

February 17, 2000

David O. Carson
General Counsel
Office of the General Counsel
United States Copyright Office
James Madison Memorial Building
Room LM-403
101 Independence Avenue, S.E.
Washington, D.C. 20559-6000

Dear Mr. Carson:

I am writing in response to your notice of inquiry entitled "Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies" (Docket No. RM 99-7). AAM is the national organization that has served America's museums and their staffs since 1906. We hope you find the following comments helpful to your rulemaking.

Before turning directly to the issue of circumvention, I would like to briefly comment on museums as nonprofit educational institutions and the importance of "fair use" to museums.

Nonprofit Educational Institutions

Our country's art museums, natural history museums, historical sites, historical societies, science and technology centers, arboretums, planetariums, children's museums, zoos, and botanical gardens house and produce an enormous wealth of information for scholarly research and public education -- more than 700 million objects and associated documentation of our cultural, artistic, and scientific heritage. Education is at the core of museums' public service mission. We urge you to keep in mind that when the Copyright Office makes policy recommendations with regard to nonprofit educational institutions, such recommendations must include museums.

Fair Use

If museums and ultimately the general public are to realize the tremendous educational potential of new technology, the "fair use" doctrine must continue to be an essential component of copyright law. Museums have traditionally relied on "fair use" for a multitude of educational purposes. Especially for museums

that collect contemporary works in which they often do not hold the copyright, the vitality of “fair use” will directly affect their ability to carry out their missions, whether it is reproducing these works as illustrations in publications, as slides shown in auditoriums, as digitized images in collections management systems, or in innovative distance learning programming for children and adults alike. Museums also perform significant library and archival functions that require the flexibility that “fair use” and other exemptions provide. Museums’ ability to continue to rely on “fair use” in the digital environment is critical if they are to achieve their mission of providing greater public access to the wonderfully rich and diverse body of resources they interpret, preserve, and protect.

Circumvention

Section 1201(a)(1)(A) provides that “No person shall circumvent a technological measure that effectively controls access to a work protected under this title.” Subparagraph (B) limits this prohibition, providing that anticircumvention “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 likely to be, in the succeeding three-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.” The prohibition on circumvention, however, does not become effective, until October 28, 2000 – two years after its enactment. The new law requires the Librarian of Congress, by that date, to make a determination whether any classes of copyrighted works should be exempt from the statutory prohibition against circumvention during the three years commencing on that date. Making this determination is the purpose of this rulemaking. Similar rulemakings will continue during each succeeding three-year period.

I would like to compliment the Copyright Office on its helpful, thoughtful, and thorough “Notice of Inquiry.” For museums, however, this inquiry to identify particular classes of copyrighted works for exemption is premature. Anticipating negative consequences of the prohibition before the prohibition’s implementation presents obvious difficulties. That technology and business models remain very much in the early stages of development, or at least in a high state of flux, adds an additional layer of difficulty.

Nevertheless the new law calls for several areas to be examined. Of particular concern to museums is the ability to make fair use of copyrighted works for nonprofit archival, preservation, and educational purposes and the impact of the anticircumvention prohibition on traditional fair use activities.

The effect of the anticircumvention provision on museums will remain to be seen as it seeks to regulate for a new paradigm while the paradigm is still shifting. On one hand, it will provide museums with new legal tools to protect against electronic piracy and encourage dissemination of materials, but it also may curtail museum access to information that increasingly may be available only in access or copy-controlled digital form.

Thus, one concern for museums is tied to preservation as our cultural heritage migrates increasingly to the digital realm. A recent *Museum News* article discussed the preservation crisis posed by accelerated technological change.¹ Given the rate at which formats, hardware, and software become obsolete, its not difficult to imagine in the years to come that actions prohibited by the anticircumvention provision may be necessary to gain access to our cultural heritage for museum activities, such as exhibition and research and/or migrating collections to new formats for preservation. Time will tell for what classes of copyrighted works an exemption from the prohibition may be needed. The museum community will continue to monitor these developments and comment and/or testify in future rulemakings (or future aspects of this one) to prevent any negative impact of access and copy-control technologies on its public service mission.

As both owners and users of works protected by copyright, museums have a strong incentive to strike a balance between these interests. As you proceed with this rulemaking, I encourage you to bring to bear the historic balance of interests between owners and users and also a much-needed measure of flexibility in implementing this complex new regime.

Finally, I want to thank you for your consideration of these comments.

Sincerely,
Barry G. Szczesny
Government Affairs Counsel
Government and Public Affairs

cc: W. Richard West, AAM Chairman of the Board
Edward H. Able, Jr., AAM President and CEO
Patricia E. Williams, AAM Vice President, Policy and Programs
Jason Y. Hall, Director, AAM Government and Public Affairs

¹ "Your Past is Disappearing: What Museums Should Know about the 20th-Century Archives Crisis," *Museum News*, January/February 1999.