I appear here for Time Warner Inc. and The Motion Picture Association of America, Inc. Both Time Warner and the members of the Motion Picture Association depend for their existence on adequate and effective copyright protection. They also are vitally interested in the healthy maintenance of the "fair use doctrine". That doctrine makes it possible for them to create and disseminate factual and nonfactual textual, audio, visual and audio/visual works.

I shall state the conclusion of my submission here. There has been no evidentiary showing of any realistic likelihood or any adverse effect on anyone's ability to make non-infringing uses of any particular "class of works" when Section 1201(a)(1)(A) becomes effective. Accordingly, there should be no delay in the effective date of that section. Interested parties may, of course, put together such evidence as they believe relevant and persuasive for submission in rulemaking proceedings during the successive 3-year periods following the effective date of Section 1201(a)(1)(A) as provided in Section 1201(a)(1)(C). Such submissions would, at least, have the benefit of being made in the context of an existing "anticircumvention" prohibition instead of dealing with, as the comments seeking exemptions now do, the chimera of alleged consequences of a statute not yet in effect.

It has become almost trite to say that digitization presents extremely serious problems for copyright protection. There are, of course, many benefits to copyright owners as well as to the rest of society. Nevertheless, the fact that copyrighted works may be speedily and cheaply duplicated in unlimited quantities and without any degradation of quality even when copies are made from copies, the fact that digitized works may be easily and cheaply transmitted throughout the world by the push of a computer button, and the fact that digitized works may be easily and cheaply modified have created a qualitative rather than merely a quantitative difference in the dangers faced by copyright and, accordingly, in the defenses required for copyright protection. In this regard, it is important to recognize that adequate defense of copyright is needed not only to protect the works themselves and the interests of copyright owners but also to protect those interested in creating and operating the physical infrastructure which depends on copyrighted works for its prosperity.

These increased dangers were recognized by the approximately 160 member nations of the World Intellectual Property Organization that agreed in Geneva in December 1996 to two treaties intended to provide protection in digital and online environments. These treaties were thought necessary to achieve adequate protection despite the recent passage of the TRIPS agreement and its protections

for intellectual property, so clear were the increased dangers to copyright resulting from digitization.

One of those treaties, the WIPO Copyright Treaty, includes in its Article 11 the following:

> "Contracting parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law".

That Article is at the basis of the statutory provision, Section 1201(a)(1) of the Digital Millennium Copyright Act which was enacted to implement the US requirements under the WIPO treaties.

It is pursuant to that statutory provision that this Rulemaking proceeding was instituted "...to determine whether there are classes of works as to which users are, or are likely to be, adversely affected in their ability to make non-infringing uses if they are prohibited from circumventing..." technological measures that control access to copyrighted works. This being a rulemaking proceeding, its outcome must be based on evidence presented in the course of the proceeding.

Mere speculation is of no moment. In that connection the Notice of Inquiry itself, points out that:

> "It is clear from the legislative history that a determination to exempt a class of works from the prohibition on circumvention must be based on a determination that the prohibition has a substantial adverse effect on non-infringing use of that particular class of works. The Commerce Committee ordered that the rulemaking proceeding is to focus on 'distinct, verifiable, and measurable impacts, and should not be based upon *de minimis* impacts'. ...Similarly, the Manager's Report stated that '[T]he focus of the rulemaking proceeding must remain on whether the prohibition on circumvention of technological protection measures (such as encryption or scrambling) has caused any substantial adverse impact on the ability to make non-infringing uses,' and suggested that 'mere inconveniences or individual cases...do not rise to the level of a substantial adverse impact'."

The assertions about purported adverse effects flowing from the future effectiveness of Section 1201(a)(1)(A) are based on nothing more than speculation and, moreover, on speculation based on ill-founded premises. One example is in the statement by Copyright's Commons that it shares "...the Library Association's concerns...that access controls *may* too

easily become persistent use controls, in the hands of publishers". [Emphasis supplied.] Another example is the statement in that same paper that "...we fear that the 'anti-circumvention' rules will be wrongfully used for improper commercial purposes and to block speech".

There they stand, completely free of any factual support. Moreover, those seeking exemptions from application of Section 1201(a)(1) fail to consider a number of fundamental premises that should lay to rest those and the other speculations on which their papers are based.

For one thing, at least for some time, works will continue to be made available in analog formats and paper formats, that is, in ways not subject to the provisions of Section 1201 and, accordingly, free from the concerns expressed in those papers. I should say parenthetically that even motion pictures released on DVD, about which so much vituperation was spilled in this proceeding, have been and are continuing to be released on VHS and even, *mirabile dictu*, in 35 millimeter prints so that the members of Copyright's Commons and of the library and educational communities can enjoy them in theatres.

Secondly and very fundamentally, copyright owners, distributors and publishers are interested in the widest possible distribution of their

works. The *Salinger* case, which involved an author's seeking seclusion for himself and his works, is not an exemplar of the content-owning community. Copyright owners, distributors and publishers cannot exist and prosper by barring their works from public availability. The assertion by Copyright's Commons that "...corporate copyright holders now seek to use the Digital Millennium Copyright Act's 'paracopyright' to expand the monopoly on expression and restrict the public's use of their works" is not only unsupported, but flies in the face of economic logic.

There is a dramatic contrast between the speculations of those seeking exemptions and the reality of attacks on copyright protection of the kind against which Section 1201 is intended to protect. One example of the latter is the hacking of the CSS technology intended to protect DVDs from unauthorized copying access; another example is the circumvention by *Streambox* of the access control and copy protection measures that *RealNetworks* affords to copyright owners. In short, while the expressed concerns about "adverse effects" are speculative and illogical, the threats to technological protections and to copyright are real and have already manifested themselves.

Equally problematical is what the Notice of Inquiry calls a "major consideration": "...to determine how to define the scope of boundaries of a 'particular class' of copyrighted works". The Notice of Inquiry quotes the Commerce Committee Report to the effect that "the 'particular class of copyrighted works' (should) be a narrow and focused subset of the broad categories of works of authorship than is (*sic*) identified in Section 102 of the Copyright Act...".

Whether or not such a definition can be articulated, none of the papers has succeeded in doing so. Indeed, it seems clear that no matter how "class of works" is defined, any exemption from the operation of Section 1201(a)(1)(A) for such a "class" will have the effect of removing the protection of that Section from other works not intended to fall within the definition.

In conclusion, it is with some puzzlement and even dismay that I regard the positions taken by the educational and library communities. They, as much as Time Warner, the members of the Motion Picture Association, and other content owners, depend on and should encourage greater protection and greater availability of copyrighted works. Greater protection because in a digital environment it makes possible increased production of copyrighted works as well as increased and speedier distribution. Greater availability because it makes possible educational

and library services to a broader public and by newly developed media. In helping to diminish piracy and other dangers to copyrighted works, access controls have and will increase the availability of a wide range of copyrighted works. To grant exemptions from or otherwise weaken Section 1201(a)(1)(A) would have the affect of discouraging production and distribution of copyrighted works and particularly from making such works available in digital format.

It seems clear, particularly in view of the complete lack of any factual support for delaying the effective date for Section 1201(a)(1)(A) or granting exemptions from that provision and particularly in view of the huge and irreparable damage that would be done to copyright by virtue of any such delay or exemptions, that law and logic require that there be no such delay or exemption at least at this time. After the statute has gone into effect five months from now, the interests that are opposed to the statute can make a real world assessment of its impact instead of the speculation proffered in this Inquiry and, as provided in the statute, make such submissions as they deem appropriate.

Bernard R. Sorkin, Esq.
Senior Counsel
Time Warner Inc.
75 Rockefeller Plaza, 24th floor
New York, NY 10019
Tele: (212) 484-8915
Fax: (212) 258-3006
e-mail: Bernard.Sorkin@twi.com