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David O. Carson, Esq.  
General Counsel  
United States Copyright Office  
Library of Congress  
101 Independence Ave., SE  
Washington, DC 20559-6000

RE: Docket No. RM 2002-4

Dear Mr. Carson:

Thank you for your letter of June 27, giving us the opportunity to review the post-hearing submissions of the Electronic Frontier Foundation (EFF) in this proceeding, and inviting us to provide any other relevant information regarding the EFF answer to one question posed.

The question to which EFF was responding asked, “How many DVDs which are encrypted using CSS contain a compilation of works including both audiovisual works in the public domain and audiovisual works protected by copyright?”

At the outset of its answer, EFF attempts to shift the burden of answering the question to “the motion picture industry participants in this proceeding,” EFF submission at 17. EFF asserts that “requiring a non-industry proponent to provide a complete list of public domain works available on DVD in order to meet the threshold burden in this proceeding would raise very significant issues of procedural inequity.” *Id.* at 16-17.<sup>1</sup>

This appears to mischaracterize the question EFF has been asked. No one has been asked to provide “a complete list of public domain works available on DVD.” Instead, the Copyright Office asks about a subset of this universe: instances in which an audiovisual work in the public domain has been (1) included on a DVD

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<sup>1</sup> We read your letter of June 27 as not inviting any response from us to the EFF assertion regarding the supposed “procedural inequity” EFF faces in meeting the burden Congress assigned to proponents of exemptions in this proceeding. We would be pleased to respond to this assertion if and when you think it appropriate for us to do so. We would simply note for the record that commercial motion picture studios and distributors, such as those represented among the Joint Reply Commenters, are not in the business (with rare exceptions) of distributing copies of audiovisual works that are in the public domain, and would not claim any specialized or privileged knowledge about this sector of the market. Furthermore, commercial studios or distributors do not have any greater access than any other member of the public to information about whether a particular DVD, not produced or distributed by them, was or was not encrypted using CSS.

that is encrypted using CSS and (2) compiled along with audiovisual works protected by copyright on that DVD.

The Joint Reply Commenters are prepared to stipulate that such instances probably exist, given the huge range and variety of audiovisual works that are now being made available to the general public on DVD. However, we emphatically do not agree that the existence of such DVDs in the marketplace is probative in any way of the existence of detrimental impacts on the ability to make non-infringing uses of copyrighted materials, which is the sole focus of this proceeding. In general, as stated in the Joint Reply Comments, we believe that the proliferation of DVD titles protected by CSS (and thus subject to the prohibition against circumvention of access controls) has resulted in much greater accessibility of a wide spectrum of copyrighted audiovisual materials to a much broader public than would otherwise have been the case. This net benefit is not affected by the fact that, in some undetermined but certainly miniscule slice of that spectrum, the DVDs in question also contain audiovisual works that have fallen into the public domain.

In any event, the submissions made by EFF in response to this question fall far short of demonstrating that such compilations of protected and public domain audio-visual works on DVDs that have been encrypted using CSS are common, widespread, or numerous. Indeed, for all that the submissions prove, such compilations scarcely occur at all.

We agree with EFF that “to prove definitively that a particular motion picture is in the public domain in the United States is a complex and time-consuming process.” *Id.* at 17. The following comments thus observe (except where noted) the practice of EFF as labeling audiovisual works that were released prior to 1923 as “presumptively public domain,” but with the caveat that this test is certainly both underinclusive and (as a practical matter) perhaps overinclusive in delineating which works are no longer protected by copyright. Of course, a number of audiovisual titles released after 1923 are in the public domain for a variety of reasons, most notably publication without notice (prior to 1988), or failure to timely renew copyright protection (prior to 1992).<sup>2</sup> Whether either of these reasons is applicable to any title cited by EFF would require an examination of either the version of the title as originally published, or the records of the Copyright Office, or both. These sources are equally available to all parties to this proceeding. Furthermore, as far as we have been able to determine, none of the compilations in question was either produced or distributed by any company that belongs to any organization that is one of the Joint Reply Commenters. On this basis, as well as the fact that the burden of persuasion in this proceeding is clearly assigned to the proponent of any exemption, we know of no reason to presume that EFF is correct when it states that, for instance, the Laurel and Hardy title “Along Came Auntie” (1926) is in the public domain, while the Laurel and Hardy title “A Lucky Day” (1922) is not.<sup>3</sup>

We now turn to the specific titles cited by EFF in response to the Copyright Office’s question, beginning with the two examples cited by individual reply commenters in this proceeding to which EFF pointed at the time of the hearing as exemplifying the need for their proposed exemption. See Transcript of May 15, 2003 Hearing, at 195-96. As to these examples, EFF’s research apparently reached the same conclusion as our own (set forth in my letter of June 20, 2003). The *Charlie Chaplin Marathon* title appears to consist solely of (presumptively) public domain audiovisual works, with the possible exception of the Tony Curtis

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<sup>2</sup> Also, some audio-visual works may have been in the public domain since their creation, for example, works created by employees of the U.S. government.

<sup>3</sup> See item 1 of Annexure A to EFF Further Post-Hearing Comments. This is, of course, only one example of several in which the listings provided by EFF deviate without explanation from the stated rule of determining “presumptive public domain status” based solely on date of release.

“introduction,” assuming that this introduction is an audiovisual work. Neither EFF nor the Joint Reply Commenters were able to locate the second title cited. EFF proceeds to speculate about what title might have been meant by this commenter, but its description does not contain any indication that the compilation it identifies (“Landmarks of Early Film Vol. 1”) contains any audiovisual works protected by copyright. Indeed, the description of that compilation available at <http://www.facets.org/asticat> lists fourteen films or groups of films, with the latest release date given as 1913. Thus, at least presumptively, none of the audiovisual works in this compilation is protected by copyright, and therefore it is not responsive to the Copyright Office’s question to list this compilation.

Next, in Annexure A to its submission, EFF lists seventeen pre-1923 motion picture titles that have been released on DVD in a compilation format “with apparently copyrighted audiovisual works on DVD.” EFF at 17. All but one of these appear in a single compilation (*Treasures from American Film Archives*), already cited by the Joint Reply Commenters in this proceeding as a leading example of how the use of the DVD format has massively increased public access to public domain audiovisual material. See Joint Reply Comments at 22, n.21. EFF asserts that “copyrighted and public domain titles are combined on each of the 4 discs” that comprise this compilation, EFF at 18 n.21, but do not cite to a single specific title contained in this compilation that is not currently in the public domain. In any event, without regard to the copyright or public domain status of any particular title in this compilation, we are advised by NFPPF that the four-disc “Treasures” DVD does not employ CSS or any other access control mechanism. Thus, these titles do not meet the criteria set forth in the Copyright Office’s question.

The only other item EFF has listed in Annexure A is the 1929 silent film *The Woman He Scorned*, the DVD release of which includes the 1917 Harold Lloyd short film, *Move On*. Based solely on the dates of release, this appears to be a compilation of one copyrighted work and one public domain work. However, in this case the date of release may not be a reliable criterion. At least one website, <http://www.clarabow.net/videosforsale/videosforsale.html>, which sells VHS versions of *The Woman He Scorned*, claims that it is a public domain work. The Joint Reply Commenters have not independently verified this claim, but, as noted above, there are several ways in which a 1929 film might have entered the public domain. If the website is correct, then this example is not responsive to the Copyright Office’s question.

Next, in Annexure B, EFF lists “10 presumptively public domain titles that have been released in DVD compilations together with apparently copyrighted works.”<sup>4</sup> The Annexure points out that all the “presumptively public domain titles on this list are also available on VHS format.” While this fact by itself may not be dispositive of whether or not the titles in question are fully available for non-infringing uses, it is a factor which the Librarian has previously found to weigh heavily in favor of such a conclusion (or, more precisely, against the conclusion that a substantial detrimental impact on non-infringing use can be shown). See 65 Fed. Reg. at 64568. Furthermore, EFF does not even claim in Annexure B that any of the DVDs on this list have been encrypted with CSS.<sup>5</sup>

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<sup>4</sup> We note that for only half of the “presumptively public domain” titles on this list is any specific “copyrighted title” identified as part of the same compilation.

<sup>5</sup> Of course, even if they were so encrypted, the record in this proceeding clearly demonstrates that titles on such encrypted DVDs remain accessible for non-infringing uses (see, for instance, the demonstration by Fritz Attaway at the hearing on May 2 of the copying of an excerpt of a CSS-protected work by recording the screen image). In other words, as noted above, the Joint Reply Commenters contest the premise that the existence of titles that are responsive to the Copyright Office’s query is probative in any meaningful way of the existence of the facts upon which an exemption must be based.

Next, on pages 18-19 of its Post-Hearing Comments, EFF identifies three DVD compilations that it asserts contain both public domain works and works protected by copyright. Our examination of the description of these compilations at <http://www.digitallyobsessed.com/> suggest that they seem to exist entirely of (presumptively) copyrighted material, and there is no indication that any of these materials has fallen into the public domain. For instance, *Carnival of Souls*, the only theatrical entertainment feature ever made by the Centron Corporation, was released in 1962. Centron was primarily a successful producer of industrial and educational films. The Criterion DVD release (a two-disc set) contains an hour of excerpts from these other films. Although we have not located exact dates of release for these short films, one leading authority on “classroom films” comments that these films were commonly made from the mid-1940’s to the early 1970’s. <http://www.tipjar.com/dan/mentalthygiene.htm>. *Carnival of Souls* is available on VHS, but the hour of excerpts is not included on VHS editions. It is not clear which title or titles in this compilation EFF asserts to be in the public domain, but at least presumptively (based on date of release alone) there are none.

The *Educational Archives* series also consists of various educational films. The dates of release of the short films on the two volumes cited by EFF range from 1953 (*Social-Sex Attitudes in Adolescence* on Volume 1) to 1980 (*The Last Prom* on Volume 3). Although EFF asserts that each of the two *Educational Archives* compilations “contains ... a substantial number of other titles in the public domain,” it does not identify a single such title, and based on date of release alone, there appear to be no such titles.

Finally, in “Further Post-Hearing Comments” submitted on June 26, EFF returns to the list of nine assertedly public domain titles that it identified in its initial comments as being available only in DVD versions, see Further Post-Hearing Comments, Annexure A, and asserts that in eight of the nine cases, these DVD versions are compilations that include both public domain and copyright-protected titles. The submission contains no documentation of the status of titles in either category; but even if these assertions are correct, the evidentiary heft of this chart in support of the proposed exemption is compromised because every one of these assertedly public domain titles is available in a VHS format. We documented this as to five of the initial nine titles in our Joint Reply Comments, see Joint Reply Comments at 22 n.21, and now provide the following information as to VHS versions of the other four titles:

*Jungle Drums* is available in the compilation *Cartoon Crazy's Goes to War*, available from Amazon.com at [http://www.amazon.com/exec/obidos/tg/stores/offering/list/-/1572523891/all/ref=dp\\_pb\\_a/103-4381313-8639030](http://www.amazon.com/exec/obidos/tg/stores/offering/list/-/1572523891/all/ref=dp_pb_a/103-4381313-8639030).

*Our Gang Follies of 1938* is available from Amazon.com at <http://www.amazon.com/exec/obidos/ASIN/B00000F9H9/qid%3D1057585537/sr%3D11-1/ref%3Dsr%5F11%5F1/103-4381313-8639030>.

*Should Sailors Marry?* is available from Movies Unlimited in VHS format in the compilation, *Laurel & Hardy & Friends Vol. 8*, at <http://www.moviesunlimited.com/musite/frameset/index.asp?frame=product%2Easp&sku=875023++>

*The Beloved Rogue* is available from Movies Unlimited in VHS format, at <http://www.moviesunlimited.com/musite/frameset/index.asp?frame=product%2Easp&sku=108417++>.

Additionally, as noted above, there is no evidence that any of the DVD compilations listed in this annexure is encrypted using CSS.

*David O. Carson, Esq.*

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In summary, EFF has provided at most a handful of examples (drawn from perhaps two or three compilations) of audio-visual titles that (1) appear (based solely on date of release) to be in the public domain; (2) are currently available only on DVD, not VHS; and (3) in the DVD, are packaged with titles that appear (based solely on date of release) not to be in the public domain. In none of these cases has EFF demonstrated that the DVD compilation in question is protected by CSS or any other access control mechanism. We respectfully submit that any adverse impact on non-infringing use that can be gleaned from this evidentiary submission is no more than de minimis, and certainly falls far short of what is required for proponents to satisfy the burden of persuasion assigned to them in this proceeding.

Thank you for this opportunity to comment on these post-hearing submissions. Please do not hesitate to contact me if you have further questions.

Sincerely yours,

Steven J. Metalitz  
Counsel for Joint Reply Commenters