David Carson, Esq.
General Counsel
U.S. Copyright Office
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Washington, D.C.
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via e-mail: 1201@loc.gov

June 11, 2000

re: § 1201(a) rulemaking

Dear Mr. Carson:

This letter is sent, in my individual capacity as a professor who teaches copyright law at Columbia University School of Law, in response to testimony submitted in the recent Hearings in connection with the Copyright Office's rulemaking under § 1201(a)(1), to identify classes of works which, during the ensuing three years, will be exempt from that provision's anticircumvention prohibition. In particular, I wish to react to certain concerns that have been expressed concerning the application of technological protection measures to works in the public domain. See, e.g., 5/2/00 statement of Sarah Wiant, American Association of Law Libraries (access to government documents); 5/4/00 statement of Arnold Lutzker, Esq. (sec. 1201(a) does not apply to public domain works); 5/18/00 statement of Siva Vaidhyanathan (public domain early radio broadcasts and motion pictures).

One of the issues that technological measures prompt with respect to the "ability to make noninfringing uses of . . . particular class[es] of works" is the concern that information providers will package collections of public domain documents, facts or ideas together with minimal copyrightable value added – such as an introduction, encrypt everything, and thereby bootstrap the public domain documents to the copyrighted additions. (See response of Laura Gasaway to question of Robert Kasunic: "the veneer of copyright should not be used to bootstrap circumvention prohibition for all non-protected material." 5/18/00 transcript, p. 90, lines 7-9.)

Similarly, just as the copyright protection that attaches to a compilation's original selection and arrangement of facts or other public domain materials may not, as the Supreme Court made clear in *Feist*, *de jure* extend to the underlying public domain elements, so the same result should not be achieved *de facto* through the application of non circumventable technological controls. Yet, this would be the result if the person effecting the circumvention, albeit entitled under § 1201(a) to circumvent technological measures controlling access to works *not* protected under Title 17, were unable to circumvent the protection attached to the public

domain elements without also circumventing the protection attached to the copyrightable contribution. If it is not possible to distinguish the copyrightable from the public domain components, an otherwise lawful act of circumvention might thus be frustrated.

To avoid a result so plainly inconsistent with Congress' design, the Copyright Office might include the following class of works among the classes exempted from the application of § 1201(a):

> Compilations and other works that consist of or incorporate works or materials in the public domain, unless the compilation or other work is marked in such a way as to identify the public domain components, thereby permitting the circumvention of any technological measure that controls access to the public domain components.

I recognize that this suggestion will not resolve the problem of potential public domain lock-up when the information provider does not simply incorporate public domain materials verbatim, but contributes original value added within the document to those materials, such as editorial revisions to the text. Whether this type of "thin copyright" work should also be included in the "classes of works" exempted from § 1201(a)(1), as the AAU submissions urge, is another matter worthy of your serious consideration, and which I in principle support, in light of the continuing prohibition on the distribution of devices designed to circumvent, and the availability of copyright infringement remedies in the event that circumvention leads to infringement of the copyright that does subsist in these works. Whatever your view on that issue, at the least, it would be desirable to endeavor to assure that when the "thin copyright" attaches to a contribution separate from the public domain components, it remain possible, once a copy of the work has been lawfully acquired, to access the public domain materials themselves.

Sincerely,

Jane C. Ginsburg
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