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**TESTIMONY BEFORE THE COPYRIGHT OFFICE  
REGARDING SECTION 1201(a)(1) OF THE COPYRIGHT ACT**

My name is Arnold Lutzker and I served as special counsel to a consortium of five national library associations during negotiation of the Digital Millennium Copyright Act (“DMCA”). The purpose of my testimony today will be to offer my perspective on the development of the exemption in Section 1201(a)(1) and its meaning. First, let me give some background to my comments.

I was one of the principal negotiators for the library and educational communities during the consideration of section 1201(a). If we can return to the hectic days of yesteryear – and many of you on the panel were eyewitnesses as well – bills working through Congress to implement the WIPO treaties had several clear themes. Among them was the notion that as copyright law was modified to fit the digital millennium, certain things needed to be preserved. Foremost among the things that needed preservation, in the view of libraries and educators, were the various exemptions and limitations spelled out in current copyright law. For purposes of our discussion, all these limitations came simply to be known as “fair use.” But in the more intense discussions and negotiations, fair use was the code phrase not just for section 107, but sections 108, 109, 110, and 121, as well.

Second, the bill as it was devised applied only to copyrighted works. Public domain works, government works and unprotected databases were outside the scope of coverage. Indeed, regarding databases, a separate title of the DMCA dealt with databases and it was deleted before final passage as part of the overall compromise to pass the legislation. Section 1201 was never intended as a backdoor to database protection. As to public domain works, copyright term was also the subject of separate legislation and was adopted with a specific library and educational exception. No change in the status of government work was achieved through the DMCA.

Returning to fair use, you will recall that fair use was an issue in the OSP and database discussions, as well as section 1201 anti-circumvention. If the libraries and educators – speaking on behalf of their institutions and also for the underrepresented “user community” - could have had their way, a fair use exception would have been absolute and clear in section 1201 and elsewhere in the DMCA. However, they did not have their way. While the House Judiciary Committee managed to provide a very limited exception, which appears as sections 1201(d) and 1204(b), these provisions were a far cry from what was desired. Even section 1201(c)(1), which mentions fair use specifically, was not deemed an adequate safeguard for the concerns of libraries and educators with regard to access.

Into this breach stepped the House Commerce Committee. It was the Commerce Committee that took jurisdiction and addressed some of the issues left unresolved after an early version of the bill was passed by the Judiciary Committee. The fair use concerns of the libraries and educators in its broadest terms were considered by this legislative body. In general, the members of this Committee were more receptive than their

Judiciary Committee colleagues to providing specific relief for library and educational concerns.

Like any legislative process that results in final passage, the bill as drafted, revised and passed by the Commerce Committee – and later amended in the Senate to place the section 1201 solution in your laps – is loaded with compromises and tensions. That in part is why anyone dealing with this rulemaking takes on the task quite gingerly, while scratching one's head. Let me try to help clarify a few things and make a few declarative statements.

1. First and foremost, I believe the legislation as drafted, amended and passed was intended to create a *real* solution to a *real* problem. The Commerce Committee, which championed the rulemaking process, was convinced that the new statutory provisions in section 1201, bolstered by strong civil remedies and criminal penalties, have the real potential to diminish fair use, the first sale doctrine, and other limitations greatly treasured in copyright law as creating balance in copyright policy. Even though in today's hot intellectual property marketplace individuals and companies are often both users and owners, these rights limitations help level the playing field between owners and users, facilitating just results in enforcement and in licensing negotiations.

As you know, the rights limitations come into play without the consent of the copyright owner. In recognition of the tension between rights and rights limitations, the rulemaking process you are undertaking was intended by Congress to be a real solution, not an illusory or unattainable dream, to the difficulty of obtaining access to works solely for non-infringing purposes where no access permission has been given.

2. Second, it flows from the precept that this is a real proceeding that the burdens imposed on the public seeking an exception now and in the future are not insurmountable. The section's drafters principally asked users to establish whether actual or likely adverse effects would occur if technical measures deny them access to works that are subject to fair use or other limitations.
3. Third, I take exception with the view of those who see this burden as so substantial as to make it hard if not impossible to satisfy. When an agency is instructed to deal with "likelihood" as you are in this proceeding, it may not have "verifiable" facts before it. Rather, the agency is being asked to make a judgment based on collected information and experience. That does not mean – and I would not suggest in the alternative – that the burden is a sham.

The House Commerce Committee Report explained --

...the rulemaking proceeding should focus on distinct, verifiable and measurable impacts; *should not be based on de minimis impacts*, and will solicit input to consider a broad range of evidence of past or likely adverse impacts. (Italics added.)

By contrast, the House Manager's Report suggests the evidence must show "substantial diminution of availability of works actually occurring" and that future impacts should only be assessed in "extraordinary circumstances." The latter standard would elevate the burden so high as to make this initial proceeding utterly unproductive. There is no experience yet to indicate what the real effects on individual actions will be when it becomes a crime under copyright law to bypass technology.

4. Fourth, regarding the House Manager's Report, the Copyright Office should be wary of placing primary reliance on its interpretation of section 1201. That report goes well beyond the House Commerce Committee and Conference Reports, which are the authoritative legislative sources for this provision. As the Supreme Court in *National Association of Greeting Card Publishers v. United States Postal Service*, 462 U.S. 810, 833 n. 28 (1983) noted, citing *Vaughn v. Rosen*, 523 F.2d 1136 (DC Cir, 1975), the House Manager's statements do "not have the status of a conference report, or even a report of a single House available to both Houses." In *Vaughn*, the Court noted that the House sponsors had been unable to achieve their objectives in the legislation and thus used the floor statements to achieve their aims indirectly. The opinion goes on to say that in interpreting legislative history a Court should be "wary" of relying upon a House report, or even statements of House sponsors, where their views differ from those expressed in the Senate. "The content of the law must depend upon the intent of both Houses, not of just one." Here, of course, we also emphasize the House Commerce Committee, not the House Judiciary Committee, introduced this rulemaking language.
5. Fifth, what is this thing called "class of works" or "particular class of works" and how are you to define it? Section 1201 does not provide much guidance. Nor does the limited legislative history. Given the confusion which many commentators have stated about those phrases, as well as the meaning of other essential terms in the section (including "circumvention" and "technological measure"), there exists an unsettling ambiguity and vagueness in a provision with criminal sanctions. This ambiguity raises grave concerns about the constitutional viability of the section.

Since your charge is not to rewrite the statute, but rather to oversee this rulemaking, I will only note this as a meaningful concern.

The phrase “class of works” came out of the negotiations in the Commerce Committee and, in my view, should stand in distinction from the phrase “category of works” which appears in the Copyright Act, section 102. The notion behind “class of works” is that it cuts across categories. After all, fair use and the other limitations are not restricted to a category. As you know, however, the burden of establishing fair use and the other limitations can vary according to the nature of the work and the uses made of it. Had the phrase “categories of works” been used, there might have been some confusion that the exception should apply to literary works, for example, but not to sound recordings or audio visual works.

The notion that a “particular class of works” needed to be identified is rooted in the intention to narrow as appropriate the number of affected works. If works not protected by technological measures are available as viable alternatives for fair use purposes, then the measures protecting their digital version should not be circumvented. Thus, the Commerce Committee drafters understood that a “particular class of works” would in all likelihood be a narrow subset of one of the broad categories of works. In other words, not all literary works – only some. It sounds simple, but things have gotten more complicated. Why?

Well, for one thing, the nature of technological measures controlling access has evolved in the short period since consideration of the DMCA. The paradigms referred to in the legislative history were devices that opened works or kept them blocked, literally “on/off” switches. You either had access or you didn’t. Technological

measures like password codes or keys to encrypted or scrambled works are cited in the Committee report. If you have the code or key, you're in. If you don't, you're out. Other technological measures were recognized to control what is done with a work, such as copy protection measures. The legal implications for fair use of these latter controls are what is addressed by section 1201(c)(1). Nevertheless, one does not reach the issue of copying if you are denied access. Thus, in the legislative negotiation process, technological measures controlling access were viewed as something that assured the copyright owner control over who got into the work and who didn't. Something you negotiate for and get - or not.

It turns out, as the technological models have been refined over time. As the Library Associations comments explain, persistent access-usage controls, such as timed use controls, which turn access on and off repeatedly during access sessions, are a developing model. Those with technically savvy can speak in more depth about these. The simple truth is that the section 1201 drafters did not have persistent access-usage controls before them when crafting the current relief section 1201(a)(1) or section 1201(c). However, they knew technology would be changing. To keep the legislation current, they granted you rulemaking authority to use judgment in applying the exemption and set new rulemaking proceedings to occur in three year intervals (after the initial two year study period) so that changing conditions could be the basis for periodic reassessment.

Nevertheless, the failure to account for technological measures than merge access and usage controls and the fast evolution of technology complicates your immediate task. While the Copyright Office may revisit the issue when more data is

available, it does not provide an immediate answer as to how best to frame the exemption initially and make it work effectively for the next three years. I doubt I need to emphasize that because this is the first of these proceedings, even though you will return to these deliberations in three years, what you do by this October will set the standard for years to come.

6. As to core recommendations, here are a number of things that I believe should be stated in the final rule:
  - a. *Section 1201(a) applies only to works protected under the Copyright Act.* This means that public domain works, government works and unprotectable databases are not covered under section 1201. This much is apparent from the plain text of the statute: if a work is not protected under this title (17 U.S.C.), then section 1201 should not make bypassing technological measures that control access to the work a crime.
  - b. *A “particular class of works” is not limited to any category of copyrighted works.* Fair use and all the limitations apply to every conceivable kind of work – all categories enumerated in section 102 and any others that might be conceived. This does not mean that every copyrighted work will be fair game under the exception. Only that any work could be based on circumstances.
  - c. *A “particular class of works” should be defined in terms of criteria, not by specific titles. Among the crucial elements of the definition are these:*
    - Whether the content of the digital version of the work is identical to or the functional equivalent of a version readily available in the marketplace that is not subject to access control measures;



- Whether access to the digital version of the work was initially lawfully acquired by the user;
  - Whether the controls employed restrict uses in the guise of access; and
  - Whether the proposed use is lawful and non-infringing under current copyright law.
- d. *The need for preservation and archiving of digital works should be specifically addressed.* In the case of libraries and archives, if it is established that a particular class of works is not being preserved or archived by the copyright owners, then upon petition to the Librarian, one or more repositories should be chosen for purposes of establishing an archive of such works.

In leaving the definitions and terms of section 1201 open to expert interpretation, Congress gave the Copyright Office and the Librarian substantial authority to take the principles of section 1201 and fashion a remedy that ensures continued viability of fair use and other rights limitations. By defining particular classes of works in the manner suggested, the rulemaking would provide a narrow yet focused opportunity for persons who have legitimate fair use reasons for using a work to enjoy the rights limitations without fear of civil or criminal liability if they must bypass a technological measure to access a work. Moreover, such an approach, which mirrors the way fair use itself has evolved over time, would sustain the balance between owners and users that has persisted for decades in current law and keep the playing field of negotiations level, at a time when licensing access to works, rather than buying copies, is becoming the prevalent mode of obtaining copies of works.