

December 1, 2011

U.S. Copyright Office
Copyright GC/I&R
PO Box 70400
Washington, DC 20024-0400

Re: Comments of the Open Book Alliance (OBA); Docket No. RM 2011-7

The Open Book Alliance (“OBA”)¹ respectfully submits these comments to request that the Copyright Office issue a clarification that the anticircumvention provisions of 17 U.S.C. § 1201(a) do not apply to technological protection measures (“TPMs”) placed on digital copies of literary works in the public domain. Alternatively, the Office should exempt that class of works from the anticircumvention prohibition of Section 1201(a)(1).

It is well known that Google, Inc. has reproduced millions of books in their entirety, including both those in the public domain and those that remain in-copyright, through systematic scanning operations set up with several large research libraries. Less well known is that Google has contractually required these libraries “to implement technological measures . . . to restrict automated access to any portion of the [digital book copy] or the portions of [the library] website”² that make those copies accessible to library patrons – including digital files of books in the public domain.

¹ The Open Book Alliance works to advance and protect the promise of the mass digitization of books by ensuring that it be undertaken in the open, grounded in sound public policy and mindful of the need to promote long-term benefits for consumers rather than isolated commercial interests. The members of the Alliance are Amazon.com, American Society of Journalists and Authors, Council of Literary Magazines and Presses, Internet Archive, Microsoft, National Writers Union, New York Library Association, Science Fiction and Fantasy Writers of America, Small Press Distribution, Special Libraries Association and Yahoo!.

² Cooperative Agreement between Google Inc. and the Regents of the University of Michigan at 4.4.1, <http://www.lib.umich.edu/files/services/mdp/um-google-cooperative-agreement.pdf>.

By definition, the imposition of TPMs on digital copies of these public domain works will “adversely affect” users in “their ability to make non-infringing uses” of them within the meaning of Section 1201(a)(1)(C). Section 1201 was never intended to protect a company’s non-copyright business interests in public domain works, particularly where it could be used for anticompetitive purposes.

The proposed exemption has no effect on TPMs used under authority of a copyright owner to protect its copyright. Rather, it focuses on the TPMs used by Google to benefit its business interests in restricting online access to public domain works. To be clear, we are aware of no reason that a technological protection measure applied to a public domain work would give rise to liability under Section 1201. Nevertheless, the Copyright Office should reiterate that conclusion in this proceeding and thereby minimize the harm to competition that the presence of those TPMs creates. In the alternative, the Copyright Office should adopt an appropriate exemption to Section 1201(a)(1) so that a large body of public domain works is not closed off to use by the public.

I. Google Requires Its Partners to Use TPMs to Limit Access to Scanned Public Domain Books.

The Office is well aware of Google Book Search (“GBS”) and the facts that led to the ongoing copyright infringement lawsuits brought by authors and publishers against Google, which former Register of Copyrights Marybeth Peters summed up well in testimony to a House Judiciary Committee hearing in September 2009:

Google [is] reproducing millions of protected books in their entirety, without permission of the copyright owners, through systematic scanning operations set up with large research libraries. Once scanned, the books [are] indexed electronically, allowing end-users to search by title and other bibliographic information. Google return[s] hits to its customers that include[] the option of browsing “snippets” (e.g. several lines of the book), except for public domain books, which c[an] be viewed and

downloaded in their entirety. Google's search engine is free to users, but the company collects substantial revenue from the advertising that appears on web pages, including those pages on which images of, and information from, copyrighted books appear.³

Since the Office expressed its concerns, the number of books that Google has scanned, indexed, stored and continued to employ in its search engine has topped 15 million.⁴ Over 3 million of these books are in the public domain.⁵

Less known is the fact that Google has unilaterally imposed TPMs on even those digital files of works that are in the public domain. In contracts with the libraries that provide Google with books for copying, Google requires the libraries to implement TPMs that strictly limit use of the works through the libraries' websites. By way of example, the agreement between Google and the University of Wisconsin provides:

University shall implement reasonable technological measures (e.g., through use of the robots.txt protocol) to restrict automated access to any portion of the University Digital Copy or the portions of the University website on which any portion of the University Digital Copy is available. University shall also make reasonable efforts (including but not limited to restrictions placed in University's online terms and conditions governing the use of its website) to prevent third parties from (a) downloading or otherwise obtaining any portion of the University Digital Copy for commercial purposes, (b) redistributing any portions of the University Digital Copy, or (c) automated and systematic downloading from its website image files from the University Digital Copy. University shall develop methods and systems for ensuring that substantial portions of the University Digital Copy are not downloaded from the services

³ *Competition and Commerce in Digital Books: The Proposed Google Book Settlement: Hearing Before the H. Committee on the Judiciary*, 111th Cong. (2009) (statement of Marybeth Peters, Register of Copyrights).

⁴ James Crawford, *On the Future of Books*, Inside Google Books (Oct. 14, 2010, 7:26 PM), <http://booksearch.blogspot.com/2010/10/on-future-of-books.html>.

⁵ Google books: eBooks, <http://books.google.com/help/ebooks/content.html> ("We offer nearly 3 million free ebooks from the public domain.").

offered on University's website or otherwise disseminated to the public at large.⁶

Google also requires the libraries providing it with public domain works to limit their sharing of those works with third parties. For example, the agreement between Google and the University of Michigan provides that the University may provide “a Digital Copy of a public domain work” only to:

(i) academic institutions or research or public libraries, or (ii) when requested by U of M and agreed upon in writing by Google, other not-for-profit or government entities that are not providing search or hosting services substantially similar to those provided by Google, including but not limited to those services substantially similar to GBS ... in each case for research, scholarly, or academic purposes, all of which must be non-commercial (unless otherwise agreed upon in writing by Google).⁷

Furthermore, in the limited cases where the University is allowed to share digital files of public domain books, the University must require the receiving institution:

(A) to use reasonable efforts to prevent third parties from bulk downloading substantial portions of such Digital Copies of such works, and (B) to implement technological measures (e.g., through use of the robots.txt protocol) to restrict automated access to any part of such entity's website where substantial portions of such Digital Copies are available.⁸

Through a review of publicly available contracts, OBA was able to confirm that Google requires many libraries throughout the world to impose these TPMs and/or others like them on digital files of public domain works. For example, Google's recent agreement with the British Library contains clauses virtually identical to those in the University of Michigan contract excerpted above – thus ensuring that

⁶ Cooperative Agreement between Google Inc. and the Board of Regents of the University of Wisconsin System at 4.9, <http://www.library.wisc.edu/digitization/googlecontract.pdf>.

⁷ Amendment to Cooperative Agreement between Google Inc. and the Regents of the University of Michigan at 18, <http://www.lib.umich.edu/files/services/mdp/Amendment-to-Cooperative-Agreement.pdf>.

⁸ *Id.*

any nonprofit institution with which the British Library is allowed to share digital copies of public domain works will itself be required to impose TPMs on those files.⁹

Google requires similar or identical TPMs to be used by at least 14 other libraries with respect to digital files of public domain works: University of California and its California Digital Library, University of Chicago, University of Illinois, Indiana University, University of Iowa, University of Michigan, Michigan State University, University of Minnesota, National Library of the Netherlands, Northwestern University, The Ohio State University, Penn State University, Purdue University, and University of Texas. Given that each of these publicly available contracts includes Google's demand that libraries impose TPMs on these digital copies, it is reasonable to assume that Google imposes similar TPM requirements on all other libraries that have provided books in the public domain to Google for scanning (*e.g.*, Harvard University, the University of Oxford, Princeton University).

II. The Copyright Office Should Make Clear that Section 1201(a)(1) Liability Does Not Apply to Circumvention of TPMs that Control Access to Public Domain Books.

Google's purpose in imposing these TPMs cannot be, as Section 1201(a)(1) requires, to safeguard rights protected under Title 17, as the use of public domain works by definition is noninfringing. The legislative history of the Digital Millennium Copyright Act ("DMCA") also makes clear that Congress did not intend Section 1201(a)(1) to protect parties who copy works out of copyright. At the beginning of its discussion concerning Section 1201, the Conference Report to the DMCA cites the WIPO Treaties which the DMCA was designed to implement, requiring "contracting parties to provide 'adequate legal protection and effective legal remedies against the circumvention of effective technological measures that

⁹ Cooperative Agreement between Google Ireland Limited and The British Library at 4.8, <http://www.openrightsgroup.org/assets/files/pdfs/BL%20Google%20Contract.pdf>.

are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention.”¹⁰ Likewise, the earlier House report on the DMCA describes Section 1201(a)(1) as establishing “a general prohibition against gaining unauthorized access to a work by circumventing a technological protection measure put in place by the copyright owner where such protection measure otherwise effectively controls access to a work protected under Title 17 of the U.S. Code.”¹¹ The Executive Branch agreed; President Clinton stated the following in connection with his signing of the DMCA:

The WIPO treaties set clear and firm standards – obligating signatory countries to provide “adequate legal protection” and “effective legal remedies” against circumvention of certain technologies that copyright owners use to protect their works, and against violation of the integrity of copyright management information.¹²

While the notion that Section 1201 does not protect TPM measures placed on public domain works seems elementary, confirmation of this point by the Copyright Office will alleviate confusion in the marketplace. This is especially important in light of the chilling effect that a threatened Section 1201 lawsuit from Google would otherwise have on companies, institutions and individuals with limited resources to litigate.

In the unlikely event that the Office considers Section 1201 to be applicable in this case, there is clear grounds for granting an exemption to the anticircumvention prohibition. The TPMs that Google unilaterally places, or requires libraries to place, on the digital files of public domain books it scans have

¹⁰ H. Rep. No. 105-796, at 63-64 (1998) (Conf. Rep.) (emphasis added).

¹¹ H. Comm. on the Judiciary, 105th Cong., Section-by-Section Analysis of H.R. 2281, as Passed by the House on August 4, 1998 5 (Comm. Print 1998) (emphasis added).

¹² Statement of the President on signing the Digital Millennium Copyright Act of 1998, 34 Weekly Comp. Pres. Doc. 2169 (October 28, 1998) (emphasis added).

an “actual” and “substantial adverse effect on non-infringing uses”¹³ of this class of works, and Section 1201(a)(1) should not prohibit their circumvention. Google’s use of TPMs on digital files of public domain works also is likely to have a negative impact on “scholarship and research” within the meaning of Section 1201(a)(1)(C)(iii), given that the TPMs prevent competing search engines, including search engines operated by research institutions or by non-profit entities, from indexing these files of public domain works and providing users with search results associated with these digital copies. Certainly, Google’s demand that libraries impose TPMs on these copies also is inconsistent with its claim that GBS will “equaliz[e] access to knowledge.”¹⁴

While Google at the moment allows users to manually download individual PDFs of public domain works at the Google Books site, the stringent TPMs it imposes with respect to automated access prevent broader use of these files by competing search engines, digital libraries, and other online providers. It simply would not be feasible for an organization to make manual downloads of over three million books. Thus, the “availability of the works for use” (*See* Section 1201(a)(1)(C)(i)) is limited because no other party has wide-scale, automated access to such a vast library of scanned, public domain books.

In short, to promote dissemination of public domain works and prevent misuse of Section 1201 for anticompetitive purposes, the Office should clarify that the prohibition on circumvention of TPMs

¹³ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 76 Fed. Reg. 60398, 60400 (September 29, 2011).

¹⁴ Derek Slater, *Google Book Search Event This Wednesday: “Equalizing Access to Knowledge,”* Google Public Policy Blog (July 27, 2009, 4:08 PM), <http://googlepublicpolicy.blogspot.com/2009/07/google-book-search-event-this-wednesday.html>.

does not apply to TPMs placed on public domain works. Alternatively, the Office should provide an exemption to Section 1201(a)(1) for this class of works.

Respectfully submitted,



Gary L. Reback