

UNITED STATES COPYRIGHT OFFICE

**Rulemaking on Exemptions from Prohibition on Circumvention of
Technological Measures that Control Access to Copyrighted Works**

Docket No. RM 99-7

JOINT REPLY COMMENTS

of

AMERICAN FILM MARKETING ASSOCIATION
AMERICAN SOCIETY OF COMPOSERS, AUTHORS, AND PUBLISHERS
AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS
ASSOCIATION OF AMERICAN PUBLISHERS
ASSOCIATION OF AMERICAN UNIVERSITY PRESSES
THE AUTHORS GUILD, INC.
BROADCAST MUSIC, INC.
BUSINESS SOFTWARE ALLIANCE
DIRECTORS GUILD OF AMERICA
INTERACTIVE DIGITAL SOFTWARE ASSOCIATION
THE MCGRAW-HILL COMPANIES
MOTION PICTURE ASSOCIATION OF AMERICA
NATIONAL MUSIC PUBLISHERS' ASSOCIATION
PROFESSIONAL PHOTOGRAPHERS OF AMERICA
RECORDING INDUSTRY ASSOCIATION OF AMERICA
REED ELSEVIER, INC.
SESAC, INC.

Of Counsel:

Steven J. Metalitz
Smith & Metalitz, LLP
1747 Pennsylvania Avenue, N.W., Suite 825
Washington, DC 20006-4604 USA
Tel: (202) 833-4198; Fax: (202) 872-0546
Email: metalitz@ipa.com

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REPLY COMMENTS IN §1201(A)(1) RULEMAKING

The undersigned organizations (“Joint Commenters”) appreciate the opportunity to respond to the Notice of Inquiry (“NOI”) issued by the Copyright Office (Office) and published in the Federal Register on November 24, 1999. *See* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 64 Fed. Reg. 66,139 (1999). We also respond here to certain comments received in the first round of this proceeding.

A list and brief description of the Joint Commenters is attached to this submission. Taken together, the Joint Commenters represent most of the U.S. copyright industries. In addition to these joint comments, some of the Joint Commenters are also filing individual comments in this proceeding.

SUMMARY OF SUBMISSION

The deluge of comments in this proceeding is evidence of strongly held views on a number of important issues. However, neither individually nor collectively do these comments make a persuasive case on the sole question Congress created this proceeding to answer: should the October 2000 effective date of the prohibition (in 17 U.S.C. §1201(a)(1)(A)) against acts of circumvention of access control measures be delayed with respect to any “particular class” of copyrighted works?

Joint Commenters submit that the right answer to this question is “no.” Technologies such as password protections and encryption have become essential tools that copyright owners use to commercialize their works. These measures, now common and widely accepted in the marketplace, have promoted the availability of copyrighted works for noninfringing uses. Neither the course of marketplace developments, nor the submissions in this proceeding, provide an adequate basis for concluding that, once it becomes illegal to hack, defeat, or otherwise circumvent these measures, the ability to

make noninfringing uses of *any* type of copyrighted work will be diminished. To the contrary, the continued use and development of these access control measures, buttressed by the new statutory cause of action against circumvention, will encourage copyright owners to increase their use of new media to disseminate their works.

The vast majority of first round submissions ignore the question Congress asked and instead address questions which clearly fall outside the scope of this proceeding. Should copyright owners be forbidden from using certain access control technologies? Should the circumvention of such technologies be shielded from liability in virtually all circumstances? Should more expansive exceptions be recognized for activities such as reverse engineering or computer security testing? Should the fair use doctrine provide a defense to liability for circumvention of access controls? In enacting the Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (“DMCA”), Congress considered and answered every one of these questions. Attempts to re-open these questions in this proceeding are misdirected and should be disregarded. Similarly, observations about the proper scope of other provisions of the DMCA, notably the ban on trafficking in circumvention tools, which has been enforced in some recent lawsuits, are irrelevant here.

The ground rules for this proceeding are clearly spelled out in the statute and the relevant legislative history. Those who assert that the effective date of the §1201(a)(1)(A) prohibition should be further delayed shoulder an extraordinarily heavy burden of persuasion. They must demonstrate, through “highly specific, strong and persuasive” evidence, a likelihood that over the next three years, the net impact of outlawing theft of passwords, unauthorized decryption or descrambling, and similar acts of circumvention, will be to diminish substantially the ability to make licensed, permitted, or other noninfringing uses of specifically defined “classes” of copyrighted materials.

None of the submissions received thus far in this proceeding even comes close to meeting these tests imposed by Congress, because:

- They do not propose a coherent, well-defined “class of works” as to which the effective date of the prohibition on acts of circumvention should be further delayed.
- With isolated exceptions, they do not provide specific examples of scenarios in which a diminished ability to make noninfringing uses of works, attributable to bringing §1201(a)(1)(A) into effect, is likely.
- They do not recognize that any demonstrable adverse impact must be balanced against the role of the prohibition in fostering the proliferation of “use-facilitating” access control measures, that enable licensing and other non-infringing uses of copyrighted materials in the digital networked environment.

That balance—the net calculation that Congress intended the Librarian to make—clearly favors allowing the statutory cause of action against acts of circumvention to come into effect on schedule next October.

Congress anticipated such an outcome when it established this rulemaking process and noted that “such an outcome would reflect that the digital information marketplace is developing in the manner which is most likely to occur, with the availability of copyrighted materials for lawful uses being enhanced, not diminished, by the implementation of technological measures and the establishment of carefully targeted legal prohibitions against acts of circumvention.” House Comm. on the Judiciary, 105th Cong., 2d Sess., Section-by-Section Analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4, 1998 8 (Comm. Print 1998), *reprinted in* 46 J. Copyright Soc’y U.S.A. 631, 641 (1999) (“House Manager’s Report”). Because the congressional prediction remains valid, the Librarian of Congress should allow the “carefully targeted legal prohibitions” contained in §1201(a)(1)(A) to take effect for all works.

One submission perceptively notes that it is “not difficult to imagine in the years to come” that the anti-circumvention prohibition could have the substantial adverse impact that would justify a change in the applicability of §1201(a)(1)(A). But Congress asked the Librarian to exercise his judgment, not his imagination; to do so within the framework of the DMCA as enacted; and to carry out his rulemaking within specific ground rules set out in the statute and legislative history. In the view of the Joint Commenters, when the Librarian poses the questions Congress asked him to examine, and applies the standards that Congress intended to pertain to this proceeding, he should conclude, based on the submissions to date, that the record fails to demonstrate that any “particular class of works” is likely to be subject, over the next three years, to a substantial adverse impact on the ability of users to make noninfringing uses of works within that class, if §1201(a)(1)(A) takes effect on October 28, 2000, as scheduled.

I. What This Proceeding Is, and Is Not, About

The NOI has stimulated a torrent of submissions from individuals as well as a few from organizations. Many of these submissions express strong opinions about certain aspects of the DMCA and how it ought to be applied. However, very few of these opinions have much relevance to the task Congress has set for the Office, and ultimately for the Librarian of Congress, in this proceeding. Although the Joint Commenters believe that, for the most part, the NOI itself accurately delineates the scope of this rulemaking, it is worth reviewing briefly what this proceeding is and is not about, and why we consider so many of the submissions received in the initial round to be misdirected.

In enacting the DMCA, Congress recognized the importance of technological measures in promoting the dissemination of copyrighted materials in the digital environment. While digitization and the growth of digital networks and the Internet have the potential to increase dramatically the dissemination to the public of works of authorship, works in digital formats are uniquely vulnerable to piracy and other forms of copyright infringement. This is especially true when works are made available online. Technological measures can increase the ability of copyright owners to control and

manage access to and use of their works—especially online—and thus increase the likelihood that valuable works will be made available to the public through this medium. In order to promote the development and implementation of these technological measures, the DMCA includes certain prohibitions against acts of circumvention of technological measures and against the manufacture, importation, distribution, and other trafficking in products or services aimed at facilitating such circumvention. These provisions fulfill the U.S. commitment, as a signatory to the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty, to provide “adequate legal protection and effective legal remedies against” such circumvention. WIPO Copyright Treaty, *adopted* Dec. 20, 1996, art. 11, S. Treaty. Doc. No. 105-17, CRNR/DC/94; WIPO Performances and Phonograms Treaty, *adopted* Dec. 20, 1996, art. 18, CRNR/DC/95. They are also “intended to ensure a thriving electronic marketplace for copyrighted works on the Internet.” H.R. Rep. No. 105-551, pt. I, at 9-10 (1998) (“House Judiciary Committee Report on H.R. 2281”).

Copyright owners were using technological measures to manage access to and use of their works even before the DMCA was enacted, and nothing in the legislation evinces any Congressional disapproval of their use. Nor is there any evidence that Congress intended to discourage the proliferation of the use of these measures, or efforts to improve, refine, or strengthen their performance. Indeed, Congress anticipated that “most likely” the more widespread implementation of technological measures and of prohibitions against their circumvention would lead to “the availability of copyrighted materials for lawful uses being enhanced, not diminished.” House Manager’s Report, at 8.

In fashioning the prohibitions contained in the DMCA, Congress took great care to distinguish both between different kinds of technological measures, and between different kinds of behaviors that tend to defeat or circumvent these measures. First, the statute distinguishes between “a technological measure that effectively controls access to a work protected” by copyright, and “a technological measure that effectively protects a right of a copyright owner under [Title 17] in a work.” Measures in the first category seek to manage who, and under what circumstances, a person may have access to a work;

measures in the second category seek to manage what uses of a work that fall within the scope of a copyright owner's exclusive rights may be exercised by a person who enjoys authorized access to the work. Generally speaking, §1201(a) of Title 17 addresses measures falling within the first category, usually referred to as "access controls"; §1201(b) addresses measures falling within the second category, which are often referred to as "copy controls," a shorthand reference that is not completely accurate since measures that control the exercise of exclusive rights other than the reproduction right (such as the public performance right) are also encompassed.

Second, the statute differentiates between the manufacture, importation, distribution, or other trafficking in circumvention devices or services on the one hand, and the act of circumvention (or of use of a device or service to circumvent) on the other. With regard to copy controls, only the trafficking activities are prohibited. *See* §1201(b)(1). The DMCA does not prohibit the act of circumventing such controls. With regard to access controls, trafficking in circumvention devices or services is prohibited by §1201(a).

Section 1201(a)(1)(A), the prohibition on the act of circumventing access controls, is the sole focus of this proceeding. It does not take effect until October 28, 2000, and the question—the only question—which Congress has asked the Librarian to decide is whether the effective date of this prohibition should be delayed with respect to any "particular class" of copyrighted works. 17 U.S.C. §1201(a)(1)(B). In addition, once the prohibition takes effect, it is subject to a number of exceptions set forth in §1201(d)-(j), as well as to limitations on criminal remedies set forth in §1204(b).

II. Why Most Submissions Received in the Initial Comment Period Are Misdirected

Against the background of this statutory framework, it is readily apparent that the vast majority of submissions made in the first round are addressed to questions that are outside the scope of this proceeding.

First, those who assert that copyright owners should not be allowed to employ access controls in connection with certain kinds of copyrighted materials fundamentally misconceive both the intent of Congress in enacting the DMCA and the scope of the Librarian's authority in this rulemaking. Since Congress did nothing in the DMCA to restrict the implementation of access control measures,¹ it is not surprising that it did not empower the Librarian under this rulemaking to repeal or to restrict in any way the rights of copyright owners to employ such measures.

Second, the many submissions which argue that §1201(a)(1)(A) should not come into effect on October 28, 2000 for any class of work (or, put another way, that all "classes of works" should be exempted) amount to little more than arguments that Congress should not have enacted the prohibition against circumvention of access controls at all. That argument, which Congress rejected when it enacted the DMCA, is misdirected here, since the Librarian is not empowered to read this provision out of the statute.

Third, all the submissions which call on the Librarian to modify or overturn the precedents established in cases such as *Universal City Studios, Inc. v. Reimerdes*, No. 00Civ.0277 (LAK), 2000 WL 124997 (S.D.N.Y. Feb. 2, 2000), are requests that he exercise a power which Congress has clearly not granted him. *Reimerdes* and several other cases have applied §1201(a)(2), and in some instances §1201(b)(1) as well, to enjoin activities that violate the DMCA's prohibitions against trafficking in circumvention products or services. See *RealNetworks, Inc. v. Streambox, Inc.*, No. 2:99CV02070, 2000 WL 127311 (W.D.Wash. Jan 18, 2000); *Sony v. GameMasters*, No. C99-02743 THE (N.D.Cal. Nov. 4, 1999). This proceeding is directed to the wholly separate prohibition on the *act* of circumvention of access controls in §1201(a)(1)(A), and nothing the Librarian decides in this proceeding can overturn these precedents, or even be used as

¹ The DMCA did prohibit the application of specified copy control technologies in certain circumstances, see 17 U.S.C. §1201(k)(2), but these prohibitions do not apply to access control technologies.

a defense in any future case brought to enforce the trafficking prohibitions of the DMCA. *See* 17 U.S.C. §1201(a)(1)(E).

Fourth, a number of the submissions are devoted to arguments that it should remain permissible to circumvent access controls for purposes such as reverse engineering to achieve interoperability, conducting encryption research, or testing the security of computer networks. The short answer to these submissions is that all these issues were specifically addressed, and carefully resolved, when Congress enacted the DMCA. The statute recognizes exceptions to §1201(a)(1)(A) in each of these areas, but only under the specific conditions identified by Congress in each such exception. *See* 17 U.S.C. §§1201(f) (reverse engineering); 1201(g) (encryption research); 1201(j) (security testing). In enacting these exceptions, Congress thoroughly considered the circumstances in which they should be applicable. Nothing in the statute or legislative history indicates that Congress empowered the Librarian to relax or expand the conditions under which these exceptions apply. Thus, submitters who believe these conditions are too restrictive have misdirected their complaints by including them in this proceeding.

Fifth, many submissions urge the Librarian to rule, in effect, that the fair use doctrine provides a defense to §1201(a)(1)(A), and thus that the act of circumvention of access controls should escape any legal sanction if it is linked to, precedes, enables, or could even in theory lead to the exercise of fair use with respect to the work thus accessed through hacking, password theft, or other unauthorized means. This argument was presented with great forcefulness to Congress, which rejected it when it enacted the DMCA. On February 26, 1998, at the first mark-up held on the legislation that ultimately became the DMCA, Rep. Lofgren offered an amendment to strike what is now §1201(c)(1), and to substitute a provision making all the copyright limitations and defenses, “including fair use,” applicable to claims brought under §1201. The House Subcommittee on Courts and Intellectual Property rejected the amendment by a voice vote, and the challenged provision was preserved unchanged. Ultimately it was enacted in exactly the same form in which it was first introduced. *See* 17 U.S.C. §1201(c)(1)

(DMCA leaves copyright claims and defenses, including fair use, unchanged). Congress clearly chose to create and to maintain a distinction between copyright infringement and violations of the anti-circumvention prohibition, both with regard to claims and to defenses. The fair use defense to copyright infringement does not apply to any violation of §1201, which is a separate and distinct wrong. Indeed, since fair use presupposes authorized access, allowing such a defense in a case of circumvention of access control mechanisms under §1201(a)(1)(A) would be especially inappropriate. Having reached a considered conclusion on this score, Congress did not leave it open to the Librarian to overturn it. Certainly this proceeding is to consider the predicted impact of the §1201(a)(1)(A) prohibition upon the exercise of fair use, but only in the context of its impact on the entire range of noninfringing uses of works protected by access control mechanisms.

Sixth, many submissions concentrate on the asserted or predicted impact of access control measures (or of the prohibition against circumventing them) on the exercise of fair use, as if this fully responded to the question Congress directed this proceeding to explore. It does not. Congress did not ask about the impact on “fair use”; it asked about the impact on “noninfringing uses.” The difference is critical, and Congress chose its words carefully to underscore it. Uses carried out without the permission of the copyright owner *may* be non-infringing uses, if the user can demonstrate that they fall within the bounds of the exceptions to copyright protection set out in the Copyright Act (including fair use, see 17 U.S.C. §107). But licensed or permitted uses are *always* noninfringing uses; and the coming into force of §1201(a)(1)(A) will facilitate such licensing, by encouraging copyright owners to make works more widely available to authorized users. As discussed below, Congress intended that this proceeding calculate the likely impact of §1201(a)(1)(A) on a net basis; and to the extent that the prohibition will increase the availability of works to users under licenses, that clearly must be counted on the positive side of the ledger.

Seventh, many submissions fail to properly distinguish between “particular classes of works” and particular (or general) categories of users. The former classification is the focus of this proceeding; the latter is not. It is true that, at one point in the legislative process, the bill would have directed this rulemaking to study whether specified persons or entities would be adversely impacted by implementation of the prohibition against circumvention of access controls. *See* 17 U.S.C. §1201(a)(1)(B)(i)-(ii), as passed by the House of Representatives on August 4, 1998 (describing categories of persons and entities to which the prohibition would not apply if the rulemaking identified adverse impacts with respect to them). However, Congress ultimately abandoned this approach of identifying favored users and substituted in Conference Committee an approach aimed at identifying “particular classes of works” whose users would be adversely affected in their ability to make noninfringing uses were the prohibition on circumvention of access controls to go into effect. 17 U.S.C. §1201(a)(1)(D) (“The Librarian shall publish any class of copyrighted works” as to which the prohibition will not go into effect). The distinction has a practical impact in this proceeding. Assertions that the prohibition should not go into effect with respect to libraries, with respect to archives, or with respect to any other identified category of users, answer a question that Congress has not asked.²

Finally, just as Congress did not intend for this proceeding to focus on categories of users, so it did not ask the Librarian to focus on particular types of protective technologies. Instead, the proceeding’s goal is to consider whether the statutory cause of action against circumvention should be delayed with respect to any “particular class of works,” regardless of the kind of technology used to protect them. An example given in the House Manager’s Report is instructive in this regard: “If the same scrambling technology is used to protect two difference classes of copyrighted works, and the Secretary [sic: now should read: “Librarian”] makes a determination that the exceptions apply as to the first class, someone who circumvents that technology to gain unauthorized access to a work in the second class would violate the prohibition.” House Manager’s

² Nor does it help to mask this approach by identifying as a “particular class of works” such user-bound categories as “all electronic works marketed and sold to libraries, archives, and educational institutions.” See Comment #162 [American Library Association et al.], at 37.

Report, at 8. It is hard to square this legislative history with the assertion made by some submitters that the effective date of the prohibition should be suspended with respect to any and all copyrighted works distributed on DVD, subject to the CSS access control mechanism, or defined in any other technology-specific way.

III. What Should be the Ground Rules for this Proceeding

Finally, before turning to the relatively few submissions that are, in fact, somewhat responsive to the issues that Congress directed the Librarian to examine, it is worth reviewing some of the ground rules which Congress set for the proceeding, most of which are well presented in the NOI.

First, the most basic ground rule to be addressed in any proceeding is who bears the burden of persuasion. In this proceeding, that burden is clearly allocated to the proponents of any delay in the effective date of §1201(a)(1)(A) with regard to a particular class of works. *See* 64 Fed. Reg. 66,139, 66,141-42 (1999) (“Proponents who are unable to satisfy those burdens in the current rulemaking will have the opportunity to make their cases in each of the triennial proceedings that will succeed it.”). The prohibition created by that exception will go into effect on October 28, 2000, except with respect to any particular class of works that may be identified by the Librarian at the conclusion of this proceeding. If proponents of a delay cannot meet their burden, then the Librarian should not identify any classes of works in this proceeding, and the prohibition will take effect in respect of all works. As the authoritative analysis of the DMCA as passed by the House demonstrates, Congress not only foresaw this as a possible outcome, but considered it the “most likely” outcome: the rulemaking decisionmaker

is not required to make a determination under the statute with respect to any class of copyrighted works. In any particular 3-year period [or during the two-year period leading up to this initial rulemaking], it may be determined that the conditions for the exemption do not exist. Such an outcome would reflect that the digital information marketplace is developing in the manner which is most

likely to occur, with the availability of copyrighted materials for lawful uses being enhanced, not diminished, by the implementation of technological measures and the establishment of carefully targeted legal prohibitions against acts of circumvention.

House Manager's Report, at 8.³

Second, in judging whether the burden of persuasion is met in this initial rulemaking, the focus must be on the future. The question for decision is whether the effective date of a statutory provision that has not yet taken effect should be further delayed with respect to a particular class of works. No user, with respect to any class of work, has yet been adversely affected by §1201(a)(1)(A), since the prohibition is not yet applicable. Consequently, the NOI slightly misses the mark when it characterizes the goal of the rulemaking as “to assess whether the *implementation* of technological protection measures that effectively control access to copyrighted works is diminishing the ability of individuals to use copyrighted works in ways that are otherwise lawful.”⁴ 64 Fed. Reg. 66,139, 66,141 (1999) (emphasis added). In fact, in the final version of §1201(a)(1)(C), Congress ultimately aimed this inquiry at a different target: whether users of copyrighted materials “are or are likely to be . . . adversely affected by the *prohibition* [on acts of circumvention of access control measures] in their ability to make noninfringing uses” of these materials. 17 U.S.C. §1201(a)(1)(C) (emphasis added). Since the prohibition has not yet taken effect, no one is *currently* adversely affected by it. Thus, the real focus of this inquiry is on predicting whether the ability of users to make noninfringing uses of

³ See discussion *infra* at 16, regarding the effort by higher education submitters to invert the burden of persuasion established by Congress for this proceeding.

⁴ The NOI cites for this proposition the report of the House Commerce Committee on the DMCA, H.R. Rep. No. 105-551, pt. II, at 37 (1998). This report may have accurately explained the scope of the rulemaking contemplated by the bill reported by the House Commerce Committee, but that scope was changed before the legislation reached the House floor. As reported by the Commerce Committee, §1201(a)(1)(B) called for a rulemaking “to determine whether users of copyrighted works have been, or are likely to be in the succeeding 2-year period, adversely affected by the implementation of technological protection measures that effectively control access” *Id.* at 2. However, in the Manager's Amendment which passed the House on August 4, 1998, the rulemaking provision (at that juncture, §1201(a)(1)(C)) was changed to focus on whether specified users were likely to be “adversely affected by the prohibition under subparagraph (A),” that is, by the prohibition on the act of circumvention of effective access controls. Although other aspects of this provision were changed by the Conference Committee, the language just quoted was not, and appears in §1201(a)(1)(B) of the DMCA as enacted.

particular classes of copyrighted materials would be compromised over the next three years if the prohibition contained in 17 U.S.C. §1201(a)(1)(A) were allowed to go into effect on the timetable set by Congress. Current practices and conditions are obviously relevant to this predictive task, but not determinative.

Third, while the burden of demonstrating the need for an exception to the §1201(a)(1)(A) prohibition must be borne by the proponent in any event, this emphasis on foreseeing the future makes that burden even heavier in this initial rulemaking than may be the case in subsequent triennial reviews. This is just what Congress foresaw and intended. The House Manager's Report distinguishes between current and future adverse impacts and counsels that "the determination should be based upon anticipated, rather than actual, adverse impacts only in extraordinary circumstances in which the evidence of likelihood of future adverse impact [over the next three years] is highly specific, strong and persuasive." House Manager's Report, at 6. Since the prohibition has had no "actual adverse impacts" yet, the only route open to the proponents of exceptions in *this* proceeding is the much steeper trail of satisfying the "extraordinary circumstances" and "highly specific, strong and persuasive" tests established by Congress. To further underscore the weight of the burden shouldered by proponents of further delay, the NOI correctly notes that the effective date of §1201(a)(1) must not be further delayed regarding any class of works without a determination of a "*substantial* adverse effect on noninfringing use" (emphasis added), a burden that is not satisfied by demonstrating "mere inconveniences or individual cases." 64 Fed. Reg. 66,139, 66,141 (1999) (quoting House Manager's Report, at 6).

Finally, it is abundantly clear that in calibrating the anticipated impact of the prohibition on the ability to make noninfringing uses, the Librarian is being asked to make a net calculation. As noted above, Congress fully expected that the use of technological measures by copyright owners, backed up by the prohibition in §1201(a)(1)(A), would "support new ways of disseminating copyrighted materials to users, and . . . safeguard the availability of legitimate uses of those materials by individuals." House Manager's Report,

at 6. Of course, Congress also expected that use of technological measures would increase the availability of copyrighted works to the public, since copyright owners could use new media of public dissemination, such as the Internet, with reasonable confidence in their ability to prevent piracy and unauthorized access to their works. Indeed, the Librarian is specifically directed to examine the availability of works in making his determination in this proceeding. *See* 17 U.S.C. §1201(a)(1)(C). The House Manager's Report calls specific attention to "use-facilitating technological protection measures" that copyright owners may employ, and instructs the decision maker to consider "whether on balance" the circumvention prohibition is likely to have an adverse impact. House Manager's Report, at 7. It also identifies the continued availability of works in formats not subject to access controls as a factor to be considered. *See id.*

IV. Responses to Selected Submissions

We now offer brief comments on the submissions of some of those who have taken on the burden of persuading the Copyright Office, and ultimately the Librarian, that one or more "particular classes of works" are likely to be subject, over the next three years, to a substantial adverse impact on the ability of users to make noninfringing uses of works within that class if §1201(a)(1)(A) takes effect on October 28, 2000.

A. Association of American Universities et al (Comment #161)

The submission from higher education organizations is one of the few that makes an effort to delineate specific classes of works as to which §1201(a)(1)(A) should not, in the view of the submitters, take effect in October. However, the submission falls far short of carrying the burden of demonstrating why prohibiting circumvention of access controls on these works is likely to cause a substantial adverse effect on the ability to make non-infringing uses of them.

1. “Thin Copyright Works”

The higher education groups first define a class of “Thin Copyright Works,” said to include “scholarly journals, databases, maps and newspapers.” Comment #161, at 3. The submitters claim that these works demonstrate only “a thin veneer of authorship,” so that access controls on these works are mainly used “to lock up unprotected facts and information,” and therefore should be exposed to circumvention without penalty.

The characterizations of works in the “Thin Copyright” category would undoubtedly surprise James Madison and his colleagues in the First Congress, who accorded full copyright protection to “maps and charts” in our first national copyright law. It would certainly bewilder writers and artists from Charles Dickens and Isaac Bashevis Singer to Russell Baker and Charles Schulz, as well as countless others whose creative, copyrighted work first appeared largely in newspapers. It would puzzle the publishers and authors of many articles appearing in scholarly publications affiliated with some of the research universities represented in AAU and the other submitting organizations, since some of these institutions are embroiled in heated controversy over who owns the assertedly “thin” rights in the fruits of the research of university faculty and staff.

Perhaps more importantly, the submission lacks a single example of how the submitters, or the users they represent, would be hampered in their ability to make “noninfringing uses” of these materials if, on October 28, 2000, §1201(a)(1)(A) came into effect for “Thin Copyright Works.” When this occurs, it will become illegal for users to, for instance, steal a password required to access the online version of a scholarly journal, or disable a utility that prevents simultaneous access to a research database by more than a specified number of individual users, as defined by a license agreement negotiated between a database publisher and a university. The “substantial adverse impact” of making these actions illegal is nowhere spelled out.

The submission also overlooks the degree to which the use of technological measures has made possible the enhanced network-based access to these materials which universities now enjoy. For instance, a university library which subscribes to an online archive of newspaper stories from thousands of periodicals worldwide escapes the costs of thousands of individual subscriptions. Its users obtain far more current and convenient access to the desired material than could ever have been possible in a paper environment. This increased availability (and ability to make non-infringing uses) is inextricably linked to the use of access control measures. The failure to penalize acts of hacking, password theft, or other circumvention activities is much more likely to decrease rather than to improve this availability.

Perhaps the submitters of this comment thought it was unnecessary to make any factual showing (or even explanation) regarding adverse impact because of their belief that the burden is on *copyright owners* to show why the effective date of §1201(a)(1)(A) should *not* be further postponed with respect to these “Thin Copyright Works.” Comment #161, at 2 (“The effective date . . . should be further deferred . . . absent a strong showing that circumvention will cause substantial loss to the affected copyright owners.”). A cursory reading of the statute and its legislative history would have shown that this belief is unfounded. *See* discussion *supra* at 11-14.

Proponents of the exception bear the burden, and these submitters have not met it. Their assertion that “the threat of access controls greatly outweighs the threat to the works from circumvention,” Comment #161, at 5, is unsupported by any factual predicate, and is hard to understand in light of the fact that access controls are already in widespread use in the university environment, including with respect to “Thin Copyright Works.” Surely if these technologies were substantially constraining noninfringing uses there should already be a bountiful record of it. (Indeed, we would hazard a guess that the submitters’ own institutions already use their own access control measures—such as the requirement to produce a student identification—to admit or deny access to many resources, including

their libraries and research facilities, and that they would not be eager to abandon the right to impose appropriate penalties for circumvention of these measures.)

2. “Fair Use Works”

The second “class of works” proposed by the higher education submitters is “Fair Use Works,” a category said to include “scholarly journals, scientific databases, textbooks and legal casebooks,” which are asserted to be “the works most commonly used for educational purposes or scientific and scholarly research.” *Id.* at 2. Here the submitters appear to accept the use of password controls, but assert that the circumvention of “enveloping or encryption technology” should be permissible if those controls “prevent use of a work even after copies have been distributed.” *Id.* at 4.

This aspect of the submission seems to recognize that the effect of a measure which controls access by allowing it to authorized users and denying it to unauthorized users is not always a simple binary matter. Access control technologies may be used to permit access to a work for a limited period of time (a free demonstration or “test drive” period, for example, or the duration of a license agreement) while closing it thereafter. These techniques are also employed to allow access to part of a work while denying it to another part; to enable access by a specified category of users but not another category; or to enable access by a specified number of simultaneous users but no more. Access controls embodied in the work itself also commonly function in tandem with the hardware used to access the work, so that a work may be made accessible on a specific machine, or a specified category of machines. In short, access control technologies are implemented in a variety of ways to facilitate authorized or licensed access to works while discouraging or blocking unauthorized users. Some of these implementations could be used with respect to works falling within the “Fair Use Works” category posited by these submitters.

However, the submission is mistaken in treating these measures, not as true access controls, but as “hybrid technologies,” Comment #161, at 5, which users should be free to

circumvent without prohibition. Access control measures that have capabilities such as those summarized in the preceding paragraph are just as much “access control measures” as are password systems. Indeed, such measures can well be considered “use-facilitating technological protection measures” of the sort that Congress wished to encourage because they make a positive contribution to the availability of copyrighted works for noninfringing uses. House Manager’s Report, at 7. For instance, a researcher who needs access to one scientific journal would be well served, in terms of lower costs, if his subscription did not extend to the ten other journals packaged on the same CD-ROM. Such an arrangement, which closely resembles an example provided in the House Manager’s Report, might well be implemented through use of the “enveloping or encryption technology,” Comment #161, at 4, that the higher education submitters believe it should be permissible to circumvent.

The submitters do not explain how allowing such circumvention would promote the availability of the journals for noninfringing uses. To the contrary, the likelier outcome would be that the CD-ROM product would either become much more expensive (since subscriptions would have to cover the costs of all eleven journals, even if only one were really needed) or the product would be withdrawn from circulation altogether.

The higher education submitters assert that “it will become increasingly difficult to distinguish access control technology from copy control technology.” Comment #161, at 4. This proposition is debatable at best. In the related arena of liability for trafficking in circumvention devices and services, the courts have already shown themselves capable of making the distinction. *See RealNetworks, Inc. v. Streambox, Inc.*, No. 2:99CV02070, 2000 WL 127311, at *4, *8 (W.D.Wash. Jan 18, 2000).

The impact of these technologies is not as abstruse as some would choose to believe. A homespun analogy may illuminate the submitters’ position that §1201(a)(1)(A) should only apply to acts of circumvention of copies of “Fair Use Works” that “are not

lawfully in the possession of the user.”⁵ Comment #161, at 5. In effect, the higher education submitters are conceding that a student who steals or forges a dormitory meal ticket should be subject to discipline, but assert that it should not be a violation to alter a meal ticket in the student’s “lawful possession” so that he is entitled to eat 15 meals a week rather than the 10 he had paid for. Our response is that such a forgery should be a violation and should be punishable without proof of how many meals the student actually ate.

In the end, the submitters’ claim that §1201(a)(1)(A) should not come into effect with respect to scholarly journals, scientific and academic databases, textbooks and legal casebooks, at least with respect to some access control technologies, falls short for the same reason as its argument with respect to “Thin Copyright Works.” There is a complete absence of any factual support for the assertion that, if users are penalized for decrypting these materials without authorization or for steaming open electronic envelopes that contain these materials, their ability to make noninfringing uses of these works will be substantially compromised.⁶ Indeed, we submit that the impact is likely to be exactly the opposite. The enhanced, customized, convenient access which higher education users now enjoy to these materials, thanks to their increasing dissemination in digital formats and over networks, will be diminished if the Librarian of Congress were to declare a three-year open season on the technologies that copyright owners use—and that Congress expected and encouraged them to use—to manage and control access.

B. American Library Association et al. (Comment #162)

The lengthy comment submitted by five library associations concludes with the following proposal for a “particular class of works” as to which §1201(a)(1)(A) should

⁵ Of course, this formulation begs the question of when a user comes into “possession” of a copy which she accesses online.

⁶ The assertion that the use of access control measures “seems certain to diminish the exercise of fair use,” Comment #161, at 4, even if it could be documented, is not dispositive. Congress directed this rulemaking to focus on the availability of works for “noninfringing uses,” not solely or even primarily on

not come into force on October 28, 2000: “the exemption should address all electronic works marketed and sold to libraries, archives, and educational institutions. Applying the exemption only to lawful uses of such works would then substantially narrow the reach of the exemption. Additionally, determining specific institutions or groups of institutions that might be responsible, in particular, for the archiving or preservation of specific classes of works could permit a narrowing of the exemption as applied to those function [sic].” Comment #162, at 37.

We fail to see anything narrow about this proposal. Virtually all works that exist in electronic formats are marketed and sold to libraries, archives, and educational institutions to some degree, so adoption of this proposal would nearly write §1201(a)(1)(A) out of the statute. In fact, the proposal would virtually eliminate the cause of action with respect to works, such as computer programs, that are distributed only in electronic form. The second sentence, which seems to suggest an exception that can fluctuate depending upon what is done with the work once the user has circumvented the access controls protecting it, may be founded upon a misunderstanding of §1201(c)(1), which we discuss below. The third sentence adds another level of uncertainty to the proposal. But besides these flaws, the voluminous library associations comment simply fails to establish any meaningful factual predicate for the prediction that, unless §1201(a)(1)(A) is made virtually inapplicable in the library, archival and educational environment, the ability of users to make noninfringing uses of “all electronic works” will be substantially harmed in the next three years.

Similarly to the comments submitted by the higher education groups, the library comments draw a distinction between “simple access control measures” and “persistent access and usage control measures.”⁷ Comment #162, at 13-14. The latter, it asserts, are particularly deleterious and “in contravention of section 1201(c)(1).” *Id.* at 15. This

the subset of such uses which are not permitted by the copyright owner but which are excused from infringement due to §107 of the Copyright Act. *See* discussion *supra* at 9.

seems to reflect a fundamental misunderstanding of that provision, which is simply a savings clause that preserves the status quo with respect to copyright claims and defenses, including but not limited to fair use. Section 1201(c)(1) has no impact on claims of or defenses to a violation of §1201(a)(1)(A), once that provision comes into effect, or any other prohibition contained in Chapter 12 of Title 17, as added by the DMCA, since these are not claims or defenses relating to copyright infringement.

Nor does §1201(c)(1) direct in any way that the Librarian should give disfavored treatment in this proceeding to access controls that operate after a user gains “initial lawful access” to a copy of a work.⁸ *Id.* at 3-4. As explained above, the effects of access control measures are not simply initial binary permissions or denials of access; they can also allow the management of who can have access, when, how much, and from where. Congress not only understood this, it recognized that these features could be “use-facilitating” aspects of an access control mechanism which could encourage widespread dissemination of copyrighted materials. House Manager’s Report, at 6-7.

The library associations’ submission brushes aside the NOI’s questions about the impact of either the use of access control measures, or the threat of circumvention, on the availability of works for noninfringing uses, deeming both inquiries “irrelevant” or “having no bearing on this proceeding. Comment #162, at 36, 38. To the contrary, these are among the central questions that Congress directed the Librarian to consider in making the

⁷ The libraries’ typology also includes “persistent marking and identification technologies,” *id.* at 14, but since these “do not by themselves prevent access to any digital work,” they are evidently not considered access control measures subject to circumvention if §1201(a)(1)(A) does not come into effect.

⁸ The citation by the library associations of the Senate Judiciary Committee report on the DMCA, S. Rep. No. 105-190 (1998), for an assertion about “the central reason for giving the Librarian the extraordinary authority set forth in the statute,” Comment #162, at 4, is inexplicable, since the Librarian had no such authority in the legislation as reported by the Senate Judiciary Committee. The legislative genealogy of this proceeding goes no further back than the consideration of the DMCA in the House Commerce Committee; that committee did not report the bill until July 22, more than two months after the Senate had completed action. Furthermore, any special status in the proceeding accorded to the interests of parties who obtained “initial lawful access” to works protected by access controls, see H.R. 2281, §1201(a)(1)(B)(i), 105th Cong. (1998), as approved by the House of Representatives on August 4, 1998, fell by the wayside in conference committees; this phrase does not appear anywhere in §1201(a)(1) as enacted.

determination whether, “on balance,” prohibiting circumvention of access controls would have a substantial adverse impact on availability. House Manager’s Report, at 7.

As already stated, we believe that the implementation of access control technologies has already increased the availability of a wide range of copyrighted works to lawful users. These technologies have encouraged the digital distribution of works that would otherwise be too vulnerable to piracy to consider bringing into the digital arena. They have also enabled greater granularity in the dissemination of certain copyrighted materials, so that users can gain access to the specific works or portions of works in which they are most interested. The coming into force next October of the prohibition against circumvention of these technologies will reinforce these trends. By providing a new legal tool against hacking and other circumvention activities that fall outside the scope of the exceptions to §1201(a)(1)(A), the prohibition is likely to accelerate the digital dissemination of copyrighted materials.

The library associations claim that, in using technological measures, copyright owners are motivated by a desire to reduce access to their works. From the perspective of industries whose survival depends upon making copyrighted materials available to the public, this claim defies economic logic. Similarly, the assertion that, if the circumvention prohibition remains inapplicable to virtually all electronic works for the next three years, that “would not decrease the amount or quality of information made available to the community,” Comment #162, at 38, reflects a clouded crystal ball. In any event, the factual predicate for such a prediction is wholly absent.

Anecdotal Concerns

Unlike many of the other submissions, the library associations’ document does provide some anecdotal information about the concerns of librarians in the current digital marketplace environment. However, none of this material buttresses the submitters’ claim

that §1201(a)(1)(A) should remain essentially inoperative in that environment for the next three years. These anecdotal entries fall into four main categories.

Several entries express unhappiness about limitations placed by online information providers (presumably using access control measures) on the number of users who are simultaneously allowed access to certain copyrighted information resources. *See id.* at 20, 21, 22, 32. It is not clear whether these limitations derive from technical considerations or from negotiated license terms, and, if the latter, whether licenses allowing more simultaneous users would be available if the subscriber chose to upgrade to it. There is also no indication about how the level of access to works in this environment compares with the levels available before the materials were accessible online, e.g., whether more simultaneous users could have consulted the print versions of these resources before the library switched to online access. Without this information, it is impossible to evaluate how the use of access control measures has affected the availability of these works, or to determine whether any adverse impact on users is attributable to the technological controls or, instead, to library decisions about how much access to license.

Similarly, some librarians express concern about the inability of users to access copyrighted resources remotely, from sites not registered under the license, or without a university affiliation (“walk-ins”). *Id.* at 19, 21-22. As with the complaints about simultaneous use restrictions, it is impossible to tell whether these restrictions (which presumably are implemented through access control technologies) reflect technological limitations or licensing terms, and if the latter, whether other options are available, including self-help (e.g., issuing “walk-ins” some form of identification for the purpose of access to the resource). It is also unclear how the status quo compares to the situation before these resources were generally available online, so that a realistic assessment can be made of whether availability has diminished or increased.

Third, some librarians worry about disparities between the electronic and print versions of some copyrighted products. *See id.* at 21. Certainly the availability of works in formats not protected by access control measures (e.g., print, VHS videotape) is a

relevant criterion in assessing the net impact of access control measures on the availability for noninfringing uses of some works. Even if the protected and unprotected versions are not identical, it does not necessarily follow, as the library associations argue, that the availability of an unprotected version should be treated as a nullity, and the two versions should be considered different works. *See id.* at 23. The submitters seem to believe that the possibility that users would have to choose “between second-class but affordable products and very expensive, ‘deluxe’ forms of that product” is an evil which should be cured in this rulemaking proceeding. To the contrary, such product differentiation may greatly increase overall availability; far fewer people would own cars if only Mercedes were on the market. Such choices are faced every day in our economy, by, among others, people who decide whether to purchase a book, video or other copyrighted material, or to borrow it from a library.

The final category of complaints fall easily into the category of “mere inconveniences” which the NOI, faithful to the legislative history, classifies as insufficient to justify the recognition of any exception to §1201(a)(1)(A)’s prohibition. The fact that some researchers must do their work late at night, or that library patrons experience “psychological barriers” to access, *id.* at 21, 22, while perhaps regrettable, is not enough of a reason to withhold legal penalties from acts of circumvention.

C. DeCSS concerns

The vast majority of first round comments focus on the Content Scramble System (CSS) access control mechanism used in connection with commercial DVDs, and the perceived inequities of the decision rendered by the U.S. District Court in *Universal City Studios v. Reimerdes*, enjoining acts of trafficking in the DeCSS program that exists solely to circumvent this mechanism. While the Joint Commenters disagree with many of the criticisms leveled by these submissions and believe that Judge Kaplan correctly applied the DMCA to the facts before him, this is not the appropriate forum for responding to these complaints because Judge Kaplan was not applying the only statutory provision at issue in

this proceeding: 17 U.S.C. §1201(a)(1)(A). It could hardly be otherwise, since that provision has not yet taken effect.

Accordingly, it is not surprising that virtually all the comments generated by this controversy are misdirected in this proceeding. Some call for a different interpretation of §1201(a)(2), which is not involved in this proceeding;⁹ others argue for an expanded reverse engineering exception, also an issue that Congress has directly addressed and that clearly falls outside the scope of this rulemaking; and others recommend other changes in (or even repeal of) the DMCA, all of which are beyond the scope of this proceeding. To the extent that these comments do seek to identify particular classes of works as to which §1201(a)(1)(A) should not apply, those proposed classes are, in most cases, either ill-defined, or defined in technology-specific ways (such as a class of all DVDs) that Congress clearly did not intend. *See* discussion *supra* at 6-11.

These comments also uniformly overlook the critical point, discussed *supra* at 13-14, that the predicted impact of §1201(a)(1)(A) on noninfringing uses must also take into account the positive contribution of access control measures to the availability of copyrighted materials. In other words, the Office must make its predictive calculation in this proceeding on a net basis. Thus, when considering the impact of the prohibition against circumvention of access controls on the new DVD medium, the Office should take into account that 5.4 million DVD players had been sold in the U.S. by the end of 1999, and an additional 6.5 million are projected to be sold this year. *See DVDFile.com Sales Statistics* (last visited March 30, 2000) <http://www.dvdfile.com/news/sales_statistics/hardware.htm>. By the end of this year, more than twelve million households will be viewing motion pictures in this new format—a format that would not be available but for access and copy control technology that induced content suppliers to release their high value content in the high risk digital environment. Whatever non-infringing uses this access control technology might inhibit are insignificant when compared to the non-infringing uses this technology has made possible.

⁹ Indeed, Congress explicitly ruled out the possibility that the outcome of this proceeding would have any impact on the interpretation or application of §1201(a)(2). *See* 17 U.S.C. §1201[a](1)(E).

Two comments arising from the DeCSS controversy are worthy of a brief response here. In Comment #193, Dr. David Touretzky proposes an exemption for a class consisting of certain works “protected by encryption-based access control mechanisms such as CSS,” Comment #193, at 2, and buttresses this request with the assertion that users cannot excerpt “still images or short video clips from copyrighted motion pictures” protected by CSS, for uses such as classroom demonstrations. *Id.* at 1. Assuming for the moment that Dr. Touretzky is correct regarding the inability of standard DVD players to perform this function, and to the extent the situation cannot reasonably be expected to change over the next 3-year period, the question then becomes whether alternative means to accomplish this goal are available (e.g., by using images from VHS versions, or obtained from authorized online sources, or cued in advance on multi-disc DVD players, etc.), and how the prohibition against circumvention of CSS is likely to affect the net availability of film stills and short clips for this purpose. Certainly from all that appears in Comment #193, it is impossible to conclude this particular access control mechanism, as applied to this type of work, is likely to have a “substantial adverse impact”—one that exceeds the level of “mere inconvenience”—on this type of noninfringing use of motion pictures, particularly when evaluated “on balance” against the greatly increased availability of these works for a wide range of noninfringing uses that the DVD format itself enables. As other reply comments discuss in more detail, the use of CSS and similar access control mechanisms are a practical *sine qua non* for the widespread distribution of many mass market copyrighted products in advanced digital formats, and an exception to §1201(a)(1)(A) which allowed circumvention of CSS could have a seriously negative impact on overall availability of these products.

Similarly, the assertion by Scheirer and Foner (Comment #185) that CSS makes it more difficult to carry out research in the field of “intelligent ‘media indexing’ technology” falls well short of providing a sufficient foundation for excluding CSS-protected audio and video products from the scope of the §1201(a)(1)(A) prohibition. As the submitters themselves concede, use of analog media to carry out this research, while less desirable, is possible, and they are aware of no category of works suitable for their research that is

available only in digital formats protected by CSS or similar technologies. *See* Comment #185, at 2 (response to question 7).

These submitters' comments, like those of many participants in this proceeding, rest upon the inaccurate assumption that "CSS-compliant video players and descramblers for [Linux-based] computer platforms are not available." *Id.* (response to question 3). In fact, CSS technology is available for licensing in the Linux operating system environment, and Linux products with a DVD playback capability have been introduced to the market and demonstrated at trade shows.¹⁰

D. AAM (Comment #184)

Finally, one of the shortest comments, submitted on behalf of the American Association of Museums, contains two statements deserving of the Copyright Office's serious consideration. First, AAM notes, "it's not difficult to imagine in the years to come" that the prohibition on acts of circumvention could have a substantial adverse impact on the availability of certain works for noninfringing uses. But imagining such dire consequences is not enough. The Librarian must not act to further delay the effective date of §1201(a)(1)(A) without "highly specific, strong, and persuasive" evidence, House Manager's Report, at 6, that it is necessary to do so. As AAM's submission notes, "time will tell" whether there is a class of works for which relief from the prohibition is needed, and if so, what class that is. Accordingly, AAM concludes, designation of any such class in this proceeding is "premature." The Joint Commenters agree.

CONCLUSION

The Joint Commenters appreciate this opportunity to offer their perspectives in this important proceeding. Representatives of any of the organizations listed below may

¹⁰ For more information on such products, see Eagle Wireless International, Inc., *Sigma Designs Announces Linux Support for DVD and MPEG Video Streaming* (visited Mar. 15, 2000) <<http://www.eglw.com/english/news-item.asp?ID=62>>. More detail on this issue may be found in reply comments submitted by the Motion Picture Association of America.

wish to testify in public hearings in this proceeding, and hereby reserve their rights to seek to do so.

Respectfully submitted,

American Film Marketing Association
American Society of Composers, Authors,
and Publishers

American Society of Media Photographers

Association of American Publishers

Association of American University Presses

The Authors Guild, Inc.

Broadcast Music, Inc.

Business Software Alliance

Directors Guild of America

Interactive Digital Software Association

The McGraw-Hill Companies

Motion Picture Association of America

National Music Publishers' Association

Professional Photographers of America

Recording Industry Association of America

Reed Elsevier, Inc.

SESAC, Inc.

Of Counsel:

Steven J. Metalitz
Smith & Metalitz, LLP
1747 Pennsylvania Avenue, N.W., Suite 825
Washington, DC 20006-4604 USA
Tel: (202) 833-4198; Fax: (202) 872-0546
metalitz@iipa.com

APPENDIX

American Film Marketing Association (AFMA)

AFMA is a trade association whose members produce, distribute and license the international rights to independent English-language films, television programs and home videos. AFMA was founded in 1980 by independent distributors who sought to build and protect their businesses through the creation of a world-class international motion picture trade show.

American Society of Composers, Authors, and Publishers (ASCAP)

ASCAP, the oldest and largest musical performing rights society in the United States, licenses the non-dramatic public performance rights of millions of copyrighted works of more than 90,000 songwriter and publisher members. ASCAP is also affiliated with over 60 foreign performing rights organization around the world and licenses the repertoires of those organizations in the United States.

American Society of Media Photographers (ASMP)

ASMP is a non-profit trade association founded in 1944 by a handful of the world's leading photojournalists to protect and promote the rights of photographers whose work is primarily for publication. Today, ASMP is the largest organization of editorial and media photographers in the world, with 40 chapters in this country and over 5000 members in the United States and more than 30 other countries. Its members are the creators of the most memorable images found in newspapers, advertising, magazines, books, multimedia works, and Internet web sites.

Association of American Publishers (AAP)

The Association of American Publishers, Inc. is the principal national trade association for the U.S. book publishing industry, representing more than 250 commercial and non-profit member companies, university presses, and scholarly societies that publish books and journals in every field of human interest. In addition to their print publications, many AAP members publish computer programs, databases, and other electronic software for use in online, CD-ROM and other digital formats.

Association of American University Presses (AAUP)

The Association of American University Presses' 120 members represent a broad spectrum of non-profit scholarly publishers affiliated with both public and private research universities, research institutions, scholarly societies, and museums. Collectively, they publish about 10,000 books and 700 scholarly journals each year.

The Authors Guild, Inc.

The Authors Guild, Inc., founded in 1912, is a national non-profit association of more than 8,000 professional, published writers of all genres, including journalists, historians, biographers, academicians from many fields of study, and other authors of nonfiction and fiction.

Broadcast Music, Inc. (BMI)

BMI licenses the public performing right in approximately 4.5 million musical works on behalf of its 250,000 songwriter, composer and music publisher affiliates, as well as the works of thousands of foreign songwriters, composers and publishers through BMI's affiliation agreements with over sixty foreign performing rights organizations. BMI's repertoire is licensed for use in connection with performances by broadcast and cable television, radio, concerts, restaurants, stores, Internet sites, background music services, passenger vessels, trade shows, corporations, colleges and universities, and a large variety of other venues.

Business Software Alliance (BSA)

Since 1988, the Business Software Alliance (BSA) has been the voice of the world's leading software developers before governments and with consumers in the international marketplace. Its members represent the fastest growing industry in the world. BSA educates computer users on software copyrights; advocates public policy that fosters innovation and expands trade opportunities; and fights software piracy.

Directors Guild of America (DGA)

The Directors Guild of America is the world's leading labor organization for film and television directors and members of their creative team, with a national membership of close to 12,000. Guild members direct audiovisual works in every genre and the role of directors as the lead force behind the vision and creation of movies and television is well established. DGA represents and protects its members collective bargaining and creative/artistic rights, serving as an advocate for their rights within the industry, before Congress, state legislatures, judicial proceedings, and in international policy fora.

Interactive Digital Software Association (IDSA)

The Interactive Digital Software Association is the U.S. association exclusively dedicated to serving the business and public affairs needs of companies that publish video and computer games for video game consoles, personal computers, and the Internet. IDSA members collectively account for more than 90 percent of the \$6.1 billion in entertainment software sales in the United States in 1999, and billions more in export sales of American-made entertainment software.

The McGraw-Hill Companies

The McGraw-Hill Companies is a global information, publishing, and media and financial services company. It provides products and services via traditional media, as well as by means of electronic networks including the Internet, to customers around the globe.

Motion Picture Association of America (MPAA)

MPAA is a trade association representing major producers and distributors of theatrical motion pictures, home video material and television programs. MPAA members include: Walt Disney Company; Sony Pictures Entertainment, Inc.; Metro-Goldwyn-Mayer Inc.; Paramount Pictures Corporation; Twentieth Century Fox Film Corp.; Universal Studios, Inc.; and Warner Bros.

National Music Publishers' Association (NMPA)

NMPA is a trade association representing over 600 U.S. businesses that own, protect, and administer copyrights in musical works. NMPA is dedicated to the protection of music copyrights across all media and across all national boundaries.

Professional Photographers of America (PPA)

Professional Photographers of America is the world's largest photographic trade association, representing photographers from all walks of life. PPA photographic classifications include portrait, wedding, commercial, advertising, corporate and other photographers. PPA is very active in the fight to defend the creative works of its members and strongly urges consideration of the issues and opinions offered in this paper.

Recording Industry Association of America (RIAA)

RIAA is the principal trade association representing recording companies in the United States. Its members are responsible for the creation of over 90 percent of the legitimate sound recordings sold in this country.

Reed Elsevier Inc. (REI)

Reed Elsevier Inc. is a leading international publisher of scientific, legal, and business information.

SESAC, Inc.

SESAC, Inc., founded in 1930, is the second oldest musical performing rights organization in the United States. SESAC, Inc. represents approximately 3,800 composers and music publishers.