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Dear Mr. Carson:

The Motion Picture Association of America¹ appreciates the opportunity to respond to the Notice of Inquiry (NOI) issued by the Copyright Office and published in the Federal Register on November 24, 1999 (64 Fed. Reg. 66139).

The NOI reflects a careful analysis of the statutory directive under which this proceeding has been initiated (17 U.S.C. 1201(a)(1)(C)), and of the relevant legislative history. We commend the Copyright Office for this careful approach, and believe that, for the most part, it has faithfully carried out congressional intent in the ground rules it has set for this rulemaking. This includes the conclusion that the burden of persuasion rests on those who assert that the October 28, 2000 effective date of the prohibition on the circumvention of access controls (section 1201(a)(1)(A)) should be delayed with respect to one or more particular classes of copyrighted works.

¹ MPAA is a trade association representing seven of the largest U.S. producers and distributors of theatrical motion pictures, television programming and home video entertainment. Its members include: Buena Vista Pictures Distribution, Inc. (Disney); Sony Pictures Entertainment Inc.; Metro-Goldwyn-Mayer Studios Inc.; Paramount Pictures Corporation; Twentieth Century Fox Film Corporation; Universal City Studios, Inc.; and Warner Bros.

MPAA does not believe that such a delay is justified for any class of works. In other words, we do not believe that the users of any class of works are likely to be adversely affected, in their ability to make noninfringing uses of those works, by the coming into force of section 1201(a)(1)(A).²

To the contrary, the use of technological measures in general, and of access control technologies in particular, has already greatly increased the availability of a wide range of copyrighted materials to members of the public. Bringing into effect the legal prohibition on the unauthorized circumvention of these measures will reinforce and accelerate this trend.

Copyright owners have used access control measures for many years, long predating the enactment of the Digital Millennium Copyright Act (DMCA), and will continue to do so as conditions warrant. Indeed, the continued use and development of technological measures for access control is essential for the healthy growth of electronic commerce and for the increased dissemination of copyrighted works in the digital networked environment.

The wide variety of technological measures that copyright owners use to control or manage access to their works cannot be comprehensively cataloged here, but encryption, scrambling, and password protection are among the main techniques. While all these mechanisms serve to control access by allowing it to authorized users and denying it to unauthorized users, the effect of these measures is not always a simple binary matter. Access control technologies are used, for example, to permit access to a work for a limited period (such as a free demonstration or “test drive” period, or the duration of a license agreement) while closing it thereafter. These techniques are also employed to allow access to part of a

² Accordingly, we will postpone any discussion of the question of how to define a “particular class of copyrighted works” – the focus of several of the questions posed in the NOI -- until we can examine any evidence that may be brought forward that assertedly demonstrates a likelihood that the coming into force of section 1201(a)(1)(A) will adversely affect the users of any copyrighted works in their ability to make lawful uses of those works.

work while denying it to another part; to enable access by a specified category of users but not by 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. Such authorized or licensed users are certainly among the universe of legitimate users with whom Congress was concerned when it ordered that this rulemaking proceeding be held. In this regard, the many references in the NOI to “lawful users” of copyrighted materials (see, e.g., questions 3, 4, 5) and to “noninfringing uses” (see, e.g., questions 13, 15) may improperly be read to refer solely to uses falling within one or more of the exceptions to copyright protection set forth in sections 107-121 of the Copyright Act. To the contrary, most “lawful users” are licensed users, and most “non-infringing uses” are uses that are carried out pursuant to a license agreement.

Accordingly, one major issue, which the Copyright Office should consider in this rulemaking, is the likely impact of the section 1201(a)(1)(A) prohibition on the availability of licensing agreements for access to copyrighted materials.³ We believe this impact is likely to be overwhelmingly positive. 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

³We believe the NOI is off target in focusing on the impact of the implementation of technological measures themselves, rather than on the likely impact of the prohibition against circumvention of those measures. As the final version of section 1201(a)(1)(C) makes clear, Congress ultimately decided to aim this inquiry at whether users of copyrighted materials “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). The NOI’s formulation accurately states the thrust of the provision as the House Commerce Committee reported it, but not as it was passed by the full House on August 4, 1998, nor as it was finally enacted.

vulnerable to piracy to consider bringing into the digital arena. They have also enabled greater granularity in the dissemination of copyrighted materials, so that users can gain access to the specific works or portions of works in which they are most interested, without incurring the added expense of access to unwanted material. As noted above, “test drives” and other forms of conditional or time-limited access have further increased availability.

The coming into force in October of the prohibition against circumvention of these technologies will provide a new legal tool against hacking and other circumvention activities that fall outside the scope of the exceptions to section 1201(a)(1)(A). This prohibition will supplement existing statutory prohibitions against the circumvention of technical measures that prevent unauthorized access to content (See 47 U.S.C 553 and 605) and is likely to offer further encouragement to the digital dissemination of copyrighted materials. Works not previously made available in the digital environment will be offered to authorized users, because with the legal prohibition in effect, copyright owners will have a greater practical ability to manage access and to exclude unauthorized users.

We consider that the likely impact of the coming into force of section 1201(a)(1)(A) will be that more works will be made more widely available to more authorized (lawful) users than before. Those who shoulder the burden of arguing that section 1201(a)(1)(A) should not go into effect for all works on October 28 cannot prevail unless they are able to demonstrate convincingly that the contrary is true.

MPAA appreciates this opportunity to provide its perspective on the important issues involved in this rulemaking proceeding. We look forward to reviewing the other comments received, and stand ready to assist the Copyright Office in any way.

Respectfully submitted,

THE MOTION PICTURE ASSOCIATION
OF AMERICA, INC.

By:

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