June 23, 2000

David Carson
Office of the General Counsel
U.S. Copyright Office, Library of Congress
101 Independence Avenue, SE
Washington, DC 20540

RE: Docket No. RM 99-7, Exemption to Prohibition on Circumvention of Access Control Technologies

Dear Mr. Carson:

These post-hearing reply comments on exemptions from the section 1201(a)(1) prohibition on circumvention of access control technologies are submitted on behalf of the Association of American Universities, the American Council on Education, and the National Association of State Universities and Land-Grant Colleges (collectively, the "Higher Education Associations").

As discussed in our prior comments and testimony in this proceeding, the Higher Education Associations believe that the Copyright Office should recommend exemptions from the section 1201(a)(1) prohibition that preserve the statutory distinction between access control and copy control technological protection measures and that carry out the clear intent of Congress to ensure that fair use and other Copyright Act exemptions critically important to nonprofit scientific and educational institutions are not nullified by technological protection measures.

The content community has now made clear in the record that it intends to invoke technological protection measures ("TPMs") and the 1201(a)(1) prohibition to facilitate the very pay-per-use business models that Congress intended not to protect by section 1201(a). To preserve Congress' intent, the 1201(a)(1) exemption should apply to any work which the user had lawful initial access (i) during the period of lawful access, or (ii) after any period of lawful access if the user has physical possession of a copy of the work. Such a rule would preserve the critical distinction between "access control" technologies, to which the prohibition of section 1201(a)(1) was meant to apply, and "use control" technologies, to which it was not.[1]

Further, as Prof. Laura Gasaway testified on our behalf at hearings at Stanford University, there are certain classes of works for which the balance weighs particularly heavily in favor of granting a section 1201(a)(1) exemption: "Fair Use Works" and "Thin Copyright Works," which we define

[1] This proposal also responds to concerns expressed during the hearings that a rule based solely on initial lawful access would create a perpetual right to break into web-sites and other sources of information not in the possession of the user.

below. The application of access control technologies to such works is most likely to interfere with the long-recognized lawful uses by nonprofit educational and scientific institutions and to upset the copyright balance that has served this nation so well for so long. At a minimum, such works should be exempted during the period of lawful access by such users, and following such lawful access when such a user has lawful possession of a copy of the work.

I. In Making its Recommendation, the Copyright Office Should Give Paramount Consideration to the Purpose of the 1201(a)(1) Exemption and to the Relative Risks of Granting and Denying an Exemption.

A. Congress Intended the Section 1201(a)(1) Exemption to Preserve a Meaningful Exercise of Fair Use and Other Copyright Exceptions.

When it enacted the anti-circumvention provisions of the DMCA, Congress was concerned that technological protection measures could vitiate fair use and other Copyright Act exceptions that implemented the fundamental copyright balance between the public's interest in the vigorous flow of thoughts and ideas and its interest in providing incentives to authors to create their work. This balance is responsible for the enormous success of the American copyright system, which has created an environment in which authorship, education, research and scholarship have thrived and have contributed critically to the nation's world leadership in the creation and dissemination of knowledge.

Congress included the section 1201(a)(1) exemption in the DMCA specifically to protect fair use and the other Copyright Act exceptions. This purpose is clearly demonstrated in the legislative history of the 1201(a)(1) exemption. The House Commerce Committee inserted the provisions governing this rulemaking because the Committee was "concerned that H.R. 2281, as reported by the Committee on the Judiciary [i.e., the section 1201 protections, without the (a)(1) exemption] would undermine Congress' long-standing commitment to the principle of fair use." H.R. Rep. No. 105-551, pt. 2, at 35 (1998) (hereinafter "House Commerce Committee Report"). The Commerce Committee was "concerned that marketplace realities may someday . . . result[ ] in less access, rather than more, to copyrighted materials that are important to education, [and] scholarship . . . Section 1201(a)(1) responds to this concern." Id. at 36. As Commerce Committee Chairman Bliley stated on the floor, this rulemaking is "a mechanism to ensure that libraries, universities and consumers generally [will] continue to be able to exercise their fair use rights and other exceptions that have ensured access to works." 144 Cong. Rec. E2137 (Oct. 13, 1998) (statement of Rep. Bliley).

As Senator Ashcroft stated on the Senate Floor, "I trust that the Librarian of Congress will implement this [Section 1201(a)(1)] provision in a way that will ensure information consumers may exercise their centuries-old fair use privilege to continue to gain access to copyrighted works." 144 Cong. Rec. S11887 (Oct. 8, 1998) (statement of Sen. Ashcroft).

In implementing this statutory provision, the Copyright Office should heed Congress' instructions and give due accord to this intent and purpose.[2]

B. Congress Did Not Place a "Burden of Proof" on Proponents of an Exemption. Rather, Since the Copyright Office Must Predict the Future in this Rulemaking, It Should Weigh the Risk to the Public Interest of Granting an Exemption Against the Risk to the Public Interest of Not Granting the Exemption.

The primary argument of the content community in this proceeding is that those seeking an exemption have not met what that community characterizes as a heavy burden of proof. *See, e.g., Software & Information Industry Association Reply Comments at 2-3 (hereinafter "SIIA Reply Comments"); Joint Reply Comments of American Film Marketing Association et al. (hereinafter "Metalitz Reply Comments") at 2-3*. But Congress did not allocate any particular burden of proof or persuasion on any party to this proceeding; the text of Section 1201 is silent on who bears any burden.[3] Therefore, the Copyright Office should not impose such a burden.

Instead, section 1201(a) requires the Copyright Office to exercise its judgment and to make a recommendation to the Librarian. The paramount consideration in making this recommendation must be the public interest, not the "burdens" on any party. In this rulemaking, where the Office is charged with predicting the future, principles of reasoned decision-making obligate the Office to weigh the potential benefits and risks to the public interest of its possible alternative decisions. Specifically, the Register should weigh the potential injury to the public interest if the Librarian exempts too broadly against the potential injury to the public interest if the Librarian is too narrow in his exemption.

C. The Importance of Fair Use and Access to Public Domain Information, and the Vast Array of Alternative Remedies Available to Copyright Owners, Argue for the Copyright Office to Resolve Doubts in Favor of Granting the Requested Exemption.

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[2] This legislative history belies two claims asserted by the content community—that fair use cannot and should not exist absent access, and that the Office should give weight to their unsupported speculation that the 1201(a)(1) prohibition will increase licensed access to works. The former is contradicted by the very presence of the 1201(a)(1) exemption to "access control technology." The latter, aside from lacking credibility given the broad array of remedies already available to copyright owners (see Part I.C., *infra*), falls outside of the purpose of this rulemaking provision, which is to assure the continuation of fair use and other exempt uses, not to modulate the volume of information produced.

[3] The copyright owners' cite to legislative history in support of their burden-of-proof arguments is misleading. The *House Floor Manager's Report* relied upon by the copyright owners was drafted by the House Judiciary Committee, whose original version of the bill (H.R. 2281) was specifically amended by the Commerce Committee in order to include the provision for this rulemaking. *See* Committee on the Judiciary, House of Representatives, 105th Cong., Section-by-Section Analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4, 1998 ("House Judiciary Committee Report"). The *House Judiciary Committee Report* reflects none of the Commerce Committee's positions, particularly regarding its fair use concerns, that motivated it to create this rulemaking proceeding.

Two fundamental aspects of our national information policy—fair use and access to public domain information—are imbued with immense public interest. Courts have long-recognized that fair use is "a necessary incident of the constitutional policy of promoting the progress of science and the useful arts, since a prohibition of such use would inhibit subsequent writers from attempting to improve upon prior works and thus ... frustrate the very ends sought to be attained." *See Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 549. Indeed, as the Supreme Court made clear in *Nation Enterprises*, the doctrine of fair use is the essential means by which copyright law is reconciled with the First Amendment. *See id.* at 560 ("First Amendment protections [are] embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use . . ."). Presumably, there can be no disagreement about the importance of the First Amendment to the public interest, and particularly to the academic community. *See, e.g., Keyishian v. Board of Regents of University of New York*, 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment . . ."); Maureen Ryan, *Fair Use and Academic Expression: Rhetoric, Reality, and Restriction on Academic Freedom*, 8 Cornell J.L. & Pub. Pol'y 541, 575-76 ("[The Supreme Court] has generally afforded great [First Amendment] deference to the academy, recognizing that universities are places that require 'robust exchange of ideas' in order to fulfill their function. . . However, copyright doctrine in the university context implicates academic freedom because it affects choices made by academics in the pursuit of inquiry. . . Copyright policy in the context of the university should be based on a justification that recognizes the distinctive mission of the university and incorporates correlative principles of academic freedom.").

Just as the courts have affirmed the fundamental importance of fair use, they have also affirmed the importance of access to public domain information. The Supreme Court in *Feist* made clear the importance of unfettered public access to facts, news and information: "all facts – scientific, historical, biographical, news of the day . . . are part of the public domain available to every person." *Feist Pubs., Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 348 (1991) (citation omitted). "[T]he raw facts [in a work] may be copied at will. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art." *Id. at* 350.

A significant reason that the United States stands at the forefront of education, science, and technological achievement today is that our government has long asserted that no one may own facts or information, or may prevent full, unfettered use of any facts or information.[4] This policy has fostered a rich public domain of information, which is used by the academic and scientific communities for further exploration, comment, discussion, debate, research, and other intellectual activities that advance

[4] In addition to being reflected in our laws, this policy is reflected in government initiatives such as the present Administration's drive to "close the digital divide" by providing greater public access to information in electronic and online format. *See, e.g.* Remarks by the President in Digital Divide Discussion with East Palo Alto Community (White House Education Press Releases and Statements, April 17, 2000); *see also* Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 Cardozo Arts & Ent. L.J. 215, 264-67 (1996) (arguing that digital distribution and discontinuation of public entities' (*e.g.,* universities' and libraries') provision of free access to information may promote socioeconomic inequality).

society's knowledge. Depletion of that rich public domain will impede education and slow the progress of science and innovation. *See, e.g.*, Diane Zimmerman, *Copyright in Cyberspace: Don't Throw Out the Public Interest with the Bath Water*, 1994 Ann. Surv. Am. L. 403, 410 (discussing possible chilling effect on students, scholars and library users of having to pay for each use of information).

Thus, the doctrine of fair use is essential to implement core Constitutional values; and the public interest in access to facts, information and the other content of the public domain is central to the copyright system and to the progress of science. Questions about the scope of an exemption from a newly enacted prohibition on circumventing technological protection measures should be resolved in favor of these twin values of fair use and access to public domain information.

Moreover, granting the exemption proposed by the Higher Education Associations would cause little risk to copyright owners.

Some copyright owners have asserted that an exemption for their works would cause huge and irreparable damage. *See, e.g., Written Statement of David Mirchin, on behalf of Silverplatter Information, Inc.*, at 4-6 (May 2, 2000) ("*Mirchin Written Statement*"); *Written Statement of Bernard Sorkin, on behalf of Time Warner Inc.*, at 6-7 (May 4, 2000) ("*Sorkin Written Statement*"). Others have claimed that "nothing would have a more chilling effect" on the release of a new product. *Transcript of Anticircumvention Hearings, May 3, 2000*, at 12 (testimony of Cary Sherman, on behalf of the RIAA) (hereinafter "[Date] Hearing Tr."). Yet there is no evidence (other than unsupported assertions by interested parties) that any fewer works would be available to the public if an exemption were enacted.

Throughout all of the copyright owners' comments and testimony seems to run the theme that the sky will fall if the Copyright Office grants any 1201(a)(1) exemptions relating to their works. But their comments fail to elucidate how this dire result will come to pass. In fact, it will not. If the Copyright Office grants the exemptions proposed herein by the Higher Education Associations, copyright owners still will possess an enormous arsenal of legal and technical remedies against unlawful conduct that will continue to protect their works.

First, nothing in this rulemaking will affect the availability of the prohibitions contained in sections 1201(a)(2) or 1201(b) of the DMCA. These sections prohibit the manufacture and distribution of circumventing devices (down to the component level) and the performing of circumvention services. Because any act of circumventing an access-protected work requires a device (defined to include software) for doing so, these provisions have already been used successfully by copyright owners. *See, e.g., RealNetworks, Inc. v. Streambox, Inc.*,
No. C99-2070P (W.D. Wash., Jan. 18, 2000) (granting preliminary injunction against distribution of "VCR" software used to circumvent access and copy controls of RealNetworks' streamed content); *Universal City Studios, Inc. v. Reimerdes*, 82 F.Supp.2d 211 (S.D.N.Y. 2000) (granting preliminary injunction against distribution of DeCSS software used for circumventing DVD Content Scramble System).

Second, nothing in this rulemaking will prevent copyright owners from applying TPMs. Several witnesses testified that TPMs such as passwords and encryption already limit access to works, and that such protections, even if theoretically "breakable," are effective because they require time, effort, and special expertise (which most entities do not have) to break. Thus, the existence and use of the TPMs themselves will control all uses, including lawful uses. Copyright owners will remain free to use these TPMs to frustrate fair use and other lawful uses. However, they should not be entitled to use the U.S. courts in aid of this goal.

Third, and perhaps most importantly, the full range of sanctions for copyright infringement remain in force against the very persons or entities who would be subject to a claim under section 1201(a)(1) for circumventing access control technologies. If an access control technology is circumvented for an infringing purpose, the person doing the circumventing is likely liable for copyright infringement, fully subject to a broad and powerful array of sanctions. The added sanctions for unlawful circumvention are redundant and cumulative.

Finally, this rulemaking will not abrogate contractual remedies that copyright owners may have under license agreements. We have heard a great deal of testimony describing the new models of licensing used, or contemplated, by copyright owners in order to assert greater control over the use of their works. Use of the copyrighted work in violation of the license agreement will subject the user to damages for breach of contract. To the extent these contractual restrictions overlap those that will be imposed by TPMs, there is no reason to believe that Congress intended section 1201(a)(1) to criminalize or create new, far-reaching civil sanctions for breach of contract.

In sum, there is great public interest in preserving fair use and access to public domain information that will otherwise be frustrated by access control technological protection measures. The public interest to be served by a redundant and cumulative remedy against circumvention is limited. Accordingly, in evaluating the record and determining the appropriate scope of any exemption under section 1201(a)(1), the Copyright Office should weigh the balance in favor of the requested exemption.

II. The Copyright Office May Define Exempt Works in Terms of Affected Users.

One question asked repeatedly in the hearings before the Copyright Office was whether the Office could define an exemption in terms of users as well as classes of works. The Higher Education Associations submit that section 1201(a)(1) contemplates that the exemption be defined in just such a way.

Subparagraph 1201(a)(1)(B) sets forth the operative substantive rule that is the focus of the Copyright Office's recommendation. This subparagraph explicitly defines the scope of the exemption in terms of both user and works:

> "The prohibition contained in subparagraph (A) shall not apply to persons who are *users* of a copyrighted work which is in a particular class of works, *if such persons*

> *are, or are likely to* be in the succeeding 3-year period, adversely affected by virtue of such prohibition in their ability to make noninfringing uses of that particular class of works under this title, as determined under subparagraph (C).

17 U.S.C. § 1201(a)(1)(B) (emphasis added).

Subparagraph (C), which provides for this rulemaking, explicitly speaks of "the determination in a rulemaking proceeding . . . *of whether persons who are users* of a copyrighted work, or are likely to be . . . *adversely affected* by the prohibition under subparagraph (A) *in their ability to make noninfringing uses* under this title of a particular class of copyrighted works." 17 U.S.C. § 1201(a)(1)(C) (emphasis added). Similarly, subparagraph (D) provides for the publication of classes of works based on a determination that "noninfringing uses *by persons who are users* . . . are likely to be adversely affected, and the prohibition contained in subparagraph (A) *shall not apply to such users*." 17 U.S.C. § 1201(a)(1)(D) (emphasis added).

In short, section 1201 requires the Office to undertake this rulemaking in the context of particular users of particular classes of copyrighted works. The Act gives the Office the authority to define an exemption in terms of users as well as classes of works. Indeed, it would be contrary to law not to define the exemption in terms of users as well as classes of works.

III. The Copyright Office Should Recommend an Exemption that Will Preserve Congress' Intent to Differentiate Access Control Technology from Use Control Technology, Rather than Enforcing Copyright Owners' Vision of a "Pay-Per-Use" Society.

The section 1201(a)(1) exemption was only a part of Congress' response to the threat that technological protection measures would be applied by copyright owners in ways that interfered with lawful uses of copyrighted works and that upset the historic copyright balance. *See, e.g.*, Part I.A., *supra*. Another part of the response was Congress' decision to differentiate between the circumvention of "access control" TPMs, which are the subject of subsection 1201(a), and the circumvention of "use control" or "copy control" TPMs, which are the subject of subsection 1201(b). The prohibition on the act of circumvention was specifically limited to "access control" technologies. By so limiting the prohibition, Congress made clear its intent that TPMs protected by section 1201 not be allowed to be used to create a "pay-per-use" society. *See, e.g.*, House Commerce Committee Report at 25-26; 144 Cong. Rec. H7093-94 (floor statement of Rep. Bliley) (describing Congress' goal of preventing a "pay-per-use society").

Unfortunately, the content community has made clear that the use of TPMs in new business models will "circumvent" the clear distinction between access control and use control that Congress contemplated: copyright owners have repeatedly testified that they will use technologies that they consider "access control" TPMs to regulate use and to implement the very pay-per-use practices Congress intended to prevent. Thus, for example, Cary Sherman of the Recording Industry Association

of America spoke in glowing terms of RIAA's "new business models," which notably included distributions for "single listen" and for limited time periods of "access." *May 3, 2000 Hearing TR.*, at 20. Bernard Sorkin of Time Warner argued that one who purchases a DVD, and thus has full physical access to it, acquires only "the right" to play the disk on a "licensed player." *May 4, 2000 Hearing TR.*, at 168-69. Notably, both he and the motion picture industry witnesses made clear that they considered CSS, the TPM used on DVDs, to be an "access control" technology. *See id.* at 169-70; *May 19, 2000 Hearing TR.*, at 239-242 (statements of Dean Marks, representing MPAA). Richard Weisgrau of ASMP went even farther, arguing that if you want a particular use, you should pay for it. *May 4, 2000 Hearing TR.*, at 177. Mr. Sorkin followed a similar tack, saying "trust us" to make a use available and, of course, "pay us." *See id.* at 128-29. Mr. Sherman even argued that TPMs could be used to protect authors' moral rights, which are not even recognized under U.S. copyright law. *May 3, 2000 Hearing TR.*, at 49-50. Steve Metalitz essentially stated that there was nothing wrong with copyright owners using TPMs to institute their pay-per-use models. *See May 19, 2000 Hearing TR.*, at 124-25. [5]

These implementations of alleged "access controls," which have been called by some "second-order access control technologies," (*see, e.g.*, Metalitz testimony, *May 19, 2000 Hearing TR.*, at 118) are far beyond what Congress contemplated when it enacted the distinction between access controls in 1201(a) and use controls in 1201(b). Under the rubric of "access control," Congress sought to prevent the "digital equivalent of breaking into a bookstore to steal a book." *See* House Judiciary Committee Report at 5. Indeed, copyright owners repeatedly appealed to the argument that breaking an access control technology is akin to breaking into a house, breaking into a store, or breaking into a theater. They have even argued that access control technologies can be used to protect the copyright owner's privacy interests, invoking the private letters of J.D. Salinger. *See May 4, 2000 Hearing TR.*, at 128, 156-57 (testimony of Bernard Sorkin).

But, as the frank testimony of many of the copyright owners now makes clear, it is not the bookstore that the owners want to lock, it is the very book itself. It is not the theater that the owners want to lock, it is the very DVD disk or videotape itself. It is not the concert hall that the owners want to lock, it is the CD itself. They want nothing less than to require users to buy a key by putting a coin into the slot any time the user opens the book to read it. They want the right to require users to put a coin into the slot every time the user puts the disk in the player. The uses that copyright owners have admitted that they want the power to regulate go beyond that which copyright law was ever intended to give them the right to regulate—for example, reading a book and private performances of movies or recordings.

Copyright owners realize full well that imposing such use controls in the name of "access control" will prevent users from exercising fair use and other exemptions that promote access to information. In fact, they would applaud such a result. Mr. Sorkin testified that copyright law is "an

[5] The foregoing examples were the examples referenced by Prof. Gasaway in her May 18 testimony. *See Transcript of Anticircumvention Hearings, May 18, 2000*, at 40-41. This paragraph responds to the request of Mr. Carson, *see id.* at 111, to provide the citations to the references.

anomaly" and lamented that "not many property laws are so full of holes or obligations." *May 4, 2000 Hearing TR.*, at 157. He and Mr. Weisgrau argue that in the brave new world of "access control technology," there should be no such thing as fair use—users should need permission, and should be required to pay for each use. *Id.* at 137-38, 148-49, 168, 177.

However, it is precisely the "holes" about which Mr. Sorkin and Mr. Weisgrau complain that this proceeding is intended to protect. This proceeding is all about the preservation of fair use and other lawful uses of copyrighted works. *See infra* Section I.A.

Moreover, those who advance the rhetoric that there can be no fair use without access, such as Mr. Kupferschmid in his statement on behalf of SIIA (*see May 2, 2000 Hearing TR.*, at 138-39) are fundamentally wrong for another reason. Copyright law reflects value judgments about uses that should be subject to the owner's control and those that should not. The goal is to create a balance that fosters an incentive to create, as well as permits certain uses that are deemed beneficial to society. Congress has made clear that this goal, and the need for balance, remain critical in the digital environment. However, the rules implementing this balance were developed in the world where, for most works, exploitation required access. Physical copies were distributed, and radio and television signals were transmitted and received. In other words, the economic motivation to exploit functioned as the engine that ensured unregulated access. The rules of fair use, and other lawful uses, evolved assuming that unregulated access.

Once the premise is changed, so that exploitation no longer requires the granting of unregulated access, the balance disappears. In fact, as noted above, the copyright owners have candidly admitted that they want to change that balance fundamentally in the name of access control technology. An approach that better serves Congress' demand to preserve the balance between proprietary rights and exempt uses is to recognize that it is exploitation of a work that should determine whether fair use attaches. In short, fair use does and must exist even when "access" is controlled.

The foregoing discussion illustrates that the "access control" technologies contemplated by the content community are incompatible with fair use and other lawful uses of copyrighted works. Moreover, the testimony of the content community provides compelling evidence that its members' intended use of these technologies will subvert the clear distinction Congress contemplated between use control and access control. The Copyright Office should make a recommendation that preserves the distinction that Congress intended. The first part of the Higher Education Proposal, set forth in Part V.A., below, preserves this distinction. We urge its adoption.

IV. The Record Demonstrates the Threat to Fair Use and the Public Domain from the Application of "Access Control" TPMs.

As discussed above, the balance of the relevant risks and the policy considerations that should govern the Copyright Office's recommendation make clear that any doubts about the need for an exemption should be resolved in favor of granting the exemption. Moreover, the content community's

projected use of TPMs in a manner that will obliterate Congress' intent to differentiate between the treatment of access control and use control provides an independent basis for the exemption sought by the Higher Education Associations. But, even without these presumptions and considerations, the evidence supports the exemption proposed in Part V, below.

The comments and testimony in this proceeding have provided evidence that, without appropriate exemptions, section 1201(a)(1) will impede fair use and other lawful uses necessary for academic and scientific pursuits. Even now, before the section 1201(a)(1) prohibition even takes effect, there is evidence that TPMs are preventing such uses by, for example, denying access to lawfully licensed and encrypted CD-ROMs during the licensed period, *see May 18, 2000 Hearing TR.*, at 40 (Gasaway testimony), denying library users off-site access to materials based on IP address requirements, *i.d.* at 37-38, and denying the lending of materials to certain library users, *id.* At 93-94 (Gasaway and Coyle testimony).

The evidence presented to the Office of contractual restrictions now being imposed by copyright owners further demonstrates the real threat from access control TPMs. Copyright owners and users testified to the increasing use of license terms that seek to restrict the place of access, the number of accesses, the number of users, and to impose other limitations on the use of works. *See id.* at 38-40 (Gasaway testimony): *May 3, 2000 Hearing Tr.* at 20-21 (Sherman testimony). License terms, like TPMs, are simply another way to impose prohibitions and restrictions on use that go beyond that which is prohibited by copyright law. Regulating use is the goal of "digital rights management systems." Today's contractual restrictions are tomorrow's TPMs.

The evidence in this proceeding also has shown that, for many works used by universities and libraries, there are no practical alternatives to digital formats. *See, e.g., id.* at 55-58. E-journals, databases, and other electronic-only publications are becoming increasingly common. Even for those works theoretically "available" in both electronic and print format, the electronic format often offers features not included in the print version, including features that facilitate research. Further, because libraries and research institutions often cannot afford the cost of offering both formats, they are practically limited to the electronic version.

In sum, the threat to fair use and the public domain is real. The Copyright Office should recommend an exemption that recognizes this threat.

V. The Higher Education Associations' Proposal.

The Higher Education Associations believe that the record in this proceeding fully supports exemptions for nonprofit institutions of research and learning on several grounds. First, as discussed more fully in Part III, above, the use of "access control" TPMs in furtherance of use control merits an exemption to ensure that the distinction intended by Congress will be maintained. This proposal is discussed in Part V.A.

Second, as we have demonstrated in prior comments, application of access control technologies to two classes of works threatens to raise particularly acute difficulties for institutions of higher learning. These classes of works—Fair Use Works and Thin Copyright Works—merit particular deference in the consideration of the section 1201(a)(1) exemption.

In considering these exemptions, the Office should keep in mind that, as discussed in Part II, above, its recommendation may be limited by user as well as by class of work.

A. Proposed Rule To Address the "Use Control" Issue.

Congress intended to distinguish between access control and use control TPMs. The content community has made clear that it intends to use technologies that it classifies as "access control" to implement use control, effectively eliminating the distinction Congress intended to preserve. The Copyright Office can and should prevent this result. To preserve Congress' intent, the Higher Education Associations urge the Librarian of Congress to promulgate an exemption to 1201(a)(1) that would apply to:

> any work to which the user had lawful initial access (i) during the period of lawful access, or (ii) after any period of lawful access if the user has physical possession of a copy of the work.

This proposal recognizes the difference between access under circumstances where the user has physical possession of the content, and access under circumstances where physical possession remains with the copyright owner. In the former case, distribution has occurred and the access control technology is, by definition, being used to control use. In the latter case, the use control effects are most troublesome during the time that user has licensed access. Then, the bookstore is open, and the user should be able to enter. On the other hand, the threat to the owner may be greater if the circumvention is directed at a copy of the work that remains in the owner's possession (e.g., on the owner's web site) after the period of licensed access. Then, the analogy is closer to a bookstore that is closed. Thus, with respect to copies of the work that remain in the owner's possession, we would limit the 1201(a)(1) exemption to that period of time. This approach implements the intent of Congress that section 1201(a)(1) be used only to ensure that users not be able to break into the bookstore when it is closed—that is, section 1201(a)(1) is intended to control access, not use.

B. Works Subject to Access Control that Create the Greatest Threat to Higher Education, Learning and Research.

Although the Higher Education Associations believe that the statutory scheme and the evidence adduced in this process dictate the above result, there are certain classes of works for which the balance weighs particularly heavily in favor of exemption. These are works with respect to which the application of access control technologies are most likely to interfere with lawful uses by institutions of higher learning and nonprofit academic research. The Higher Education Associations identified these classes of works in our opening comments as "Fair Use Works" and "Thin Copyright Works." Although the content community has criticized these categories as vague, they are, in fact, easily defined.

As discussed in Part V.A., above, the exemption would apply only (i) during the period of lawful access by such users and (ii) following such lawful access when such a user has lawful possession of a copy of the work.

1. "Fair Use Works"

Fair Use Works are copyrighted works that, due to their nature and the users who typically use them, are likely to be lawfully used under the fair use doctrine, for education or research. To satisfy concerns about potential vagueness, the Copyright Office's recommendation for an exemption should specify a list of *per se* inclusions in the exempt class, which should include: scientific and social databases, textbooks, scholarly journals, academic monographs and treatises, law reports, and educational audio/visual works. If the Office is concerned about potential abuses of such an exemption by users who are not generally fair users, the Office could limit the exemption to specific classes of likely fair users, which would include nonprofit educational institutions and their students and faculty.

The Copyright Office should also recognize that any work can be primarily used for fair use purposes with respect to more limited user communities. Thus, the Office should propose a more flexible exemption by regulation that would constitute a defense to an action for circumvention where a type of user sustains the burden of proving that such users typically use a particular type of work for fair use purposes. This provision could be used, for example, by university fine arts departments as to motion pictures. A defense so constituted would not apply to other users.

2. "Thin Copyright Works"

Thin Copyright Works are works that contain limited copyrightable subject matter, and which derive their most significant value from material in the public domain, such as facts, processes, ideas, or other elements that are beyond the scope of copyright protection. Again, to satisfy concerns of vagueness, the Copyright Office should recommend a specific list of types of works that are subject to the exemption. This list should include databases, histories, statistical reports and abstracts, encyclopedias, dictionaries, and newspapers. As with an exemption applied to fair use works, if the Office is concerned about potential abuse, the Office could limit the exemption to classes of users particularly in need of access to thin copyright works, which would include nonprofit educational institutions and their students and faculty.

The application of TPMs to such works are particularly likely to preclude a user from obtaining access to facts, ideas or other elements of the work that are not protected by copyright law. Such limitations are a particular threat to the continued vitality of the educational system and the progress of learning. For example, the Supreme Court has expressly recognized that that copyright protection for databases and other compilations is "thin." "[T]he raw facts [in a work] may be copied at will. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art." *Feist*, 499 U.S. at 350; Jane Ginsburg, *Copyright, Common Law, and Sui Generis Protection of Databases in the United States and Abroad*, 66 U. Cin. Law Rev. 151, 152-53 (1997) ("'Thin' copyright protection is still available [after *Feist*], but it covers only the original

contributions (if any) that the compiler brings to the public domain information. Moreover, *Feist* makes clear that padding the compilation with original added value will not flesh out the skeletal figure beneath: the information, stripped of selection, arrangement, or other copyrightable frills, remains free for the taking.").

The Higher Education Associations believe that the above approaches to classifying works and identifying users will most closely serve the purpose of section 1201(a)(1) and the exemptions Congress expressly contemplated to preserve fair use and other lawful uses.

VI. Conclusion

The Copyright Office is faced in this proceeding with the critical task of preserving the meaningful exercise of fair use and other lawful uses of copyrighted works and material in the public domain. This is not a task that should be put off for another three years at the request of the content community. Digital rights management systems that implement use control are already being employed. We therefore urge the Copyright Office to recommend, and the Librarian of Congress to adopt, the exemptions set forth in our comments.

Thank you for your consideration of our request and for the thoughtful, balanced rulemaking proceeding which the Copyright Office is conducting.

Sincerely,

John C. Vaughn
Executive Vice President