Long Comment Regarding a Proposed Exemption

Under 17 U.S.C. 1201

Item 1. Commenter Information

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Item 2. Proposed Class Addressed

Class 9: Software Preservation

A proposed exemption for libraries, archives, museums, and other cultural heritage institutions to circumvent technological protection measures on lawfully acquired computer programs for the purposes of preserving computer programs and computer program-dependent materials.

Item 3. Overview

SIIA is the principal trade association of the software and information industries and represents over 800 companies that develop and market software and digital content for business, education, consumers, the Internet, and entertainment. SIIA's members range from start-up firms to some of the largest and most recognizable corporations in the world, and one of SIIA's primary missions is to protect their intellectual property and advocate a legal and regulatory environment that benefits the software and digital content industries. SIIA member companies are market leaders in many areas, including but by no means limited to:

- software publishing, graphics, and photo editing tools
- corporate database and data processing software
- financial trading and investing services, news, and commodities exchanges
- online legal information and legal research tools
- protection against software viruses and other malware and

- education software and online education services

Our members depend on section 1201 to protect their works from infringement, and SIIA has participated in every rulemaking since the statute's enactment. In our view, Section 1201 has succeeded in performing its intended purpose: namely, to accomplish the "mutually supportive" goals of a "thriving electronic marketplace [that] provides new and powerful ways for the creators of intellectual property to make their works available to legitimate consumers in the digital environment," and a plentiful supply of intellectual property" to drive the demand for a more flexible and efficient marketplace."[1] Congress properly recognized that "the digital environment poses a unique threat to copyright owners" and that it "necessitates protection against devices that undermine copyright interests."[2]

The Library petitioners have asked for a broad exemption permitting both for-profit and non-profit libraries and other "cultural heritage institutions" to circumvent technological measures for the purpose of preserving both "computer programs" and "computer-program-dependent" materials. The definition includes not just utility-based software like word processing, but also video games, literature, and essentially anything else that can be stored on a computer. (Library Comments, at 4).

The Library Comments begin with a paean to Game of Thrones, and how the author writes on Wordstar 4.0, a first-generation MS DOS word-processor, and invites the reader to imagine about what might happen if those first drafts of his works are lost. But as of this moment, there is no risk of that. Wordstar 4.0 is neither copy nor access-protected—the creator's one experiment with copy protection was for a later version, and proved unsuccessful.[3] As for MS-DOS, the operating system that runs Wordstar, Microsoft released the source code to the public three years ago.[4]

Hardware and software difficulties, however, have nothing to do with section 1201(a)(1), its effect on non-infringing uses, and neither does copy protection. And even then, such

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1 H. Rep. 105-551 (Part II), at 23.

2 *Id.* at 25.

3 MicroPro Suspended Its Use of Copy Protection, http://articles.latimes.com/1985-02-07/business/fi-5408_1_copy-protection. Wordstar converters are also widely available. E.g., https://kb.ucla.edu/articles/wordstar-converter;

4 Microsoft makes source code for MS-DOS and Word available to public, https://blogs.technet.microsoft.com/microsoft_blog/2014/03/25/microsoft-makes-source-code-for-ms-dos-and-word-for-windows-available-to-public/. There are also open-source alternatives. See www.freedos.com

problems would extend only to the word processing program as the files it creates have neither copy nor access protection. Petitioners' proposed class, however, goes well beyond computer programs and into "computer-program dependent materials." (Library Comments, at 4). Not to put too fine a point on it, but the definition encompasses every work created on a computer—e-books, movies, computer programs, databases, and the like.

The problems with petitioners' rhetorical gambit permeate their overall filing. First, their proposed class is fatally overbroad, and beyond the Register's power to recommend. Second, it is not clear at all that the evidence that they adduce has anything at all to do with access controls, or that it is caused by the statute.

Petitioners Have Not Proposed a Viable Class of Works.

SIIA objects to petitioners' proposed class as overbroad. The Register has stated that

> "the description of the "particular class" ordinarily will be refined with reference to other factors so that the scope of the class is proportionate to the scope of harm to noninfringing uses. For example, a class might be refined in part by reference to the medium on which the works are distributed, or to the access control measures applied to the works. The description of a class of works may also be refined, in appropriate cases, by reference to the type of user who may take advantage of the exemption or the type of use that may be made pursuant to the designation. The class must be properly tailored to address not only the demonstrated harm, but also to limit the adverse consequences that may result from the exemption to the prohibition on circumvention. In every case, the contours of a class will depend on the factual record established in the rulemaking proceeding." [5]

The proposed class does not contain any of these specific limiters. Instead, it encompasses entire categories of works—audiovisual, literary, musical, sound recordings—so long as they are attached, one way or another, to a computer. The class applies to for and non-profit libraries and museums, as well as "cultural heritage institutions" – a class of user that does not slim its overbreadth. The Library Petitioners no doubt have a genuine disagreement with the way that Congress chose to deal with this in 1988. The proper place to handle that dispute, however, is in the legislature, not this rulemaking. SIIA opposes the exemption for several reasons.

Items D-F:

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[5] 75 Fed. Reg. at 65260, 65261 (October 26, 2012). *See also*

First, the class permits the circumvention of access controls no matter where the work is in its commercial life cycle. Recently released computer programs or e-books both may be put in the clear on preservation grounds by a nonprofit or for-profit entity.

Second, the exemption applies no matter where the software is stored. Many SIIA members have switched to a software-as-a-service model. In such cases, users can generally save files locally, but most of the actual computing is done in the cloud on remote servers. Circumvention of access controls to the cloud-based software would involve penetration of systems against the wishes of the system provider, an act which 18 U.S.C. § 1030 prohibits, and the information provided simply does not support any such intrusion.

According to the Office's study, section 1201 must be *"the* cause" of the adverse effects that allegedly support the petition.[6] As applied to the preservation petition, this rule has a factual and legal implication. The fact that software is now stored in the cloud has nothing whatsoever to do with section 1201. And if there is another statute that *prohibits* the user from accessing the work (as it would in this circumstance) then section 1201 cannot by definition be "the" cause of any adverse effects.

Third, SIIA notes that, as the Copyright Office well knows, most software that is *not* cloud-based is licensed and not sold. The provisions of section 117 do not apply to a licensee, and breach of a license generally constitutes infringement.[7] Most software that was sold on fixed media, however, permit the user to make backup copies of those works. When modern software is downloaded, backup copies can be easily made on the hard disk.

For the Register to issue such a class, the evidence of adverse effects *from an access control* would have to be overwhelming. Petitioners have cited survey evidence multiple times, but disclose neither the questions, response rate, sample size, or other methodology. Even so, much of the evidence is defective: they instead have claimed that *copy* controls have interfered with their ability to engage in otherwise lawful activity,[8] or that they "might" run into problems when archiving particular kinds of works,[9] or that the software can be accessed, but it is

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6 1201 Study, at 115 (emphasis supplied).

7 *See generally* U.S. Copyright Office, Software-Enabled Computer Products, 21-25 (2016).

8 E.g., Library comments at 26 ("However, many of the software titles we would like to preserve and exhibit have some form or another of *copy protection* that does not allow us to legally make copies.") (emphasis supplied); *id.* at 4 (describing bad sector "copy" protection).

9 *See* Library Comments, at 25 ("*if* we reach a proprietary wall") (emphasis supplied).

inconvenient to do so.[10] Other claims of inaccessibility are puzzling given the availability of prior versions of the software.[11]

We do not believe that the evidence supports any exemption, and certainly not one of the breadth petitioners propose. There is a specific and narrow class of works that could be affected, however: computer programs that are truly obsolete and at risk of being lost. Such programs would be, at a minimum:

- originally made available on fixed media such as CDs, floppy disks, or other media that is both no longer widely used commercially and at the time of circumvention at risk of soon irreparably deteriorating;
- unable to run on modern hardware;
- necessary to perceive or use the works of others that are not protected by a TPM (e.g., a text editor); neither commercially valuable nor obtainable; and
- Owned by a copyright owner that cannot be located after a diligent and documented search.

When a nonprofit library or archives, for a noncommercial purpose, acts to preserve such a work within the statutory confines of section 108(h) and subject to reasonable security procedures, that type of narrow and targeted exemption might be supported by a different record.

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[10] *See* Library Comments, at 24 (stating that it is "difficult" to present certain artworks, but also noting that the user has emulation software that enables that presentation).

[11] Compare *id.* at 8 ("The Philadelphia Museum of Art is unable to preserve a time- based media artwork because of TPMs blocking Adobe Flash.") *with* https://helpx.adobe.com/flash-player/kb/archived-flash-player-versions.html (providing access to prior versions of the software).