

**Before the
Copyright Office
Library of Congress
Washington, D.C. 20024**

In the Matter of

Section 1201 Study: Request for
Additional Comments

Docket No. 2015-8

**COMMENTS
OF
THE SOCIETY OF AMERICAN ARCHIVISTS**

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The Society of American Archivists (SAA) welcomes the opportunity to provide additional comments on the need for a new permanent exemption in Section 1201 for obsolete technologies. This is identified as subject 1(d) in the Notice of Inquiry.

As the oldest and largest organization of archivists in North America, SAA is deeply interested in the challenges that obsolete technology presents. Archivists select, preserve, and make available primary sources that document the activities of institutions, communities, and individuals. These archival sources can be used for many purposes, including providing legal and administrative evidence, protecting the rights of individuals and organizations, and securing the cultural heritage of society. Archivists provide important benefits and services, such as identifying and preserving essential parts of the cultural heritage of society; organizing and maintaining the documentary record of institutions, groups, and individuals; assisting in the process of remembering the past through authentic and reliable primary sources; and serving people who seek to locate and use valuable evidence and information.¹ When archival research sources are embedded in obsolete media, archivists cannot fulfill their democratic, cultural, and professional missions.

Through the previous rulemaking proceedings, the Copyright Office has learned how an obsolete access control method can prevent a contemporary user from accessing content. VisiCalc software is a perfect example of the kinds of problems that archivists face when trying to preserve and provide access to older software. VisiCalc was the first spreadsheet program for the personal computer. Many consider it to be the application that turned what had been a toy for computer enthusiasts into a serious business tool.² Several years ago the developer of VisiCalc, Dan Bricklin, wanted to run a copy of the original program, but the copy protection system on the diskette kept him from being able to create a copy that he could distribute to others. Fortunately there was a “test” copy that did not have the copy protection mechanism on it, and Bricklin could use that copy to give people today a sense of what the seminal software for the personal computer was like. But it is not quite the same as the software that was actually distributed, which remains inaccessible because of an obsolete copy control mechanism.³ A part of our social, intellectual and cultural heritage has been lost. As software and storage media age, there will be a flood of stories similar to Bricklin’s.

SAA believes that there should be a blanket exemption in Section 1201 that would allow anyone to circumvent an access control mechanism for a lawful purpose. If such a provision were included in Section 1201, there would be no need to single out special exemptions for obsolete media. Preservation activities are authorized in 17 U.S.C. §108(b) and 108(c), and those sections should take precedence over the Section 1201 restrictions. Preservation can also be justified under 17 U.S.C. §107, which has the added benefit of being available as a right to all users, not just archives and libraries. The preservation of our digital heritage is so enormous a challenge that we will need input from a wide range of actors to ensure that we do not enter a digital “dark age.” The most effective solution would be to exempt legal activities from the limitations imposed by Section 1201.

If it proves to be impossible to make this critical change to Section 1201, an acceptable alternative would be to allow archives and libraries to bypass Section 1201 when they are engaged in legal

¹ Society of American Archivists, “Core Values of Archivists,” May 2011.

<http://www2.archivists.org/statements/saa-core-values-statement-and-code-of-ethics>.

² “VisiCalc” from Wikipedia, accessed on 18 October 2016, <https://en.wikipedia.org/wiki/VisiCalc>.

³ Dan Bricklin, “Copy Protection Robs the Future,” <http://www.bricklin.com/robfuture.htm>.

activities. A permanent exemption could be added for “Original works of authorship fixed in a digital medium of expression that are currently in the collection of a library or archives of the type described by clause (2) of subsection (a) of 17 USC §108 when circumvention is accomplished for the sole purpose of managing, maintaining, and preserving its collection pursuant to 17 USC §107 and §108.”

It is not necessary to specify in the exemption that it is the access control mechanism that is obsolete, *i.e.*, “is no longer manufactured or is no longer reasonably available in the commercial marketplace.” Given the difficulty of bypassing an access control mechanism, an archivist’s preferred method of operation would be to work with the manufacturer of the software and/or the access control mechanism to gain access to the underlying work. It is possible, however, that a commercially active manufacturer of an access control may not wish to assist an archives in gaining access to content that has become “orphan,” *i.e.*, for which no owner can be found. In this case, the access control would not be faulty, but archivists still could not gain access to the content. Therefore obsolescence of the access control mechanism should not be a precondition to avoid legal penalty when a circumvention is undertaken for a lawful purpose.

Archivists are not a threat to the creative endeavor. Instead, our labor preserves and makes available the raw material for imaginative, innovative, and inventive new works. It is truly in the nation’s interest to allow us to circumvent access protection mechanisms in the pursuit of our lawful and valuable mission—to preserve our essential cultural heritage.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Nancy McGovern". The signature is fluid and cursive, written in a professional style.

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