to electronic information. Many of the technological measures will erase the distinction between "access" and "use" regulating the exploitation of the work. Any rollback to preserving fair use to the digital information that libraries lawfully acquire will drastically diminish non-infringing uses of copyrighted works and further increase the digital divide.

The fair use, library, archives, and educational institutional exemptions in the Copyright Act are key to the ability of libraries to serve social needs and public policy.

Copyright law is the very foundation by which libraries and educational institutions provide the public with the products and services necessary to meet their informational needs:

- The First Sale doctrine, 17 U.S.C. §109, allows libraries to loan information products they have purchased;
- The Fair Use provisions, 17 U.S.C. §107, allow users to exploit fully their access to information resources for the legitimate purposes of education, research, criticism, and other socially beneficial purposes;
- Section 108 allows libraries (a) to make single copies of works in their collections available to patrons engaged in private study, research and scholarship, and (b) to archive and preserve works for long-term access;
- Section 110 includes provisions to facilitate classroom and distance learning;
- and Section 121 contains limitations that ensure the reproduction and distribution of copyrighted material for use by the blind and handicapped.

These principles must be preserved in the digital environment just as they have applied historically to print resources. Any technological measures limiting these principles will seriously and irreparable harm the ability of libraries to serve the public good. Our research into the development of state-of-the-art technological measures proves beyond question that such controls will erode substantially the ability of library patrons to make non-infringing uses of copyrighted material without prior approval of the copyright owner. We urge that an exemption meaningful enough to preserve fair use and other limitations would encourage digital publishers to create technological measures that are flexible and amenable to fair use and other limitations.

Section 1201 expands the boundaries of criminal law in ways that are vague and poorly defined and that cover acts that are legal, acceptable behavior.

As our initial comments describe in greater detail, the language of §1201(a) contains troubling ambiguities in such key terms as "technological measures," "circumvent," "access," and "class of

works." There are few legal precedents interpreting these terms to guide libraries and users in their application, nor is the legislative record helpful. Court decisions may help clarify some meanings, but in the meantime library users face criminal and civil penalties for exploitations that have been considered until now to be legal and non-infringing. The threat of litigation will serve as a deterrent from uses, which may be lawful. As a practical matter most libraries could not afford the high cost of litigation. This uncertainty will have a chilling effect on users and will inhibit legitimate, non-infringing uses for education, research, criticism and other public information uses.

As to the second area of focus in this mornings comments, I would like to now address the legal community's concerns regarding limitations on access to government publications for which no copyright protection is available.

As previously noted, the purpose of technological measures is to limit or control access and use of digital information. In our earlier comments, we emphasized that the Section 1201(a) prohibition *only* applies to "works protected under this title" and therefore does not apply to works in the public domain or to works of the United States government (17 U.S.C. §105). The March 30, 2000 Comments filed by Kent A. Smith, Deputy Director of the National Library of Medicine, (Reply comments # 75) notes circumstances in which works by government scientists receive copyright protection.

Technological measures to control use of copyrighted works have also limited the ability of this library (as well as all other libraries) to archive, preserve, and provide continuing access to some publications. This rulemaking seeks to determine classes of works that might be adversely affected by such technological protections. Clearly all forms of scientific technical information dissemination would be adversely affected. Most blatant would be the limitation on access to publications of government scientists, for which no copyright protection is available, but which constantly appear within the copyright imprimatur and under the technological barriers of published works. (P. 2)

While these comments from the National Library of Medicine define the problem only from the perspective of government funded scientific and medical research, the identical situation exists with many other subject areas of government information, particularly legal information, which is aggregated into large electronic databases.

Law libraries are in the unique role of serving the American public by providing access to print and electronic law and law-related resources, as well as to legislative, regulatory and judicial government information. Nonetheless, vendors place limitations on access to digital federal government information--contained in value-added commercial databases--for which no copyright protection is available. More and more government information is being published only electronically under licenses that restrict access and use.

The technological measures, which may be as simple as a password, place restrictions on who can use the digital information and often disenfranchise the public. Whereas the public may use the same

print resource in a law library, in the digital arena law libraries are no longer able to provide equal access to all users.

As in earlier written commentary, we noted that it is important to balance the interests of users and copyright owners so that educational institutions, including libraries may realize the benefits of information technologies and networked environment.

While many students in colleges, universities, libraries, and other institutions do have access to legal and other information through consortia agreements or other forms of licensing agreements to online information, other students, members of the bar and equally important members of the public who are served by these institutions are able to neither access nor use information in online systems such as Westlaw or Lexis-Nexis due to licensing arrangements. In the paper world these individuals would be permitted to make a fair use copy of the information. Most state college and university libraries and many nonprofit organizations have as part of their mission, the obligation to provide members of the public with access to information and to make available the information for the public's use.

There is no distinction among the classes of works needed by users. Only the use to which the information is put can be distinguished. That is to say, the uses may be educational, personal, or commercial purposes. There must be no restrictions on the uses of federal government information because it falls outside of copyright protection.

Finally, we are concerned that, as more and more information becomes available only online, the ability of law libraries to provide permanent access to some publications, and to preserve and archive them, will be adversely affected.

A preponderance of comments from user communities submitted to the Copyright Office during this rulemaking process have raised very legitimate concerns about the loss of digital information, the need to provide permanent access, and to archive and preserve electronic information. The comments submitted by the national library associations in this regard were reiterated by the National Library of Medicine, the National Agricultural Library, the National Archives and Records Administration, the Digital Future Coalition, the Society of American Archivists, the Home Recording Rights Coalition, and many individuals representing academic institutions, libraries, museums, and archives.

The anticircumvention systems create another injustice by denying libraries access to works which they previously and lawfully acquired. In the print world the issues of archiving and preservation are much clearer. Libraries have the historic and important role of preserving and archiving knowledge and our cultural heritage. It is critically important that the electronic information produced today will be readily available to future generations. As more and more information becomes available only through an electronic media and a technological protection measure prohibits copying for archival purposes, then the information will be lost if the publisher fails to provide persistent access to archived information. Of particular concern to the law library community is the loss of important information content when a publisher of an online resource either ceases publication or

goes out of business with no advance warning (such as legalonline.com) or instances when CD-ROM products protected by technological measures can no longer be reformatted and, therefore, are unreadable.

The following examples illustrate how selective libraries have been affected by the use of technological measures that effectively control access to copyrighted works.

When an educational institution or archive for a library buys a subscription and has a print copy of a newspaper, book, or periodical, the library can make a copy. However, if the technological measures prohibit reproducing a work in the electronic work, then no archival copy may exist. Although publishers should archive their works and, in fact some do, more often than not publishers fail to archive their works. This is even truer for digital information going back five years. Moreover, when publishers are the sole source for archival copies of their works, replacing the political, social, and cultural mission of many libraries and archives, there is a greater risk of selective archiving. Just as in the paper world, not every library needs to have a preservation copy of a given work. However, research institutions throughout the country should have preservation copies. The judgement of what to preserve or not to preserve should not be solely in the hands of the publishers.

Online publishers have a very poor record of preserving copyrighted works. Producers of commercial online information resources rely on market demand to determine the content of their products. With no financial incentive to archiving older materials, low demand often results in titles being dropped from an online resource without warning. Law libraries have experienced this situation when a major database producer dropped without notice the French legal database from its collection. Even if a library had the right to archive the material and had notice that the material was to be deleted from the database, the information could have been preserved by a library or a consortium.

Unlike in the print world, because there may be no secondary market for electronic works, libraries, and educational institutions may be unable to acquire works that they were initially unable to acquire.

Conclusion:

During lengthy debate over the most contentious provisions of the *Digital Millennium Copyright Act*, distinctions were blurred between the act of circumvention and the act of digital piracy. They are not the same. The need to circumvent technological measures for the legitimate purposes of fair use, first sale, interlibrary loan, permanent access, archiving and preservation are needed to permit libraries to serve their users in the digital world. Libraries adhere strongly to the limitations of copyright law while providing their users with access to information within the rights allowed users under the law.

We believe that it is essential for the Librarian to create a meaningful exemption before Section 1201 does irreversible harm to the rights of users allowed under the statute based on public policy. An exemption is necessary from the prohibitions on circumvention of copyright protection systems for access control technologies for libraries, educational institutions and archives. Without this

exemption, the historic balance between the interests of copyright holders and copyright users that is necessary to preserve today's knowledge and culture for future generations will be irrevocably impaired.

AALL appreciates the opportunity to provide its perspectives on the important issues that fall within the scope of this rulemaking. Thank you very much for inviting me to testify before you this morning.