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United States Copyright Office
Library of Congress

To Whom It May Concern,

I write today to provide comments in response to the Copyright Office's December 29 Notice of Inquiry regarding section 1201 of the Copyright Act. This response has been authored by Brandon Butler, Director of Information Policy, University of Virginia Library. It reflects the views of the University of Virginia Library and we offer it for your consideration.

When Thomas Jefferson founded the University of Virginia in 1819, he placed a library, not a chapel, at the center of the institution. It was a characteristically radical move, heralding an unwavering commitment to the pursuit of knowledge. As the University has grown and evolved over the ensuing 200 years, so has the University Library. Its collections now include five million print items, 463,000 ebooks, and 16 million manuscripts and archival items. The University Library also holds over 50,000 DVD, Blu-Ray, and streaming titles. Each year the University Library invests more than $13 million acquiring new materials for its collections.

The advent of media formats protected by technological protection measures, and the adoption of Section 1201 of the Digital Millennium Copyright Act, created a schism in our collection. One set of rules, the default rules of copyright, applies to non-TPM content, but another, stricter set applies to media with TPMs. Everything we and our patrons have learned over the decades about how to make lawful uses of library materials was

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destabilized by this move. We welcome the Copyright Office's inquiry into how well this bifurcated system is working, and we offer the following observations.

The University of Virginia Library's experience with Section 1201 of the Copyright Act has revealed three key things about the law:

1. The endless cycle of petitioning the Copyright Office for special exemptions is inefficient and unfair. Past exemptions should be presumptively renewable, as the Office has suggested in its NOI. This can be done without legislation.
2. The sole permanent exemption for libraries is essentially useless. A useful permanent exemption would simply and clearly permit circumvention for all lawful uses, as the Unlocking Technology Act and other reform bills have proposed over the years.
3. The complexity of the specially-granted exemptions deters intended beneficiaries from making lawful uses. If the Office is to continue recommending specific exemptions, it should recommend broader and simpler exemptions to foster the lawful uses that the exemption process is supposed to enable.

To elaborate on each of these points:

First, the current structure of the rule making, where the class of users seeking an exemption bears the same burden every three years to prove the exemption is needed, is one of the most problematic aspects of the law. For librarians and educators, this has meant going to the Copyright Office every three years to prove two facts that haven't changed in over a decade: that their uses are lawful, and that they need to copy clips from consumer sources protected by encryption. Indeed, these facts aren't likely to change for a decade to come. Even the content industries seem to realize this, as in the most recent cycle of the triennial process they did not oppose renewal of several exemptions that have been granted in previous cycles, including those for educational use.

The rule-making process is cumbersome and alien for non-lawyers, which only exacerbates the difficulty of returning to it every three years to re-prove the same facts. It requires investment of substantial resources, including multiple sophisticated filings and appearances at in-person hearings in Washington, D.C., or Los Angeles. Developing fresh

evidence of faculty need, of technology availability, of the state of the content market, and so on is extremely taxing for the dedicated few who have worked to participate in this ruling. Demanding this kind of investment over and over puts widely disbursed interests like libraries, professors, and students at a disadvantage relative to highly motivated and concentrated interests on the other side. Advocates on both sides should be encouraged to focus their energies on new issues, to the extent that there are any, rather than returning eternally to settled legal questions and unchanged facts.

Second, the current permanent exemption for libraries is, by all accounts, completely useless. Indeed, it does serious harm to the extent that it gives the false impression that the statute has granted libraries some leeway for circumvention in core use cases. In reality, the only use case covered by the permanent exemption for libraries simply does not exist. We have never encountered a situation where the University Library wanted to circumvent DRM to make a purchasing decision, but could not get permission from the relevant vendor to do so (or, more likely, get temporary authorization such that circumvention is unnecessary). Seventeen years since its passage, we are not aware of anyone ever actually using this provision.

A more useful permanent exemption for libraries (and others) would be a blanket exception for any lawful use, as proposed by the Unlocking Technology Act and numerous other reform bills over the years. This would free librarians, educators, and students to focus on the question of whether a use is fair, or permitted by another relevant exception, and do away with the arbitrary disparate treatment of library materials contingent on formats.

Third, the complexity of the exemptions granted by the Librarian of Congress in previous rule makings has deterred lawful uses. The triennial rulings have become complex legal documents that lay practitioners struggle to parse without expert help. Most colleges and universities simply do not have the capacity to provide individualized legal advice to faculty and students who are trying, in good faith, to comply with these dense rules. While there are certainly some sophisticated faculty and students who are able to decode the rules, and others who are willing to move forward in the face of uncertainty, in our

experience many students and faculty members will err on the side of caution and refrain from lawful uses.

A final, overarching point emerges from each of these more specific concerns: the flaws in the 1201 regime threaten to undermine the credibility of the copyright law in the eyes of faculty and students who must interact with it. When they learn that otherwise lawful uses are nevertheless forbidden when they involve TPM-protected media, and then they try to parse the latest set of complex rules which may offer an exception to that bar, or they consider proposing a new exemption to permit their own lawful activities only to discover the extraordinary effort involved in obtaining an exemption, it reflects poorly on the law. A balanced and functioning 1201 system, by contrast, would inspire confidence in the law and lead those who interact with it to take all of the law's requirements more seriously. The University Library takes its responsibility to educate the UVA community about copyright very seriously, and a balanced 1201 system would be a boon to our efforts in that regard.

We hope these comments are helpful to you. If you have follow-up questions, please do not hesitate to contact us.

Sincerely,

Martha Sites

Martha Sites
University Librarian and Dean of Libraries