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Re: Notice of Inquiry under Section 1201(a)(1) of the Copyright Act on Possible Exemptions to the Prohibition against Circumvention of Technological Measures that Control Access to Copyrighted Works (Docket RM 99-7, 64 Fed. Reg. 66139 (Nov. 24, 1999); Docket RM 99-7B, 65 Fed. Reg. 14505 (March 17, 2000))

– Post-Hearing Comments

Dear Mr. Carson:

Sony Computer Entertainment America Inc. ("SCEA") submits these post-hearing comments in response to certain points that have arisen in the current rulemaking.

1. The Congressional Overview. The panel itself has made the fundamental point a number of times as to why we must protect technological measures that control access to copyrighted works: digitization and the Internet present enormous opportunities and equally enormous potential threats. Congress, in implementing treaty obligations of the United States, and in carrying out its constitutional charge of promoting the progress of "Science" (in its Eighteenth Century sense) through the copyright incentive, has recognized that electronic commerce, specifically the broad dissemination of copyrighted works in digital form, simply will not develop optimally unless copyright owners have the ability to use and enforce technological access control measures. The prohibition on circumvention of technological access controls is also the product of Congress' recognition that, in order to preserve the traditional balances in copyright law, such measures are essential tools.

2. Copyrighted Works Are Available for Use. The first factor to be examined by the Librarian under the statute is "the availability for use of copyrighted works." 17 U.S.C. § 1201(a)(1)(C)(i). The representatives of the copyright industries have given extensive

testimony that effective access control measures have been an enabling factor, indeed a precondition, to making works available in digital form. And it is undisputed that, by using such measures, the copyright industries in the past few years have been able to release a vast number of digital works, to the benefit of the consuming public. This explosive growth in the availability of copyrighted works, with unprecedented convenience and flexibility, is the forest – the lush and verdant forest – willfully missed by those who focus instead on a few stunted trees that, on examination, prove to be mischaracterized, if not chimerical. The likelihood is that exceptions to Section 1201(a)(1)(A) would cause works to become less available, as copyright holders became less willing to make their creations available in digital form.

3. Should the Librarian Enact a Different Statute? Many advocates of exemptions, in tacit recognition that no case can be made for adverse effects on noninfringing uses of narrow classes of works, instead have misused the rulemaking as a forum to attack the DMCA itself. Others, by urging impossibly expansive exemptions – for fair use, for "fact works," for "thin copyright" works, or even for all lawfully acquired copies (commonly, under license restrictions) – have argued in effect that Section 1201(a)(1)(A) should not come into effect, and that the Librarian should overturn the statute through rulemaking – despite knowing, as they must, that it is not within the Librarian's authority to do so. Over the course of two sets of hundreds of written submissions and five days of detailed testimony, what is most conspicuous is the failure of the advocates of exemption to produce anything like the kind of evidence the statute requires of their position. In contrast to what amount at best to claims of inconvenience, there has been a great deal of testimony, both written and oral, as to the problems posed for copyright owners by digitization and the Internet, and why a legal prohibition against circumvention is essential to commerce in digital works.

4. Copyright Owners Do Not Use Technical Measures to Deny Users Lawful Access. Copyright owners prosper by pleasing their customers. SCEA competes in an extremely competitive market. So, we are supremely conscious of our customers' desires. If our control measures inconvenience our customers, they can and will go elsewhere. Conversely, if we can gain a competitive advantage by making our technological access controls more transparent, facile, etc. than those of our competitors, we have every incentive do so. If, however, measures could be circumvented with impunity (for the benefit, no doubt, of a small minority of users), we would be compelled to implement more cumbersome measures, to the detriment of all users.

5. We Do Not Wish to Minimize Access to Our Works. As we and numerous other representatives of the copyright industries have testified, access controls maximize access – they don't minimize it – by the greatest number of users in the most efficient manner. There can be little doubt that if access controls were not enforceable for works distributed in any given form, the availability of works in such form would be rapidly and significantly curtailed. We can conceive of no scenario in which that would not be the case.

6. Can the Librarian Use this Proceeding to Change Balances or Imbalances in the Marketplace? Many of the circumstances offered in these proceedings as adverse effects of access control measures were instead what the proponents perceived to be imbalances or inequities in the marketplace, such as difficulty in reaching licensing terms, concurrent user limitations, inconveniences, and insufficient budgets to acquire what they desire. It bears repeating yet again that these accounts do not approach the specific evidence of substantial adverse effect requested by the Office in the Notice of Inquiry. More important, to whatever extent such situations exist, and to whatever extent they indicate problems, they are marketplace problems requiring marketplace solutions.

7. Are the Problems Ascribed to Access Controls New Problems? Access control limitations are not new; analogous limitations existed in the pre-digital world. Regional limitations, for example, are an inherent aspect of distribution of works in the physical world. As others have pointed out, a print book is subject to severe concurrent-user limitations, and if that limitation is seen as a problem, the solution lies in the marketplace. A library can acquire one or more additional copies of popular titles, just as it may acquire the right to add additional users to the license for a work in digital form. Even if purported market inequity were convincingly shown to exist, SCEA takes strong exception to the suggestion that copyright law – let alone this proceeding – would be an appropriate vehicle for correcting it, through imposition of limitations on copyright owners' ability to market their works when, as, and in the form they choose, based on changing market strategies in a changing marketplace.

8. Does the Fair Use Defense Require an Exemption? Throughout the rulemaking, the advocates of exemption have focused disproportionately on fair use, despite the fact that the effect of access control measures on aspects of fair use is only one of the five factors the statute directs the Librarian to balance in the rulemaking. 17 U.S.C. § 1201(a)(1)(C)(iii). The notion has even been advanced that Section 1201(a)(1)(A) "prevents" fair use. The flawed logic behind this assertion appears to be that, since fair use is not authorized by the copyright owner, fair use requires unauthorized access. This is as much as to say that fair use of a novel can be made only when the user has purloined the copy; or fair use of a film requires sneaking into the theater, or using a pirated cable signal. The idea is not only outlandish; it is exactly wrong under the tenets of fair use itself, which, as an equitable doctrine, requires that the user's hands be clean. And in fact, fair uses of copyrighted works are customarily made using legitimate copies, or through authorized access.

Technological access controls, fortified by a prohibition on their circumvention, will continue to enable the widest, most flexible dissemination of copyrighted works in digital form. By virtue of that very fact, such controls will facilitate the fair use, along with the authorized use, of those works. In sum, it appears to us that such controls have no more potential detrimental effect on fair use than do the non-technological access controls long employed to control access to copyrighted works, such as cash registers, box offices and security devices in stores, which have always been deployed in tandem with legal prohibitions on their circumvention.

9. The Contentions of Bleem, Inc. Have Not Added Any Substance to the Claims for Exemptions. Representatives of Bleem, Inc., with which SCEA is currently engaged in litigation, have made the extraordinary assertion in this proceeding that Sony PlayStation CDs form all or part of a "class of works" that should be exempted from the prohibition on circumvention. Bleem, like the other advocates of exemptions, could offer no evidence that access controls (in this case, SCEA's PlayStation WIZ Code, which prevents counterfeit copies of authorized games from running on PlayStation consoles), have or will have a distinct, verifiable and measurable impact on users' ability to make non-infringing uses of PlayStation game discs. Instead, Bleem posits an anticipated "chilling effect" on its sales based on a purported threat of claims by SCEA under Section 1201(a)(1)(A) against users of its products, unless a "class of works" consisting of or including PlayStation discs is exempted.

Looked at from any angle, the claim that the Librarian should recommend an exemption for the purpose of foreclosing SCEA, or any party, from asserting its rights in court is entirely improper. The merits of any such hypothetical claim would be for a court to decide, not the Librarian. In any case, such a speculative "chilling effect," based on non-existent facts and non-existent law, comes nowhere near to meeting the evidentiary burden in this rulemaking.

In his testimony, Bleem's attorney also claimed that Section 1201(a)(1)(A) would prevent owners of PlayStation discs from exercising a non-existent "right" (frequently asserted in these proceedings) to play those discs on any platform they choose, in the event that Bleem's software were determined by a court to be what he termed a "circumvention device" under the DMCA. The idea that PlayStation discs should be subject to an exemption from Section 1201(a)(1)(A) in order to immunize use of a device that violates another section of the DMCA is peculiar, to say the least. In any case, to advance such a notion is a far cry from providing the clear and specific evidence of actual or anticipated adverse effects on non-infringing uses required to justify an exemption.

Finally, Bleem's attorney appears to imply that a measure such as the SCEA WIZ code, which prevents counterfeit copies of authorized games from running on PlayStation consoles, is not a technological measure that controls access to copyrighted works under the statute because it is not a traditional copy control device. Others have asserted in this proceeding that technological access controls whose purpose is to prevent unauthorized copying enjoy a special status under the statute. There is no basis in the statute or the legislative history for such a distinction. To paraphrase Judge Kaplan in Universal City Studios, Inc. v. Reimerdes, 82 F. Supp. 2d 211 (S.D.N.Y. 2000), if Congress had wanted to accord certain types of access controls higher status under the statute, it would have said so.

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SCEA believes there is no need to create any new exemptions to Section 1201(a)(1)(A). We find the conclusion drawn by the Copyright Office in its recent report regarding the Joint Study of Section 1201(g) of the DMCA to be equally apposite here. The

report stated, “Of the … comments received … not one identified a current, discernable impact. … Every concern expressed, or measure of support articulated, was prospective in nature …. Given the forward-looking nature of the comments and the anticipated effective date of the section at issue, any conclusion would be entirely speculative. As such, we conclude that it is premature to suggest alternative language or legislative recommendations … at this time.”

SCEA thanks you once again for your consideration of our views and the opportunity to present them.

Very truly yours,

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