June 20, 2003

Mr. David Carson
General Counsel
U.S. Copyright Office
101 Independence Ave, SE
Washington, DC 20559-6000

Dear Mr. Carson:

Thank you for your follow-up question concerning BSA's May 2nd DMCA rulemaking testimony. In response to your request concerning the written submission provided by Mr. Montoro, BSA provides the following response.

As stated in our earlier written and oral testimony, the Business Software Alliance believes that there is not sufficient evidence in the record for granting Mr. Montoro's request for an exemption for "literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage or obsoleteness." In our view, the written materials submitted do not change that conclusion.

The Librarian's analysis in the previous rulemaking of the burdens established by the law is correct (although as we have noted in previous submissions, we disagree with the way they were applied). The application of that analysis to Mr. Montoro's submission shows that the exemption he proposes should not be granted.

The first and critical element is determining if there is problem of sufficient gravity to merit an exemption. On this matter, the burden of proof is with the proponents. The mere identification of **any** actual or "potential" problem is not sufficient. The harm must be serious and compelling, sufficient to overcome the anti-piracy goal of the Congress in enacting the law, inter alia as specifically stated in 1201(a)(1)(C)(iv). If the proponent carries the burden of demonstrating a cognizable problem, it is then up to the Librarian to act within the parameters of the law to craft an exemption. Such exemption must be narrowly tailored to conform to the evidence presented, and to enable, to the extent possible, only those non-infringing uses that the proponent has shown to be substantially adversely affected by section 1201(a)(1). The Librarian must also ensure that the exemption encompasses only a defined class of works consisting of a narrow subset of the statutory categories enumerated in Section 102.

Put differently, an exemption should not be recognized unless two showings are made: that a serious problem exists, and that a class of works can be defined in accordance with the statute to which the problem is applicable.

Mr. Montoro seeks an exemption to an overbroad class of works. Classes of works, the term used in the law, must mean something smaller than the statutory categories. The objective of the Congress was to ensure that remedies under this rulemaking were narrowly tailored to the circumstance.

There is substantial precedent and guidance on how to define categories of works. All these are based on objective criteria applied to analyzing the work, **and not the persons who may acquire or enjoy the work**. For example, the Copyright Office's Circular 22, "How to Investigate the Copyright Status of a Work", describes how the Office classifies works. Starting in 1891, the Copyright Office has published a "Catalog of Copyright Entries", which inter alia classifies works by such objective criteria. Further guidance may be found, for example, in the Library of Congress's classification systems. The Library classifies works by objective factors, for example, "literary work, novel, historical novel, French history, the Napoleonic war," or "literary work, computer program, CAD/CAM, mainframe, Unix". Given the legislative history, the classification done by the Library may be too specific, while the Copyright Office's classes may be to narrow. But it is our strong sense that the solution to "classes" is to be found in examining these types of existing classification systems. The key fact is that none of these systems describe works by their users' attributes. This makes perfect sense. A "hip hop" tune may appeal to a teenager and a grandmother, a native English speaker or an engineer. The same is true for other works.

At issue in this rulemaking, is whether the exemption for "literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage or obsoleteness" should be renewed for the next three years. It is well established that the proponents of the exemption have the burden of demonstrating de novo that it should be recognized again in this proceeding. We do not believe they have carried that burden.

That exemption as granted under the previous rulemaking was inappropriate. The evidence in the record did not establish that the problem was serious and even to the extent that it was real, that it affected

more than a very small number of copyrighted works. Thus, its proponents did not meet their burden of proving that the detrimental impact of the statute would be more than de minimis. The ensuing rule nonetheless applied to all literary works as defined under the category established under Section 102(a)(1), despite the specific direction from the law, and the clear direction from the Congress as evidenced by the legislative history, not to exempt entire categories. The rule also failed to define key terms, specifically "malfunction, damage or obsoleteness". Finally, the rule failed to properly apply the balancing test enunciated in Section 1201(a)(1)(C).

Your supplemental questions of June 16 ask for comment on the material submitted by Mr. Joseph Montoro of Spectrum Software, the principal proponent of renewing the exemption. We read your question to ask whether we believe the evidence supplied by Mr. Montoro meets his burden of persuasion. We believe that it does not.

We note that the majority of Mr. Montoro's submission represents printouts from web based support pages relating to dongles and not specific examples of specific problems. The wide use of online support pages is common in the tech sector. Many of our members have in excess of 10,000 online support pages on a variety of hardware and software support questions. A review of our members' support pages related to dongles shows a limited number of support questions relating to hardware dongles (generally less than 10 or 20 per company) in contrast to the thousands of pages relating to questions about other hardware and software issues. The few support pages limited to hardware dongles generally offer solutions for known issues. The fact that Mr. Montoro can only provide fewer than 50 examples of support pages that reference dongles reflects the lack of an issue for most consumers, and to the extent that issues do exist, that they are de minimis. Furthermore, the availability of the solutions offered on these support pages undermines the proposition that an exemption to the otherwise applicable statute is required. Clearly the marketplace is already providing mechanisms, other than unauthorized circumvention of the access control measure, to enable the non-infringing uses in question.

In determining whether an identified problem requires action under the rulemaking, the Librarian must take into account the anti-piracy objective of the law, and the specific requirement under 1201(a)(1)(C) about the impact of any proposed exemption upon the legitimate market for copyrighted works. To the extent that the Copyright Office views the number of web pages devoted to the topic of dongle support issues as

significant to its analysis, we would urge the Copyright Office to use any web search engine, such as Google, to search for the terms “crack hardware dongle.” A recent search by us found approximately 21,500 pages containing these three terms, the overwhelming number of which refer to cracks for hardware dongles for unauthorized use. This reflects the widespread attempts to defeat dongles for illicit purposes. The 50 or so web pages cited by Mr. Montoro should be evaluated in this context. To the extent that dongles have been an issue for consumers, the extent of piracy seems to have been far greater than the demand for the capability that would be facilitated by renewing the exemption.

I would also re-emphasize that many of the experiences cited by those who seek to remove the need for dongles from their system have nothing to do with a malfunctioning piece of hardware. Mr. Montoro has apparently only submitted eight emails that appear to refer to broken dongles. Several of them instead refer to the desire to simply get rid of the need for a dongle without any connection to actual obsolescence, malfunction or damage. In other words, the goal of these persons is to circumvent (evidently in violation of the statute) a technological protection measure that is working properly. From what appears in these papers, they are not seeking to take advantage of the exemption previously recognized by the Librarian, which Mr. Montoro and others propose should be renewed. Thus, this submission provides very little support for the proponents’ position.

As an example, as I noted in my oral testimony, Three Rivers Community College allowed only one individual, a part time employee who was fired for violating computer privileges, to know the access code to a database system. Upon his departure from the college, the database system was temporarily inaccessible. This example reflects a poor personnel and technology management system, not a defective digital rights management system. Other desires to remove the need for a dongle have referred to the concerns over the future that “if I lose the dongle, I will face some trouble.” Although this would seem to be an obvious point, such speculation should not be the basis for the Register to grant an exemption. Quite frankly, such a concern does not meet the test of the existing exemption, nor should it support the granting of any future exemptions.

Thank you again for the opportunity to present oral testimony before the Copyright Office and to provide further written responses. Please feel free to contact me if you have any questions about my response or if you need any additional information.

Sincerely,

Emery Simon