June 22, 2000

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Washington, DC 20024

Re: Section 1201(a)(1) of The Digital Millennium Copyright Act (Docket #7M99-7)
Post-Hearing Comments

Dear Mr. Carson:

I am grateful for the opportunity to submit on behalf of Time Warner, Inc. and the Motion Picture Association of America, these brief post-hearing comments, bearing in mind the Copyright Office's requirements that they be limited to "relating specifically to matters addressed at the hearings or identified as the reply comments".

An oft repeated and persistently stated concern of many of the proponents of exemptions is what they call "secondary levels" of protection. By this, it appears that they mean application by copyright owners of technological protections to their works to control the number of uses that could be made of a work lawfully acquired by a user. This is perceived by those proponents as a means whereby the copyright owners will foreclose subsequent uses from the world or make unreasonable charges for them.

That perception and the arguments based on it fly in the face of fundamental market realities and fail to recognize the benefits to consumers that would flow if such a system of "secondary levels" of protection were instituted.

Assuming that such a technology exists or comes into being and is applied by some copyright owners, there would be clear benefits to consumers as well as to sellers and licensors – the kind of benefits that arise from flexibility by them in

setting terms of sale so as to meet the diverse needs of consumers. Instead of charging only (as those proponents seemingly would have it) a price of, say, fifteen dollars for a DVD which would allow unlimited performances for an unlimited time, such technology would also allow charging a small fraction of that price for a DVD which would allow one performance and even possibly provide for a sliding scale of charges for varying numbers of performances or other variations.

In short, not only have the proponents failed to present any factual support for the existence of "adverse effects", their speculations about future effects are even less supportable because they ignore the realities of what motivates consumers and sellers.

Another issue posed by the Congressional mandate for these hearings, that of defining a "class of works", was dealt with in some of the testimony. What had been merely an unsolvable question was left a tangled mass of illogicality.

A number of the proponents of exemptions suggested that the Librarian should exempt "works embodied in copies which (sic) have been lawfully acquired by users who subsequently seek to make non-infringing uses thereof". Some of the questions raised by this suggestion are:

At what point does a user who "subsequently" seeks to make non-fringing uses make known that intention? To whom is such advice given? How extensive is the exemption granted in this case: is it applicable to all copies of that work or only to the copy (or copies) as to which one or more users has or have given such advice? What if it turns out that the use or uses made is or are not non-infringing or not subject to the defense of fair use?

The proponents' inability to suggest a rational and workable definition of "class of works" adds further support to the conclusion that no exemption should be granted at this time.

Respectfully yours,

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