Mary Minow, J.D.
California Association of Library
Trustees and Commissioners (CALTAC)
21265 Stevens Creek Blvd. Suite 205-333
Cupertino, CA 95014
minow@stanfordalumni.org

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

17 U.S.C. §1201(a) Rulemaking Process: Reply Comment

The California Association of Library Trustees and Commissioners (CALTAC) is an association of public library trustees and commissioners from all parts of California. Trustees and Commissioners are elected or appointed by their local communities.

CALTAC supports maintaining the current status of Fair Use

CALTAC firmly supports the judicial doctrine of Fair Use, and its codification in the U.S. Copyright Act, at 17 U.S.C.§107. As such, we have deep concerns about the delicate task of preserving fair use and other legal uses carefully crafted by Congress and the Courts in the quest "to promote the progress of science and useful arts" (Const. Art. I Sec. 8 Cl. 8) in the implementation of 17 U.S.C. §1201 (a).

The Librarian must maintain legal limitations on exclusive rights such as §107 (Fair Use), §108 (Reproduction by Libraries and Archives), and §109(First Sale) etc. by carving out all legal uses of copyrighted materials

17 U.S.C. §1201 (a) has the potential to upset that balance by extending the mantle of legal protection to technological measures, even when the measures prevent lawful use of materials, specifically carved out under the Act's limitations on exclusive rights, including §107 (Fair Use), §108 (Reproduction by Libraries and Archives), and §109(First Sale) etc.

Although we do not envy him the task, the Librarian of Congress has the opportunity to take a strong position in maintaining the balance in his careful examination of the five factors under §1201(c), which require an examination of the effect of rulemaking on the availability for use of works for nonprofit archival, preservation, and educational purposes, and which explicitly gives him great latitude, "such other factors as the Librarian considers appropriate."

Two questions asked by Rachel Goslins, Copyright Office at Stanford Panel

We would like to specifically address two of the questions asked by Rachel Goslins, Esq., Attorney Advisor, Copyright Office at the Stanford Panel on May 18, 2000.
http://www.loc.gov/copyright/1201/hearings/index.html#transcripts

First question (paraphrased): If libraries and academic institutions were currently circumventing technological protection measures (TPMs). If not, why did §1201(a) really matter?

Second question (paraphrased in response to testimony by Dr. Vaidhyanathan): could libraries and academic institutions point to instances in which they were blocked by vendors based on editorial or otherwise biased motivations?

Libraries and academic institutions care about legal enforcement of TPMs even if they are not currently spending resources to crack them.

There is no doubt that content producers have legitimate concerns about the ease and quality with which content hires may copy and distribute copyrighted works. TPMs are a reasonable response for content producers who wish "self-help" in addition to protections afforded by copyright law.

While it is true that libraries and academics institutions do not currently employ personnel to crack technological protection measures (TPMs), the technology is still emerging, and it is already of concern to the library community as many have testified. The larger concern is about the possibility that legitimate intervention will become illegal.

Technology failures: Disappearing CD-ROMS

Laura Gasaway testified that her library has experienced a "disappearing CD-ROM." She said, "Actually, we still have the CD-ROM, it's the content that's disappeared. Apparently they were date-sensitive, although this was not included in the license agreement, and there was no advance warning. The library was left with nothing. This happened to us with Westlaw CD-ROMs. The publisher admitted that it was a mistake and agreed to replace them. But we were several weeks without the material."
http://www.loc.gov/copyright/1201/hearings/index.html#transcripts

Libraries are concerned as much about an increasing rate of such "technology failures" as intentional blocking as TPMs are increasingly used. If libraries are not protected by §1201 to fix these failures, they and their patrons will have little recourse to use the material.

Inexpensive TPMs would be encouraged by §1201

Many testified that it is extremely expensive to "crack" TPMs today, and that is one reason libraries have not yet been heavily engaged in the practice. With legal force behind even simple TPMs, the situation would likely dramatically change. Simple TPMs would proliferate, and lock out wide audiences (in libraries and academic institutions, for example), that have legitimate uses for materials licensed or purchased by the institutions. Simple contract law (licensing agreements) should take care of market demand – ensuring that content producers are paid per use or per campus size etc.

User-blocking: editorial discretion and "reverse filtering"

Although we have not yet seen reported cases, libraries and other users may easily be shut down from websites from content-providers.

Filtering content providers is a well-known process in which users block Uniform Resource Locators (URLs) that they feel are inappropriate to their needs. Prime examples include URLs of organizations and companies promoting pornography, hate speech, bomb-making and the like.

Less well-known in the process of "reverse filtering" by which *content providers* can block *users* by blocking the users' IP address. Each computer connected to the Internet has an IP address, a 32-bit numeric address written as four numbers separated by periods. For example, 1.160.10.240 could be an IP address.

The ease with which entire campuses or library buildings may be blocked out, by simply blocking IP addresses from reaching a site demonstrate the potential for editorial or political blocking practices. Even if not widespread, the chilling effect threat is a serious one for academic and information freedom.

The most appropriate exemption is for the "class of legitimate uses"

Although some have tried to pose the argument that "thin copyrighted materials" might form a class suitable for exemption, you, Mr. Carson, raise the issue that exempting only thinly copyrighted materials is not necessarily the best solution, and we agree. As you said in the Stanford hearing: "And I guess my question is, aren't all works fair use works? In fact, my experience is that some of the most interesting fair use cases, and the ones that I find myself believing most strongly about are the cases in which the work -- with respect to which fair use is being made, are highly creative works."

You ask if you have the discretion to exempt "lawful works" . . . "What do you find in the statutory language or the legislative history that suggests we have that much discretion?" http://www.loc.gov/copyright/1201/hearings/index.html#transcripts

Answer: "§1201(c)(v) such other factors as the Librarian considers appropriate."

You have great latitude in shaping the regulations in this new, uncharted arena. Please ensure that legitimate uses are not threatened by giving legal weight to technological protection measures. The most appropriate exemption is for the "class of legitimate uses."

Respectfully submitted,

Mary Minow
California Association of Library Trustees and Commissioners