

Library of Congress Copyright Office

Notice of Inquiry)
)
In re Exemption to Prohibition on) Docket No. RM 2002-4
Circumvention of)
Copyright Protection Systems for)
Access Control Technologies)

Comments of John T. Mitchell

John T. Mitchell is a public-interest advocate dedicated to advancing greater legal protections against infringement of copyrights, balanced by greater protections against infringement upon the rights of the public, independent authors and businesses suffered when the copyright monopoly is improperly expanded into control over areas of discourse, trade and commerce that fall beyond the bounds of the copyright. These Comments are filed in response to the crucial need to re-balance the public and private interests contained in our copyright law before millions of Americans are disenfranchised from the intellectual wealth of this Nation and the world. Based in Washington, DC, he can be reached at 1-202-415-9213, John@InteractionLaw.com or through <http://InteractionLaw.com>.

These comments are filed on behalf of himself and on behalf of the public. In particular, these comments are filed on behalf of the vast number of people for whom copyright laws were first established – those who lack the financial means to pay for their own “access” to creative works but could and should benefit from the generosity of others; those who wish to continue to exchange lawful copies and phonorecords with each other, whether by sale, gift, rental or lending; those who wish to continue to enjoy the freedom to pay for access to copyrighted works with cash only instead of also having to give up personal information; those who wish to create new distribution systems that will offer competitive and efficient means of increasing lawful dissemination; those who wish to build innovative technology through which to present these works in the most convenient, competitive and useful manner that human ingenuity can provide; those who wish to continue to have the freedom to give away their collections of copyrighted materials; those who wish to build upon the greatness of the creative talent that came before them; and those authors and creators who wish to be free to disseminate their works to the public independently, without having to play by the rules of a few large copyright holding companies.

Proposed Classes of Works

In furtherance of these objectives, John T. Mitchell submits the following seven classes of works for which exemptions from section 1201(a) should be granted, together with evidence and arguments why an existing exemption should be extended.

I respectfully request that these seven proposals be considered together. The legal arguments in support of each individual exemption lend support to the others, as do the evidentiary examples. I also request that these proposals be considered in light of the entire record. I anticipate that others may offer initial comments or responses which may well lend additional evidentiary or legal support to these proposals.

Class 1

Removing Right of Private Performance from the Public Domain

Identification of Class 1:

<p>Sound recordings and audiovisual works (including motion pictures) embodied in copies and phonorecords, protected by access control mechanisms employed by or at the request of the copyright holder¹ that fail to permit the private (<i>i.e.</i>, non-public) performance of the works without the consent of the copyright holder after all lawful conditions surrounding the reproduction in the copy or phonorecord have been met.²</p>

Summary of Argument for Class 1 Exemption:

This proposed class is narrowly crafted to permit lawful use of access control technology (hereafter “ACT”) to protect exclusive rights or the copyright holder while providing a public safety valve in the event a copyright holder uses ACT to prevent the access needed to perform a work privately, thereby extending copyright-holder control beyond the limits of the copyright grant and infringing upon lawful (and noninfringing) uses encouraged by the Copyright Act.

The exclusive right to perform a work privately has never been granted any copyright owner. It is always a non-infringing use. The performance right is specifically limited in subsections 106(4) and 106(6) to the exclusive right to perform a work “publicly.” As a result, it can never constitute copyright infringement to perform a work privately. Nevertheless, many copyright owners are making the right to perform their works privately exclusive to themselves by using ACTs to condition the grant of a license to reproduce a work into copies or phonorecords on the licensee’s conveyance to the copyright holder of control over private performances. This conveyance may be carried out in part by a required End-User License Agreement (“EULA”) (see proposed Class 4) and carried out by the use of ACTs.

¹ It warrants emphasis that this proposed exemption would not permit circumvention of an access control technology imposed independently by a third party. The evil sought to be guarded against here is the vertical extension of the copyright monopoly by leveraging the strength of the monopoly into non-competitive downstream uses. That danger is not present, however, where third parties, acting independently, impose such technological constraints upon access. In such situations, normal market forces may provide the necessary correction. It may well be that the objectives of copyright law and the public interest would be best served by expanding Classes 1-5 to include works where access control mechanisms are imposed by anyone, including those acting independently of any copyright interest. Only proposed Classes 6 and 7 would do so.

² To be clear, this proposed exemption would not allow circumvention of an access control mechanism imposed even by the copyright holder if the lawfulness of the reproduction has not been perfected. For example, circumvention would not be permitted to defeat an obligation to pay for the reproduction before access is granted.

When copyright holders employ ACTs to control lawful uses of works – uses that fall outside of the scope of the exclusive rights of the copyright holders – they are misusing ACTs to expand the scope of their copyrights and infringe upon rights reserved to the public. Since such use of ACTs does nothing to protect copyrights from infringement, but has the sole purpose and effect of capturing for the copyright holder a right Congress reserved to the public, it would serve the public interest without impairing the rights of the copyright holder to permit the lawful circumvention of such ACTs for the purpose of privately performing these works.

Factual and Evidentiary Basis for Class 1 Exemption:

It is a fact that it does not constitute copyright infringement to perform a work privately. This includes playing CDs and DVDs privately. The private performance of works can never constitute copyright infringement because none of the exclusive rights granted in Section 106 of the Copyright Act include private performances.

Although we do not condone theft of property or infringement of copyrights, it is a given fact that as unlawful as theft or copyright infringement may be, it is not unlawful (and not even prima facie copyright infringement) to privately perform a copy or phonorecord which was stolen or which was unlawfully made.

It is also a fact that there are increasing instances in which copyright holders are employing (or requiring their licensees to employ) ACTs to gain control over noninfringing uses such as private performances, even as to lawfully made copies and phonorecords. For example, in the recording industry, the major record companies have formed joint ventures to license to consumers the reproduction of selected sound recordings. One of these, *pressplay*, explains under its “terms and conditions” at <http://www.pressplay.com/terms.html>:

A "conditional download" means a Track that you may save to the hard drive of your personal computer and play back as many times as you want through the *pressplay* Client for so long as your subscription is current and active. . . . *pressplay* will automatically renew your rights to all of your conditional downloads at the beginning of each Subscription Month (as defined below under "Charges/Billing: Agreement to Pay"), so long as your subscription remains current. This means that if you want to be able to play any conditional download at any time after the end of a Subscription Month, you must log on to the Service so that *pressplay* can renew your rights for those Tracks. . . . The *pressplay* Client will count the number of times that you play a conditional download, including while you are offline, for purposes of royalty accounting to artists contributing their music to the Service.

This “royalty accounting” referenced in the last sentence is itself an aberration, as it is pursuant to an Agreement with the National Music Publishers Association to forgo the royalty due for the download (the so-called “mechanical” license) in exchange for a share

of the revenue from unauthorized charges for private performances. *See* <http://www.loc.gov/copyright/carp/10-5agreement.pdf>.

The other music industry joint venture, MusicNet, likewise uses ACTs to prevent noninfringing private performances, as does the Movielink joint venture, in which the copyright holders jointly license rights they do not have in exchange for restrictions upon lawful uses of their works.

Movielink's ACT-mandated EULA goes so far as to have the effect of nullifying the very exceptions that the Librarian of Congress establishes as a result of this proceeding³.

SpectraDisc Corporation has announced a new product to restrict access to works on DVDs after a period of time. Perhaps the high-tech equivalent of printing books on very cheap paper to limit circulation, SpectraDisc proposes an ACT to limit access to lawfully made copies of works on DVD by coating the DVD with a so-called "Reading Inhibit Agent" which, upon exposure to air, begins a chemical reaction that will, over a short period of time, prevent access to the work. Just as buyers of cheap books may lawfully care for those books to extend the reading life indefinitely, so, too, should buyers of purposely cheapened DVDs be permitted to take steps to extend the usable life of the DVD indefinitely. Certainly, no cognizable copyright interest is impaired by allowing users to circumvent ACTs designed to destroy copies they no longer own.

Legal Argument in Support of Class 1 Exemption:

The fundamental question here is whether the Copyright Act gives copyright holders the right to destroy or render unusable lawfully made copies or phonorecords belonging to others. The answer, clearly, is "no".

Certainly, the Copyright Act grants no exclusive right of access to the copyright holder. Accordingly, Congress has no power to grant copyright holders power over access except in such cases where denial of access is for the protection of one of the exclusive rights. Where denial of access is used by copyright holders to expand their control beyond the boundaries of the copyright grant, application of the prohibition in Section 1201(a)(1)(A) would undermine rather than further the constitutionally mandated purpose of the Copyright Act, and Congress would therefore be without authority to authorize such misuse.

Moreover, the Copyright Act itself makes a clear distinction between the intellectual property interest and the physical property interest. Section 202 states:

Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive

³ See Exhibit A, containing an annotated excerpt from the "Movielink Terms of Use" effective September 16, 2002, and text accompanying n.22 to Exhibit A.

rights under a copyright convey property rights in any material object.

And protection of physical property belonging to persons other than the copyright owners is what is at stake here. As a spokesperson for the Motion Picture Association of America pointed out in explaining that even digitally made copies must be treated as personal property – as “goods” rather than services:

If a consumer were to place a telephone order for a DVD of the film “Finding Forrester” and have a copy of that DVD delivered to his house on a UPS truck, that is a “goods” transaction. Likewise, if the same consumer ordering a copy of the same DVD on his/her computer and had the same content delivered digitally and downloaded from his computer to a write-able DVD – that is still a “goods” transaction. The only difference is that a digital network instead of a delivery van provided the transportation from the retailer to the consumer.

Testimony of Bonnie J.K. Richardson, MPAA’s Vice President for Trade & Federal Affairs, before the House Commerce Committee Subcommittee on Commerce, Trade and Consumer Protection, May 22, 2001, prepared statement at 12.

Nearly one hundred years ago, lawmakers declared the importance of preventing copyright holders from infringing upon the rights of property owners, declaring that “it would be most unwise to permit the copyright proprietor to exercise any control whatever over the article which is the subject of copyright after said proprietor has made the first sale.” H.R. Rep. No. 2222, 60th Cong., 2d Sess. (1909).

When considering the potential effect of the DMCA upon private performances, Congress appears to have been confident that ACTs would only be used to control initial access to a work, but not subsequent access to a lawfully made copy or phonorecord. “In order to protect the [copyright] owner, copyrighted works will most likely be encrypted and made available to consumers once payment is made for access to a copy of the work.” 105th Cong., 2d sess., Rept. 105-551, House Committee on the Judiciary, May 22, 1998. (It warrants reiterating that this proposed exemption would not allow circumvention to avoid payment for the reproduction. Rather, it aims only to prevent copyright holders from prohibiting or charging for private performances from a lawfully made copy or phonorecord.) The Report from the House Committee on the Judiciary goes on to explain Section 1201(a) as preventing “the electronic equivalent of breaking into a locked room in order to obtain a copy of a book,” *id.*, but

Paragraph (a)(1) does not apply to the subsequent actions of a person once he or she has obtained authorized access to a copy of a work protected under Title 17, even if such actions involve circumvention of additional forms of technological protection measures.

In a fact situation where the access is authorized, the traditional defenses to copyright infringement, including fair use, would be fully applicable. **So, an individual**

would not be able to circumvent in order to gain unauthorized access to a work, but would be able to do so in order to make fair use of a work which he or she has acquired lawfully

(emphasis added). The section-by-section analysis in the Report further explains that the definition of “circumvent a technological protection measure” in Section 1201(a)(3), as used in paragraph (a), “covers protections against unauthorized **initial** access to a work” (emphasis added).

This commentary was preserved even as an earlier draft of the legislation had specified “initial” access only. Some may attempt to use this ambiguity to argue that Congress intended to give copyright holders control over all private performances, but if such were the case, Congress most certainly would have chosen to amend Section 106. Rather, to the degree any ambiguity may be read into the DMCA, it must be interpreted to exclude copyright holder control over private performances. As Professor Litman has noted:

If “access” is understood to refer only to *initial* access, the statute’s distinction between circumvention of access-protection technology and circumvention of copy-protection technology (almost) makes sense. If, however, “access” includes all subsequent actions to gain access to a work, the ban on circumvention of access-protection swallows up circumvention of copy-protection as well, since one will normally need to gain access to a work in order to engage in any use of it, fair or not.

Jessica Litman, *Digital Copyright* (Amherst, New York: Prometheus Books, 2001), p.144.

Finally, of crucial importance here is the fact that no one – not even a thief or a pirate – can infringe upon any of the exclusive rights of a copyright owner by making a non-public performance of a work. Copyright owners enjoy an exclusive right to perform a work publicly, but have no right to exclude anyone from performing a work privately. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 155 (1975).

The Copyright Act does not give a copyright holder control over all uses of his copyrighted work. Instead, [Section 106] of the Act enumerates several "rights" that are made "exclusive" to the holder of the copyright. If a person, without authorization from the copyright holder, puts a copyrighted work to a use within the scope of one of these "exclusive rights," he infringes the copyright. If he puts the work to a use not enumerated in [Section 106], he does not infringe.

Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 393-95 (1968) (footnotes omitted). In his dissent in the Betamax case, Justice Blackmun took issue with

the majority's exemption for private time-shifting reproductions, contrasting it with the explicit statutory exemption for private performances. He explained:

The copyright owner's exclusive right to *perform* a copyrighted work, in contrast to his right to reproduce the work in copies, is limited. Section 106(4) grants a copyright owner the exclusive right to perform the work "publicly," but does not afford the owner protection with respect to private performances by others. A motion picture is "performed" whenever its images are shown or its sounds are made audible. § 101. Like "[singing] a copyrighted lyric in the shower," *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 155 (1975), watching television at home with one's family and friends is now considered a performance. 1975 Senate Report 59-60; 1976 House Report 63. Home television viewing nevertheless does not infringe any copyright – but only because § 106(4) contains the word "publicly." See generally 1975 Senate Report 60-61; 1976 House Report 63-64; Register's 1961 Report 29-30.⁴

Footnote 19 of Justice Blackmun's dissent warrants special attention:

One purpose for the exemption for private performances was to permit the home viewing of lawfully made videotapes. The Register [of Copyrights] noted in 1961 that "[n]ew technical devices will probably make it practical in the future to reproduce televised motion pictures in the home. We do not believe the private *use* of such a reproduction can or should be precluded by copyright."⁵

Though Justice Blackmun went on to distinguish between the unlicensed performance of a home-taped movie and the unlicensed reproduction, there can be no doubt that the private performance of a lawfully reproduced copy is not an infringement of any of the exclusive rights.

Congress created copyright protections of a limited nature. Uses not enumerated in Section 106 do not infringe, *id.*, and even those rights are "[s]ubject to"⁶ fair use (Section 107), the entitlement of the owner of a lawfully made copy to dispose of possession without the copyright holder's consent (Section 109) and all of the other many limitations set forth in Sections 107-122.

⁴ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 468-69 (1984), Blackmun, J., dissenting (footnotes omitted). The Register's opinion should, logically, extend to works reproduced in the home over the Internet.

⁵ *Id.* at 469, n.19, emphasis by the Court, citing the Register's 1961 Report at 30.

⁶ 17 U.S.C. § 106.

Never have copyright owners been given the exclusive right to charge for reading a book, watching a movie or listening to a song, nor the right to charge for playing a CD at home, watching a DVD at home, or reading a book aloud to a child. Nor does the Copyright Act confer upon them any right to charge extra for reading a book twice, watching a downloaded movie outside of a 24-hour window, or playing a downloaded song beyond the expiration of a “subscription” fee. To use the monopoly power conferred in the limited rights specified in Section 106 (subject to the limitations in Sections 107-122) in such manner as to eliminate the effectiveness of those limitations and extend the reach of their control into areas beyond the boundary of their rights, such as by controlling private performances from lawfully made copies, is an abuse of that copyright.

“A copyright owner may not enforce its copyright to . . . use it in any manner violative of the public policy embodied in the grant of a copyright.” *Tricom, Inc. v. Electronic Data Systems Corp.*, 902 F. Supp. 741 (E.D. Mich. 1995) (citations omitted). Leveraging copyright power to control behavior which Congress intended remain outside of the copyright owner’s control is the type of conduct condemned in *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488 (1942); *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917), and *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970 (4th Cir. 1990).

Given that (a) such lawfully made copies and phonorecords are owned by persons other than the copyright holder, (b) Congress intended that persons who obtained lawful initial access be able to make subsequent use of works they acquired lawfully, (c) the private performance of the works embodied in such copies and phonorecords cannot possibly infringe upon any copyright, and (d) the use of ACTs to extend the scope of control over copyrighted works beyond the limits imposed by Congress is itself unlawful, *a fortiori* private non-infringing uses are impaired by preventing such access to lawful copies owned by others, the “purpose of enriching the general public through access to creative works”⁷ is impaired, and important statutory limitations upon copyrights to which Congress made each right subject, such as the entitlement of owners of lawfully made copies to redistribute them without the consent of the copyright owner (Section 109), are effectively voided.

Class 2

Tying Copyright License to Other Materials

Identification of Class 2:

Sound recordings and audiovisual works (including motion pictures) embodied in copies and phonorecords, protected by access control mechanisms which require the use of a computer operating system, media player, codec or digital rights management system specified by the copyright holder⁸ in order to gain lawful access.

⁷ *Fogerty v. Fantasy, Inc.* 510 U.S. 517, 527 (1994).

⁸ We note that nothing in this exemption would stand in the way of independent competitors offering copyrighted works which require the use of playback devices and systems specified by them.

Summary of Argument for Class 2 Exemption:

Since the beginning of copyright law, authors have relied upon the creativity, ingenuity, business skill, invention, and competition of others to disseminate their works to the public. Until just recently, authors generally had no means to distribute their works to the masses themselves. Indeed, copyright law must have been invented precisely because reliance upon private contractual terms in which the author attempted to maintain privacy of contract with each person receiving a work was a very poor method of promoting science and the useful arts, or even serving the author's economic interests. Copyright law lifted the "business" burden from authors, and provided for a careful balance of public rights that served authors as a means of serving the public.

Thus, even as major companies amassed large copyright holdings, it has long been the case that they relied upon delivery systems owned or controlled by others. Book publishers profited most by not trying to also be printers, paper mills or bookstores, music publishers profited most by not having to become (or control) vinyl record or record player manufacturers, radio and television broadcasters relied upon radio and television manufacturers, and so on. Today, that trend continues, even as the digital dissemination of copyrighted works relies upon ever more complex systems, including electronic devices (computers, routers, servers, drives, sound cards, speakers) and computer software (media players, codecs and security software).

This system of keeping the exclusive rights of copyright holders within strict limits has served us well. There is absolutely no "copyright interest" to be advanced by permitting copyright holders to leverage their lawful copyright monopolies into dictating which computer operating systems, media players, codecs or digital rights management systems must be used by those exercising licensed exclusive rights of reproduction or public performance or, worse, by those exercising rights that have never belonged to the copyright holder, such as the right to perform a work privately.

Recognizing this, our judiciary has produced a long line of cases condemning the use of one copyright to bolster the value of other material, copyrighted or not. Provision of an exemption is a necessary corollary to respect for the limits upon the copyright established by Congress. Allowing competition in the development of competing technologies used in the dissemination of copyrighted works serves, rather than hinders, the public interest in copyright law. Allowing such competition in no way impairs the exclusive rights of copyright holders. Suppression of such competition, in contrast, can serve no public interest. Accordingly, where copyright holders seek to use technological devices to enlarge their limited rights into control over broader non-exclusive areas of public and private discourse, over technology, over various distribution systems, over media channels, and over the Internet itself, the public must have at its disposal the freedom to use its own technological devices to break free.

Factual and Evidentiary Basis for Class 2 Exemption:

The practice appears to be quite common. The most prominent examples are from the joint ventures formed by some of the major copyright holding companies:

Musicnet conditions access to the copyrighted works reproduced from its service upon installation and use of the RealOne Player or RealOne Player Plus, a product of one of its joint venture partners.

Pressplay conditions access to the copyrighted works reproduced from its service upon installation and use of the Windows Media Player.

Movielink conditions access to the copyrighted works reproduced from its service upon installation and use of the Windows Media Player.

Legal Argument in Support of Class 2 Exemption:

Section 202 of the Copyright Act distinguishes the intellectual property right of the copyright owner from the property right in the copies themselves. When it comes to distribution of the latter, there is an enormous magnitude of unfettered competition. And the competition is not limited to just retailers and distributors. Rather, the competition extends to suppliers of carpeting, security equipment, signage, advertising services, computer software for a variety of business functions (inventory management, cash registers, transaction reporting, accounting), transportation services and equipment, storage facilities, Internet presence, merchandise displays, and untold other goods and services relied upon by the retail outlets and their distributors. Despite the fact that all of the competitors in these goods and services “profit from the copyrights,” the copyright holder’s exclusive rights confer no power to dictate which of the competing goods and services will be selected by the bookseller, video store or music shop, and the retailer can improve its competitive posture by wise and creative selection from among these competing goods and services. The copyright confers no power to determine where a retail establishment may be located, or to restrict who can purchase or rent copies from a given location.

And the competition continues long after the product reaches the consumer, as consumers may choose their own lighting by which to read, their own computers upon which to operate their software, and their own monitors, sound systems and other hardware upon which to perform their phonorecords and copies of sound recordings and audiovisual works.

Logic would dictate that the same free market system would serve us well in the online world, but public logic is being stifled by private greed. In the online world, some copyright holders are increasingly taking it upon themselves to condition the licensing of their exclusive intellectual property rights on acquisition and use of completely separate goods and services needed to carry out the online transaction or to perform the work. Instead of security equipment and merchandise displays, the online equivalents are such things as DRMs, codecs, and media players. (Some of these systems, in turn, may integrate or support a variety of related sub-systems.) The right to reproduce a work in copies (downloading) or the right to publicly perform a work (streaming), for example, is licensed only on condition that the licensee (and perhaps even members of the licensee’s audience in the case of a licensed public performance by streaming) use a specific codec, DRM, or media player.

The Librarian of Congress should not allow the bundling of copyrights with separate and non-essential goods and services to continue, but it will do so if it fails to exempt the

public's efforts to maintain a free market system through the circumventing ACTs that have no purpose other than to expand market power beyond the limits of the lawful copyright monopoly.

If it is unlawful to grant a license to publicly perform certain television shows on condition that the licensee agree to pay cash for another television show,⁹ so, too, the conditioning of access to a vast library of copyrighted works on the licensee agreeing to use a particular vendor's codec, DRM or media player would also be unlawful – particularly if there are competing technologies which can equally meet any legitimate copyright-related interests of the copyright holder.

Even when carried out by a single copyright holder acting alone, such bundling runs afoul of copyright and antitrust law where the option to choose the copyrighted work unbundled is not made available. *United States v. Paramount Pictures*, 334 U.S. 131 (1948); *United States v. Loew's, Inc.*, 371 U.S. 38 (1962); and *MCA Television Ltd. v. Public Interest Corp.*, 171 F.3d 1265 (11th Cir. 1999). When such bundling occurs on a wider scale by major copyright holding companies joint venturing with each other, the stakes are much higher. At one point, all seven major motion picture studios had formed two joint ventures. Movielink (formerly MovieFly), a joint venture of AOL Time Warner, MGM Studios, Sony Pictures Entertainment, Viacom's Paramount and Vivendi Universal's Universal Studios; and movies.com, a joint venture of News Corp.'s Twentieth Century Fox and Walt Disney's Disney Studios (from which News Corp. subsequently withdrew).

Movielink's service requires, as a precondition to giving access to lawful reproductions of copyrighted works, that licensees also agree to use Microsoft's Windows operating system and Microsoft's Windows Media Player. MusicNet, a joint venture of RealNetworks, BMG Entertainment, EMI Music and Warner Music Group, has selected RealNetworks for its media player and related technologies, while *pressplay*, a joint venture of Universal Music Group and Sony Music Entertainment, has selected Microsoft's Media Player.¹⁰

But “the granted monopoly power [in specific works] does not extend to property [such as DRMs, codecs, media players or retail outlets, nor to rights such as the consumer's right of private performance or the owner's entitlement, under Section 109(a), to dispose of a lawfully made copy without the copyright owner's consent] not covered by the patent or copyright.”¹¹ This is because the public policy granting

⁹ *MCA Television Ltd. v. Public Interest Corp.*, 171 F.3d 1265 (11th Cir. 1999).

¹⁰ In a parallel intellectual property scenario, the Department of Justice has raised concern about the effects of pooling where the pool includes non-essential patents. “Inclusion in the pool of one of the patents, which the pool would convey along with the essential patents, could in certain cases unreasonably foreclose the competing patents from use by manufacturers; because the manufacturers would obtain a license to the one patent with the pool, they might choose not to license any of the competing patents, even if they otherwise would regard the competitive patents as superior.” Letter from Joel I. Klein to Garrard R. Beene, Esq., December 16, 1998, at p.10. It stands to reason that this concern would be just as valid where pooled copyrighted works were made available only on condition that certain non-essential technologies or business models were employed, thereby foreclosing competition in competing and possibly superior technologies and business models.

¹¹ *Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970, 976 (4th Cir. 1990) (citations omitted).

copyrights “excludes from it all that is not embraced” in the original copyrighted work, and “equally forbids the use of the copyright to secure an exclusive right or limited monopoly” beyond the scope of the Copyright Act and which is “contrary to public policy to grant.”¹²

The Supreme Court recently had occasion to put a halt to such intellectual property expansionism in the *Kodak*¹³ case, the fact of which pale in comparison to the tactics used by some copyright holders today. In that case, owners of Kodak equipment who objected to being forced to use Kodak service had the option of providing their own service¹⁴ or, despite the switching costs, selling the Kodak equipment and purchasing another brand capable of performing just as well. But when it comes to copyrighted works, there is no “self service” option for a customer who objects to having to use only the DRM, codec, player and so on, specified by the copyright holder. To the degree that any of these effectively control access to the lawfully reproduced work, self-service could invite criminal liability for circumvention. Second, the option to not sacrifice the right of private performance or the Section 109(a) right to transfer a lawfully made copy is not available. Finally, copyrights present a more onerous situation than Kodak’s because, instead of a patented product for which there were ample market substitutes, each copyrighted work is unique.¹⁵ The consumer who objects to the copyright holder’s restraints may reject them, but would then be unable to enjoy access to even a lawfully reproduced copy or phonorecord using other software or services, and would not be able to obtain “market substitutes” for that copyright holder’s works.

The courts have already taken notice of power of a copyright owner to use but one copyrighted work to restrain trade and unlawfully expand the reach of the lawful copyright monopoly using single works as diverse as *Gone With the Wind*¹⁶ and *Harry and the Hendersons*.¹⁷ It is safe to say, therefore, that if only one title can be unlawfully

¹² *Id.* at 977 (quoting with revisions from *Morton Salt*, 314 U.S. at 492) (brackets omitted).

¹³ *Eastman Kodak Co. v. Image Technical Services*, 504 U.S. 451 (1992).

¹⁴ *Id.* at 458.

¹⁵ *See, e.g.*, n.16, *infra*, and accompanying text.

¹⁶ *Loew’s*, 371 U.S. at 48, n.6. The Supreme Court’s reaction to the district court’s findings are instructive:

The district judge found that each copyrighted film block booked by appellants for television use “was in itself a unique product”; that feature films “varied in theme, in artistic performance, in stars, in audience appeal, etc.,” and were not fungible; and that since each defendant by reason of its copyright had a “monopolistic” position as to each tying product, “sufficient economic power” to impose an appreciable restraint on free competition in the tied product was present, as demanded by the *Northern Pacific* decision. We agree. These findings of the district judge, supported by the record, confirm the presumption of uniqueness resulting from the existence of the copyright itself.

Id. at 48 (citation to the lower court and footnote 6 omitted). Surely, the movies of today are no less unique, and no more fungible.

¹⁷ *MCA Television Ltd. v. Public Interest Corp.*, 171 F.3d 1265 (11th Cir. 1999)

leveraged, even a modest collection of titles can be pooled by a single copyright holding company to leverage serious restraints on trade and a more dramatic extra-judicial enlargement of the copyright.¹⁸ But the Librarian of Congress need not leave the public to wait for legal challenges to surface, perhaps piece-meal, because Congress has placed at its disposal the tools needed to minimize immediately the impact of such market controls upon lawful uses. The Librarian of Congress needs only make lawful the circumvention of ACTs used to bundle such unrelated products – to guarantee, for example, that persons forced by the copyright holder to install and use Microsoft’s Windows Media Player to gain access to their lawful copies will not be prosecuted for accessing their lawful copies using QuickTime or some other media player instead.¹⁹

Class 3

Suppression of Lawful Trade in Copies and Phonorecords

Identification of Class 3:

Sound recordings and audiovisual works (including motion pictures) embodied in copies and phonorecords, protected by access control mechanisms employed by or at the request of the copyright holder²⁰ which tether the lawfully made copies and phonorecords to a particular digital playback device.

Summary of Argument for Class 3 Exemption:

Copyright holders are increasingly employing technological devices to deny access to works which, once lawfully made, are attempted to be played on devices other than the one to which the copyright holder has “tethered” the copy or phonorecord. As in the case of proposed Classes 1 and 2, such tethering does nothing to advance any legitimate interest of the copyright holder. More importantly, tethering serves to deny downstream users the ability to access the works, completely voids application of the first sale doctrine and the operation of Section 109 of the Copyright Act, destroys all lawful trade and commerce competing sales, rentals, lending and gifts that might compete with “original” access in a monetized transaction benefiting the copyright holder, and denies access to copyrighted works to those millions of Americans who, due to lack will or means to pay full price for a “new” reproduction, rely upon the used market, public libraries, private lending and gift economies to satisfy their thirst for learning, art and entertainment.

¹⁸ Congressman Rick Boucher has made a similar observation, noting that “the record industry is attempting to monopolize distribution of the product on the Web and to dictate the format in which whatever is distributed on the Web will be distributed.” Rick Boucher, *The Future of Intellectual Property in the Information Age*, appearing in *Copy Fights: The Future of Intellectual Property in the Information Age* (Washington: Cato Institute, Adam Thierer and Wayne Crews, eds., 2002)

¹⁹ It is not uncommon for persons seeking broad dissemination to offer downloads or streaming of their copyrighted works in multiple formats. See, e.g., www.bmwfilms.com (offering over a dozen delivery formats for BMW films).

²⁰ Once again, this exemption would apply only where the ACT is employed to extend the copyright holder’s control beyond the scope of the copyright. Where the entity imposing the ACT acts independent of any copyright interest, the concern is lessened, as market forces may come into play.

Factual and Evidentiary Basis for Class 3 Exemption:

Movielink and Sightsound.com tether lawfully made reproductions to the hardware upon which they are first accessed. For example, the motion picture film *Dead on Arrival* may be reproduced under license through SightSound.com onto a compact disc and played in any computer CD drive (so long as the computer uses Microsoft's Windows Media Player 8 or higher), but once accessed, the movie will no longer play on any other device. No competing untethered alternative is likely to emerge if the copyright holders themselves are tethering their online reproduction offerings, as those restrictive business models would likely fail in the face of competitive untethered alternatives for lawfully downloading (reproducing) the same works.

Legal Argument in Support of Class 3 Exemption:

One who downloads (reproduces) a copyrighted work under license to do so owns that copy and is entitled to give it away, sell it, or lend it without the consent of the copyright holder. Section 109. May copyright holders nullify those rights? Some might argue that the use of ACTs to nullify the operation of Section 109 is of no moment, but the impact upon those who might benefit “downstream” from the free exercise of the “unlicensed” resale, gift, rental or lending of copies under the authority of Section 109 is certainly strong, and unlikely to have any remedy (for who would know of the lost opportunity to receive used copies, if the gift were not even offered?).

Although the public policy considerations militating against such restraints on trade that would rob downstream users of the benefits of the Copyright Act are clear, and the antitrust implications of the wholesale elimination of such trade should likewise be clear (because it effectively eliminates all trade and commerce in copies and phonorecords lawfully made by downloading), we offer here an explanation of why such conduct also constitutes copyright misuse, warranting an exemption if for no other reason than that copyrights being misused cannot be enforced.

(Although we discuss copyright misuse as legal authority for the exemption in this class, we note that the copyright misuse theory supports granting the exemptions requested in the other classes as well.)

The Supreme Court has noted repeatedly that Congress “has never accorded the copyright owner complete control over all possible uses of his work,” but has instead limited the holder to the enumerated statutory rights in § 106.²¹ May that monopoly power, however limited, be used to gain control over distribution of a work after the distribution right has been terminated by law? The answer is straightforward: “A copyright owner may not enforce its copyright to violate the antitrust laws or indeed use it in any ‘manner violative of the public policy embodied in the grant of a copyright.’”²²

²¹ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1989). The Department of Justice has previously taken a dim view of extensions of intellectual property rights beyond their scope or term. See Letter from Joel I. Klein to Gerrard [sic] R. Beene, Esq., June 26, 1997, p.9 (“A licensing scheme premised on invalid or expired intellectual property rights will not withstand antitrust scrutiny”).

²² *Tricom, Inc. v. Electronic Data Systems Corp.*, 902 F. Supp. 741, 745 (E.D. Mich. 1995) (quoting *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 978 (4th Cir. 1990)).

Misuse of intellectual property rights may give rise to liability under standard antitrust analysis, but perhaps because copyright misuse so often fits within standard antitrust analysis, it can be overlooked that such misuse may also give rise to liability based upon the enlargement of the copyright monopoly in each individual copyright by using it to exert control over uses that are beyond the grant of that copyright.

In *Bobbs-Merrill Co. v. Straus*²³ the Court concluded: “In our view the copyright statutes, while protecting the owner of the copyright in his right to multiply and sell his production, do not create the right to impose, by notice, such as is disclosed in this case, a limitation at which the book shall be sold at retail by future purchasers, with whom there is no privity of contract.”²⁴ The Court added: “This conclusion renders it unnecessary to . . . examine into the validity of the publisher's agreements, alleged to be in violation of the acts to restrain combinations creating a monopoly or directly tending to the restraint of trade.”²⁵ Thus, even in 1908 the Court was prepared to consider enlargement of the copyright under antitrust principles, but was satisfied that the Copyright Act itself provided all the limitation necessary to condemn an enlargement of the copyright by notice. How much more suspect the conduct if instead of a “notice,” advanced digital technology is employed to carry out what would have been the notice’s objective!

In 1917, the Supreme Court took on the issue of private enlargement of copyright, yet did so again from an intellectual property law premise. In the Motion Picture Patents case, it determined that the owner of an intellectual property monopoly – in that case a patented motion picture film projector – could not lawfully use a “licensing” mechanism to obligate purchasers of the machine to use it solely with motion pictures containing another patent which the company also owned.²⁶

A restriction which would give to the plaintiff such a potential power for evil over an industry which must be recognized as an important element in the amusement life of the nation, under the conclusions we have stated in this opinion, is plainly void, because wholly without the scope and purpose of our patent laws, and because, if sustained, it would be gravely injurious to that public interest, which we have seen is more a favorite of the law than is the promotion of private fortunes.²⁷

Notwithstanding the fact that patent law confers both an exclusive right to “vend” and to “use,” the Supreme Court concluded that the exclusive right of use could not be

²³ 210 U.S. 339 (1908).

²⁴ *Id.* at 350.

²⁵ *Id.* at 351.

²⁶ *Motion Picture Patents Co. v. Universal Film Mfg Co.*, 243 U.S. 502.

²⁷ *Id.* at 519. This position was followed in *Carbice Corp. of Am. v. Am. Patents Dev. Corp.*, 283 U.S. 27 (1931) (owner of a patented package that used solid carbon dioxide could not obligate licensees to use its own solid carbon dioxide). In *Carbice*, the court noted that the law had already risen to prevent the unwarranted extension of other limited monopolies, such as trademarks and trade names. *Id.* at 35 n.5 (characterizing this limitation as being “inherent” in the monopoly grant).

employed as a tool to expand the scope of the patent, and that “it is not competent for the owner of a patent, by notice attached to its machine, to, in effect, extend the scope of its patent monopoly by restricting the use of it to materials necessary in its operation, but which are no part of the patented invention, or to send its machines forth into the channels of trade of the country subject to conditions as to use”²⁸ In contrast to patent law, copyright law does not confer an exclusive right of “use” of the work. Thus, the Supreme Court’s holding in *Motion Picture Patents* carries even greater weight in relation to use of lawfully made copies.

The relevance of the Supreme Court’s analysis in *Motion Picture Patents Co.* is inescapable. If it is unlawful to extend the statutory monopoly by limiting the use of a patented motion picture projector to films containing other intellectual property owned by the licensor, then it stands to reason that it is equally unlawful to condition the licensing of copyrighted works upon the relinquishment of statutory rights under Sections 107-122, to license only in conjunction with certain DRMs, codecs or digital media players, or to license only on condition that other uses beyond the reach of the copyright be abandoned.

From this premise, the law continued to develop a unique theory of misuse of intellectual property independent of antitrust law. In *Morton Salt*²⁹ the Court examined the Seventh Circuit’s approval of the use of the patent monopoly in a machine for depositing salt tablets to force licensees to use only salt tablets manufactured by the patent holder. The Seventh Circuit had reasoned that, under § 3 of the Clayton Act, “it did not appear that the use of its patent substantially lessened competition or tended to create a monopoly in salt tablets.”³⁰ The Supreme Court reversed on grounds of patent misuse, and concluded that, having done so, it was unnecessary to decide whether the Clayton Act had also been violated.³¹

[t]he public policy which includes inventions within the granted monopoly excludes from it all that is not embraced in the invention. It equally forbids the use of the patent to secure an exclusive right or limited monopoly not granted by the Patent Office and which it is contrary to public policy to grant.³²

Thus, the misuse claim was viewed as independent of the antitrust claim. But this line of reasoning is not limited to patent and trademark law. *Morton Salt* itself noted with approval the application of this doctrine to copyrights.³³ In *United States v. Paramount Pictures, Inc.*,³⁴ the Supreme Court further explained the limitations on copyright power

²⁸ 243 U.S. at 516. “The patent law furnishes no warrant for such a practice and the cost, inconvenience and annoyance to the public which the opposite conclusion would occasion forbid it.” *Id.*

²⁹ *Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488 (1942).

³⁰ *Id.* at 490.

³¹ *Id.* at 494.

³² *Id.* at 492.

³³ *Id.* at 494.

³⁴ 334 U.S. 131 (1948).

in the context of “block booking” – “the practice of licensing, or offering for license, one feature or group of features on condition that the exhibitor will also license another feature or group of features released by the distributors during a given period.”³⁵ The Supreme Court approved of the lower court’s restriction against such practice as well as the lower court’s reasoning, which was based not only on the illegality of the restraint itself, but also for reasons based squarely upon the Constitution and the Copyright Act.

The District Court held it illegal for that [antitrust law] reason and for the reason that it “adds to the monopoly of a single copyrighted picture that of another copyrighted picture which must be taken and exhibited in order to secure the first.” That enlargement of the monopoly of the copyright was condemned below in reliance on the principle which forbids the owner of a patent to condition its use on the purchase or use of patented or unpatented materials.³⁶

Like patent law, the exclusive right granted under the Copyright Act does not include any privilege to “add to the monopoly of the copyright in violation of the principle of the patent cases involving tying clauses.”³⁷

From these foundations, the doctrine of copyright misuse has developed both as a violation of antitrust law and as an affirmative defense against copyright infringement when the copyright holder, by means of an over-reaching license or other method of control, tries “to secure an exclusive right or limited monopoly not granted by the [Copyright] Office and which it is contrary to public policy to grant.”³⁸

*United States v. Paramount Pictures*³⁹ and *United States v. Loew’s, Inc.*⁴⁰ began as Sherman Act cases but found “block booking” unlawful precisely because the bundled products were copyrighted. Like the bundling of copyrights with specific DRMs, codecs, media players and restrictive “rules” that rob consumers and competing retailers of their Section 109(a) and private performance rights, the Court found that each copyrighted motion picture “stands not on its own footing but in whole or in part on the appeal which another film may have,”⁴¹ thereby unlawfully adding to the copyright monopoly power.⁴²

³⁵ 334 U.S. at 156.

³⁶ *Id.* at 157 (quoting the lower court, citations omitted).

³⁷ *Id.* at 158.

³⁸ *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 976 (4th Cir. 1990), quoting from *Morton Salt*, 314 U.S. at 491. Moreover, copyright misuse is such a violation of public policy that some courts will not require that the person against whom the misuse is directed be a party to the litigation. “[T]he fact that appellants here were not parties to one of Lasercomb’s standard license agreements is inapposite to their copyright misuse defense.” *Lasercomb*, 911 F.2d at 979.

³⁹ 334 U.S. 131, 156-159 (1948).

⁴⁰ 371 U.S. 38 (1962).

⁴¹ *Id.*

⁴² *Id.*

The power to control conduct beyond the copyright is evident, as “either uniqueness or consumer appeal” of the product suffices.⁴³ “This is even more obviously true when the tying product is patented or copyrighted.”⁴⁴ To viewers, “there is but one ‘*Gone With The Wind*,’”⁴⁵ and the use of it to force others to take “*Getting Gertie’s Garter*,” to install and use an unwanted media player, to confer upon the copyright owner the power to meter out wholly private performances, or to relinquish a federal entitlement to sell or rent the downloaded copy, is unlawful precisely because the appeal of a copyrighted work is being used to enlarge the power and scope of the copyright in that work.

The Eleventh Circuit extended the application of the block booking cases in a fact situation more analogous to the technological and EULA-based extensions at issue here. In *MCA Television Ltd. v. Public Interest Corp.*,⁴⁶ the issue came up as an antitrust counterclaim over a contract dispute, but the court’s analysis was one of pure copyright misuse. It expanded the reach of *Loew’s* and *Paramount* beyond mere block booking (conditioning the license to a desired work on accepting an undesired one) to cover the conditioning the license of desired works (various television programs) on accepting another desired work (*Harry and the Hendersons*) for partial payment in cash rather than barter. Clearly, such rationale would apply here as well: consumers may desire to reproduce the copyrighted works being offered, but they would also rather not have to “pay with first sale rights” or other non-infringing uses rather than just cash.

The public interest is, of course, damaged most by use of ACTs to limit all trade or commerce in, and access to, creative works to those that can be monetized. “Not all human needs can be met through the market, and even the market grows sterile if it cannot draw upon the commons. It is therefore important that there be ‘white spaces’ where human imagination and spirit can run free, unregimented by the commercial matrix of the market.” David Bollier, *Silent Theft: The Private Plunder of Our Common Wealth* (New York: Routledge 2002), p.208. What American has not benefited from gift economies and altruistic lending of copyrighted works? What American has not been enriched by reading a tattered book others read before, hearing a song on a CD purchased by another, watching a movie someone else bought or rented? These subsequent transactions involving lawfully made copies must be allowed to continue to flourish without the copyright holder’s consent – beyond the copyright holder’s control. Regardless how strongly technological restraints might be condemned as antitrust violations or misuse of copyrights, the opportunity and responsibility rests with the Librarian of Congress to preserve this cherished “white space” Congress and the courts have built in to our copyright system.

⁴³ *Loew’s*, 371 U.S. at 45 and n.4. See also *id.*, at 48 and n.5

⁴⁴ *Id.* at 45 n.4.

⁴⁵ *Id.* at 48 n.6.

⁴⁶ 171 F.3d 1265, 1277 and n.13 (11th Cir. 1999).

Class 4

Agreements to Remove Copyright Act Limitations on Rights-Holders

Identification of Class 4:

Sound recordings, audiovisual works and literary works (including computer programs) protected by access control mechanisms employed by or at the request of the copyright holder which require, as a condition of gaining access, that the prospective user agree to contractual terms which restrict or limit any of the limitations on the exclusive rights of that copyright holder under the Copyright Act.

Summary of Argument for Class 4 Exemption:

With increasing frequency, copyright holders are using ACTs to require assent to EULAs as a condition precedent to gaining access to copyrighted works. Some EULAs can have public and private benefits if they spell out rights of the copyright holder that are being licensed (or not) to the end user. Others, however, require users to agree to give the copyright holder additional rights denied to them in the Copyright Act.

In some cases, the copyright holder may use the ACT to require the user to give the copyright holder control over noninfringing uses that fall entirely beyond the scope of the copyright. Such would be the case of EULAs giving the copyright holder control over non-exclusive rights such as nonpublic performances of a work, for example. In other cases, the ACT will be used to require assent to waiving limitations placed upon the copyrights, such as the limitations in sections 107-122 to which all section 106 rights are subject. An ACT used to require assent to terms preventing the lawful redistribution (meaning redistribution of physical objects) of lawfully made copies and phonorecords would be but one example.

When the purpose and effect of an ACT is to enlarge the scope of the copyright beyond the limits imposed by Congress, the EULAs themselves should be void as against public policy. Naturally, any use of ACTs to require assent to such EULAs should be considered copyright misuse. It would serve the public interest without harming any rights of the copyright holder to permit circumvention of ACTs used by copyright holders to leverage the licensing of lawful rights into assent to copyright-enlarging EULAs.

Factual and Evidentiary Basis for Class 4 Exemption:

The proliferation of end-user license agreements (EULAs) to obtain waivers of rights retained by the public are commonplace. This had already come to the attention of a leading authority on copyright law back in 1995: “Software vendors are attempting en masse to ‘opt out’ of intellectual property law by drafting license provisions that compel their customers to adhere to more restrictive provisions than copyright law would require.”⁴⁷ During their hearings pursuant to the joint study on the impact of the DMCA on Sections 109 and 117 of the Copyright Act, held November 29, 2000, the Copyright Office and National Telecommunications Administration collected two examples of EULAs, one required as a condition precedent to granting a license to reproduce a song

⁴⁷ Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. Cal. L. Rev. 1239 (1995).

into a phonorecord and the other imposed upon the buyer of a CD who failed to return it within seven days after playing it in a computer, both of which purported to restrain the lawful owner's right to sell or give away the lawful reproduction.⁴⁸ Today, ACT's are being used to bar those who do not agree to EULA terms from access to the works, and such tactics are being employed by individual authors and major copyright holding companies alike.

For example, William T. O'Connor, Jr. M.D. offers licenses to reproduce some of his works relating to his book, *Making Your Back Better With the O'Conner Technique*TM: *How to Become Your Own Chiropractor*, into copies. He uses ACT to require adherence to a EULA in which licensees are authorized to "download, receive, copy . . . a single copy," of material described as unique and unavailable from other sources, but in order to do so they must agree to keep the information "restricted" to their own use, and waive their entitlement under 17 U.S.C. § 109(a) to "rent, lease, sell, transfer, assign, give, or lend" the copy to anyone. Moreover, they must agree to confer upon the copyright holder additional exclusive rights by agreeing to not "privately display" or otherwise "transfer this information" to anyone else. See <http://www.backache.md/eula.htm> (accessed December 16, 2002).

Reproductions of *Alice in Wonderland* were offered subject to a EULA required as part of the Adobe Acrobat eBook Reader (formerly Glassbook) ACT that requires licensees to agree to the EULA as a technological pre-condition to access – an agreement not to lend it, give it away, or even read it aloud. See <http://www.pigdogs.org/art/adobe.html>. This particular restriction is not so troublesome because *Alice in Wonderland* is in the public domain, the entity placing the restrictions upon it was not the copyright holder, and the same text is available elsewhere without these restrictions. In other cases, however, these types of EULA restrictions, for which ACTs are used to require acceptance, are placed upon copyrighted works by the copyright owner. For example, before software from Abode, Microsoft, and other popular vendors may be accessed, users must "click here to agree" or be denied access altogether. To be clear, there is nothing wrong with requiring adherence to licensing terms that pertain to rights owned by the copyright holder, such as spelling out whether and how many copies may be reproduced under license. The evil of concern here is requiring adherence to terms that give up public rights to the exclusive control of the copyright holder as part of the ACT-enforced agreement to the EULA.

To illustrate by way of analogy, using an ACT to obtain agreement to EULA terms may be compared to an ACT used by an employer – both can be used for good or evil. No public concerns would be raised if an employer requires each employee reporting to work to "press here" to agree, as a condition of gaining access to the job site, that they

⁴⁸ The pre-download EULA was used by the now defunct service of Universal Music ("Universal Music Group / Intertrust Technologies Corporation End User License Agreement") and the CD-based EULA was on a Sony Music CD (Destiny's Child, *The Writing's On the Wall*, Columbia, 1999), see Appendices 3 and 4, respectively, transcript of Public Hearing before the Copyright Office and the National Telecommunications and Information Administration, November 29, 2000, available as Appendix 9 to the DMCA Section 104 Report: A Report of the Register of Copyrights Pursuant to § 104 of the Digital Millennium Copyright Act, August 2001, vol. 3 (<http://www.loc.gov/copyright/reports/studies/dmca/sec-104-report-vol-3.pdf>).

will adhere to legitimate personnel policies. But if the same technology were used to require employees to agree to waive their rights under applicable labor laws, clearly such ACT-induced agreement would be void as against public policy and the employees would be permitted circumvent that ACT. The same must be true here. An ACT that requires agreement to a EULA outlining licensed uses of a work from among those uses that are exclusive to the copyright holder, for example, furthers the purpose of the Copyright Act. If the ACT requires agreement to a EULA in which the user gives up to the copyright holder non-exclusive rights belonging to the public, or agrees that limitations upon the exclusive rights of the copyright holder do not apply, the public policy considerations alone warrant condemnation of such tactics and decriminalization of any circumvention of such ACT.

Legal Argument in Support of Class 4 Exemption:

This Class 4 exemption rests on the simple premise that where Congress has laid out a system of exclusive rights balanced by a clear limitation upon those rights, private agreements that alter that legislated balance should be void as against public policy – particularly where such agreements are made through contracts of adhesion or use of the exclusive copyright monopoly as leverage.

United States courts have a long history of recognizing that licensing terms which have the purpose and effect of voiding the boundary around the exclusive rights of the copyright holder, thereby enlarging the copyright holder’s universe of control, constitute misuse of copyrights and should be void as against public policy. *See* Legal Argument in Support of Class 3 Exemption, above. The same should be true where EULAs are used to the same end. “Sound policy rationales support the analysis of those courts that have found shrinkwrap licenses to be unenforceable. A system of ‘licensing’ which grants software publishers this degree of unchecked power to control the market deserves to be the object of careful scrutiny.”⁴⁹ The *Softman* court was quite critical of Adobe’s efforts to compel third-parties to relinquish the rights they enjoy under the Copyright Act through use of an end-user license agreement – in this case, a “license” that purported to make the third party waive its rights under Section 109 to resell lawfully made copies without Adobe’s consent.

The Court finds that the provisions contained in Adobe’s EULA purport to diminish the rights of customers to use the software in ways ordinarily enjoyed by customers under copyright law. Therefore, these restrictions appear to be inconsistent with the balance of rights set forth in intellectual property law.⁵⁰

The *Softman* court went on to flatly reject the notion that restrictions in a “use” license could take away rights belonging to the owner. The owner of a lawful copy “is entitled to the use and enjoyment of the software, with the rights that are consistent with

⁴⁹ *Softman Prods. Co. v. Adobe Sys., Inc.*, 171 F. Supp. 2d 1075, 1091 (C.D. Cal. 2001).

⁵⁰ *Id.* at 1090 (footnote omitted).

copyright law. The Court rejects Adobe's argument that the EULA gives to purchasers only a license to use the software."⁵¹

Indeed, a contrary result would be untenable, for it would manage "to transform a contractual term that software purveyors unilaterally include in their contracts into a binding provision on the world – even on parties who are not in privity of contract – and one that, moreover, undoes the dictates of Congress by undermining an essential feature of the Copyright Act!" 2 M. Nimmer & D. Nimmer, NIMMER ON COPYRIGHT § 8.12[B][1][d][i] (2002) (exclamation point in original). A footnote to that passage declares that it "subverts established law" since 1908, *id.* at n. 37.37. Nimmer adds that, even if privity were to exist, "a concern would still arise 'whether the use of state contract law to avoid the first sale doctrine was statutorily or constitutionally preempted.'" Nimmer, § 8.12[B][1][d] (quoting *Central Point Software, Inc. v. Global Software Access, Inc.*, 880 F. Supp. 957, 964 n.4 (E.D.N.Y. 1995)).

We cannot lose sight of the fact that some non-exclusive rights – such as the right to give away lawfully made copies – may be more important to the person benefiting from the exercise of that right by the person who actually exercises that exclusive right. To offer a commercial example, if video retailers could not rent home videos, they could still sell them, but those millions of Americans who rely upon low-cost rentals and cannot afford to buy would be the biggest losers if a retailer were to agree with a copyright holder not to rent. Thus, it is a matter of U.S. public policy to oppose private agreements that would subvert the public benefits intended by the Copyright Act.

United States law is not unique in this regard. Special commissions in both the United Kingdom and Australia have reached similar conclusions, and have advocated specific provisions to counter such misuse.

In the United Kingdom, the Commission on Intellectual Property Rights recently concluded that "Where suppliers of digital information or software attempt to restrict 'fair use' rights by contract provisions associated with the distribution of digital material, the relevant contract provisions may be treated as void."⁵²

In Australia, the Copyright Law Review Committee recommends that the Australian Copyright Act "be amended to provide that an agreement, or a provision of an agreement, that excludes or modifies, or has the effect of excluding or modifying, the operation of [certain limitations upon the rights of copyright holders] has no effect."⁵³ The Committee further recommended "that the integrity of the permitted purposes" in certain sections of the Copyright Act "be retained by preventing a copyright owner from making it a condition of access to his or her work or other subject matter that users will not avail

⁵¹ *Id.* at 1089.

⁵² Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy: Executive Summary*, September 2002, at 22.

⁵³ Recommendation 7.49, Copyright Law review Committee, *Copyright and Contract*, Commonwealth of Australia 2002. (The Copyright Law review Committee is a specialist advisory body established in 1983 to inquire into and report to the Government of Australia on specific copyright law issues.)

themselves of a circumvention device or service for the ‘permitted purpose’ of doing an act that is not an infringement of copyright under [Australian law].”⁵⁴

The admonitions of the Australian Copyright Law Review Committee, the United Kingdom’s Commission, the *Softman* court and Professor Nimmer all bear witness to the simplest legal analysis: Congress established a Copyright Act to grant exclusive rights that go so far, but no farther. Congress enacted the DMCA to protect technological barriers to infringement, yet also established that nothing in the DMCA “shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use,” or “shall enlarge or diminish any rights of free speech or the press for activities using consumer electronics, telecommunications, or computing products.” Section 1201(c). Congress further charged the Librarian of Congress with creating exceptions to the DMCA to make doubly sure that Section 1201(c) was adhered to. It follows, then, that it would be a violation of the Copyright Act for the Librarian of Congress to permit copyright holders to remove all federal limitations upon their copyrights by simply slapping a self-serving EULA on every reproduction, public display, public performance, or other exercise of exclusive rights such that the public’s interest is diminished.

It is no answer to say that “the market” will correct such abuses, or that perhaps the copyright holder will offer a better financial deal to those who give up their rights to the copyright holder. If this were the case, employers could routinely require any new hires to waive their right to a minimum wage, or their right to be free from discrimination, as a condition precedent to obtaining employment. For some employees, the proposal might make economic sense, but for the public at large, it would spell disaster. So, too, in the case of copyrights: It is too narrow a view of the public interest to suggest that copyright holders will offer individuals a better deal if they give up their federal rights. It may be in an individual’s best interest to give up the right to sell or give away a lawful copy, or to give up their right to unlimited private performances, or to give up their right to make fair use from a given copy, but in the end, even if that individual might benefit, those persons who might have benefited from purchasing a used copy, from receiving a copy as a gift, from receiving a private performance in the future, from learning of another’s criticism of or comment on the work, are left with no recourse.

There can be no doubt that millions of Americans have benefited from reading books, listening to music, watching an audiovisual work or operating computer software lawfully despite the fact that they never had to pay anyone for “access” to the work. EULAs that limit such access by restricting the source of free access – by obtaining agreements from “first accessors” that they will not let anyone else enjoy the work – will only serve to undermine the very foundations of copyright law.

⁵⁴ *Id.* at paragraph 7.50.

Class 5

Conditioning Access on Disclosure of Identity

Identification of Class 5:

Sound recordings, literary works (including computer programs and databases), and audiovisual works (including motion pictures), protected by access control mechanisms by or at the request of the copyright holder which require, as a condition precedent to granting access, that the user directly or indirectly disclose personally identifiable information to the copyright holder other than such information as is reasonably necessary to complete a bona fide business transaction.

Summary of Argument for Class 5 Exemption:

The courts have already recognized the application of the First Amendment to the protection of anonymous speech. Congress has further extended such protection to the private sector by prohibiting private disclosure of personally identifiable information concerning users of audiovisual works, literary works and other materials used by library patrons. This proposed class furthers the dual objectives of the Copyright Clause of the Constitution and the First Amendment to the Constitution by allowing users of copyrighted works to circumvent efforts by copyright holders to require that they disclose personally identifiable information as a condition precedent to obtaining access.

Just to be clear what this class does not do, this exemption would not invalidate a requirement that persons seeking access disclose personally identifiable information where necessary to complete a bona fide business transaction, such as in the provision of credit card information or account-holder information for payment. Rather, this exemption would only mean that everyday actions such as preventing a DRM from reporting to the copyright holder the identity of the user of a lawful reproduction as part of separate data-mining activities of the copyright holder would not be actionable as a violation of Section 1201(a).

Factual and Evidentiary Basis for Class 5 Exemption:

Increasingly, copyrighted works are being used as little more than bait for valuable data-mining activities. For example:

1. Some Internet website operators require the disclosure of an e-mail address, name, or other personally identifiable information before access to otherwise “free” materials is provided.
2. Fahrenheit Entertainment released a sound recording which, when performed lawfully and privately in a personal computer, used technology to track, store and disseminate personally identifiable information about the user. In February 2002, Sunncomm, Inc., a DRM systems developer, and Music City Records settled a lawsuit by a California woman who objected to their practice of tracking and disclosing personal information – including music consumption patterns – to third-parties with no opt-out scheme. The settlement agreement required the companies to provide notice to consumers of their information collection practices

and to refrain from requiring consumers to disclose their personal information as a condition of downloading, playing, or listening to a CD.⁵⁵

Legal Argument in Support of Class 5 Exemption:

Today, individuals are free to explore different ideas presented in books, music, and movies anonymously.⁵⁶ Some existing DRM systems weaken this right by allowing copyright owners to monitor private noninfringing use of content.⁵⁷ In an attempt to secure content, many DRM systems require the user to identify and authenticate a right of access to the protected media. In the case of Microsoft's eBook Reader, this means that the media software and users' choices in books are digitally linked to the hardware system and to the Passport profiling system.⁵⁸ Some systems, such as Microsoft's Windows Media Player, assign a Globally Unique Identifier (GUID) to the media device that facilitates tracking.⁵⁹ These systems create records that enable profiling and target marketing of individuals' tastes by the private sector. Law enforcement can also gain access to these records by subpoena or by simply purchasing them.

It may be argued that the DMCA already contains an exemption for this type of activity. Section 1201(i) permits circumvention for limited privacy-protection purposes. We submit, however, that the current exemption does not go far enough because it is limited to circumvention of technological measures that contain “the capability of collecting or disseminating personally identifying information reflecting **the online activities** of a natural person who seeks to gain access to the work protected” (Section 1201(i)(1)(A)). In such cases, the circumvention must have the “sole effect” of identifying and disabling the capability of monitoring online activities (Section 1201(i)(1)(C)). Thus, the 1201(i) exemption does nothing to prevent arbitrary data-mining where copyright holders seek to use disclosure of personal data as the “currency” for access to a work, or use technology to identify the user of a particular copy or phonorecord off-line.

⁵⁵ Press Release, SunnComm, Inc., Sunncomm and Music City Records Agree to Resolve Consumer Music Cloqueing Law Suit by Providing Better Notice and Enhancing Consumer Privacy (February 22, 2002), at <http://www.xenoclast.org/free-sklyarov-uk/2002-February/001580.html>.

⁵⁶ The seminal article in this area was authored by Professor Julie Cohen, incorporated herein by reference, in which she points out that no matter how strong the government interest in preventing wholesale copyright infringement, “that interest is not implicated, much less threatened, by the actions of individuals who seek to acquire, lawfully but anonymously, copies of such works for their personal use.” Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at “Copyright Management” in Cyberspace*, 28 Conn. L. Rev. 981 (1996). See also Julie E. Cohen, *Privacy, Ideology, and Technology: A Response to Jeffrey Rosen*, 89 Geo. L.J. 2029 (2001).

⁵⁷ Chris Jay Hoofnagle, *Consumer Privacy in the E-Commerce Marketplace 2002*, 3rd Annual Institute on Privacy Law 1339 (June 2002), at <http://www.epic.org/epic/staff/hoofnagle/plidraft2002.pdf>.

⁵⁸ Russel Kay, *Copy Protection: Just Say No*, Computerworld, (Sept. 4, 2000); Chris Jay Hoofnagle, *Digital Rights Management and Privacy*, Presentation to the Santa Clara University Law School Symposium on Information Insecurity, February 8, 2002, at <http://www.epic.org/epic/staff/hoofnagle/drm.ppt>.

⁵⁹ Richard Smith, *Serious Privacy Problems in Windows Media Player for Windows XP*, Computerbytesman, Feb. 20, 2002, at <http://www.computerbytesman.com/privacy/wmp8dvd.htm>.

We need not here reiterate all of the persuasive arguments developed by Professor Cohen in *A Right to Read Anonymously* – arguments which integrate issues of copyright, First Amendment jurisprudence and state action principles. As a postscript to that article, it warrants noting that the Patriot Act and other so-called “homeland security” initiatives put in place over the last several months exponentially increase the average person’s risks that personal data collected by private individuals will fall into the hands of the government. “Then the spectre of a government agent will look over the shoulder of everyone who reads. The purchase of a book or pamphlet today may result in a subpoena tomorrow. Fear of criticism goes with every person into the bookstall.” *United States v. Rumely*, 345 U.S. 41, 57-58 (1953) (Douglas, J., concurring). The risks associated with lack of anonymity for the reader of fifty years ago certainly pale in comparison to the risks to readers, listeners and viewers of today of works in digital form, where such works are laced with features unrelated to copyright protection that have the sole purpose of extending the copyright holder’s lawful monopoly by adding onto it a treasure trove of privacy-invading data. A few discrete federal protections may modestly and temporarily stand in the way of broad subpoena powers,⁶⁰ but they are far too limited to protect the First Amendment interests placed at risk by failure to create the type of exemption proposed here. The only way of safeguarding these First Amendment principles is to prevent the leveraging of copyright monopolies into unrelated data-mining in the first instance.

Class 6

Cases of Malfunction, Damage or Obsolescence

Identification of Class 6:

Literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage or obsolescence.
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Summary of Argument for Class 6 Exemption:

This exemption is identical to an exemption currently in effect, 37 C.F.R. § 201.40(b)(2). Because there are already market examples of such malfunction, damage or obsolescence that prevent noninfringing use for which the product was intended, this exemption should be extended for another term.

Factual and Evidentiary Basis for Class 6 Exemption:

Even at this early stage of development of ACTs, it is clear that this exemption had merit. Suffice it to point out but two examples:

1. Owners of DVDs with ACTs using the Divx encryption system (by Digital Video Express, L.P.) to prevent private performances of motion pictures beyond a 48-hour initial viewing period unless additional payment was made to “unlock” access to additional performances. Access was controlled by

⁶⁰ See, e.g., the Video Privacy Protection Act, 18 U.S.C. 2710.

connecting the player to the company's server over telephone lines. The owners of lawfully made copies of those DVDs have nowhere to turn for access to unlimited plays, even though it would not infringe any copyrights to play them. See the Divx Owners Association web site, www.the-doa.com, for further information on the harm to Divx owners. There is, of course, no copyright interest implicated by allowing Divx owners to circumvent the Divx ACT. To the contrary, the public has an interest in promoting circumvention, as some works on DVD are only available in the Divx format. See <http://www.the-doa.com/Pages/DoaFaq.html> (noting that some titles were digitally released exclusively on Divx, adding: "And, since many of those titles had only a brief window of favor with the public that has long since elapsed, there is little value to the studios now in releasing them to DVD, so don't expect them anytime soon.")

2. SpectraDisc Corporation has announced a new product to restrict access to works on DVDs after a period of time. Perhaps the high-tech equivalent of printing books on very cheap paper to limit circulation, SpectraDisc proposes an ACT to limit access to lawfully made copies of works on DVD by coating the DVD with a so-called "Reading Inhibit Agent" which, upon exposure to air, begins a chemical reaction that will, over a short period of time, prevent access to the work.⁶¹ Just as buyers of cheap books may lawfully care for those books to extend the reading life indefinitely, so, too, should buyers of purposely cheapened DVDs be permitted to take steps to extend the usable life of the DVD indefinitely. Certainly, no cognizable copyright interest is impaired by allowing users to circumvent ACTs designed to destroy the usefulness of copies they no longer own.

Legal Argument in Support of Class 6 Exemption:

No copyright interest is furthered by preventing anyone from circumventing an access control technology that prevents access because of malfunction, damage or obsolescence. The Librarian of Congress recognized this. Moreover, where access is denied to a lawfully made copy no longer owned by the copyright owner, there is no possible copyright interest that would be infringed by allowing repeat private performance of a work from such copy or phonorecord. Indeed, "it does not appear that Congress anticipated that persons who legitimately acquired copies of works should be denied the ability to access these works." *Final Rule, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, 65 FR 64556, 64569 (October 27, 2000).⁶²

⁶¹ See U.S. Patent #6,338,933 for "Methods and Apparatus for Rendering an Optically Encoded Medium Unreadable."

⁶² The *Final Rule* goes on to argue that there is "no unqualified right of access" to these works either, but this misses the point. Certainly, the Copyright Act grants no exclusive right of access to the copyright holder. To the contrary, the very purpose of copyright law is "enriching the general public through access" to creative works. *Fogerty v. Fantasy, Inc.*, 510 U.S. at 527. See also discussion under Class 1, above.

Class 7

Non-Infringing Uses

Identification of Class 7:

Works embodied in copies or phonorecords that have been lawfully acquired by users or their institutions who subsequently seek to make noninfringing uses thereof.

Summary of Argument for Class 7 Exemption:

This proposed class follows the proposal of the National Telecommunications and Information Administration (“NTIA”) in its September 29, 2000 letter to the Register of Copyrights. As the Assistant Secretary for Communications and Information explained at the time on page 4 of the letter,

this construction is appropriate because the definition of classes of works [in Section 1201(a)(1)(B)] is not bounded by limitations imposed by Section 102(a) of the Copyright Act, but incorporates an examination of “noninfringing uses” of the copyrighted materials.⁶³

The greatest appeal of this Class 7 is its simplicity (making it easy for the average citizen to understand), its comprehensiveness (covering all noninfringing uses), its furtherance of the public interest (by encouraging unfettered use of lawfully acquired content), and its incentive for copyright holders to facilitate lawful uses rather than to impede them (by discouraging copyright holders or their licensees from using access control technologies to infringe upon the public’s rights).

A major substantive difference in Class 7 as previously proposed by the NTIA from the other classes proposed herein is that this exemption would apply without regard to whether the ACT was imposed by or at the request of the copyright holder. The other proposed classes would not create an exemption for competitive business models offered independent of the copyright holder and which do not unlawfully extend the scope of the copyright holder’s copyright monopoly through use of ACTs.

Factual and Evidentiary Basis for Class 7 Exemption:

Because this class is all-encompassing, all of the factual and evidentiary material set forth in support of each of the other proposed classes is equally persuasive here. Accordingly, the factual and evidentiary bases for the proposed exemptions for Classes 1-6 is incorporated herein by reference. As with the other classes, we respectfully request that the entire record in this proceeding be considered in supplying additional evidentiary examples.

⁶³ See also Testimony of Julie E. Cohen, Associate Professor of Law, Georgetown University Law Center, Rulemaking on Exemptions from Prohibition Against Circumvention of Technological Measures that Control Access to Copyrighted Works, before the United States Copyright Office, May 4, 2000, at 2 (“the question of what class or classes of works raise the problem that Congress identified cannot be answered ex ante except by reference to the use that is sought be made”).

Legal Argument in Support of Class 7 Exemption:

As the Supreme Court has made clear, “copyright law ultimately serves the purpose of enriching the general public through **access** to creative works.” *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994) (emphasis added). The purpose is to “serve the cause of **promoting broad public availability** of literature, music and the other arts.” *Twentieth Century Music Corp. v. Akin*, 42 U.S. at 156 (emphasis added). Because ACTs ultimately serve the purpose of restricting access to such creative works, it is incumbent upon the Librarian of Congress to exclude from the prohibition upon circumvention of ACTs any circumvention that respects the boundaries of copyright law. Just as “it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible,” *id.*, it is also peculiarly important that the boundaries of permissible ACTs be demarcated as clearly as possible.

As a practical matter, the same technology may be employed to protect a copyright from infringement or to expand the effective reach of copyright power beyond the boundaries demarcated by Congress. Thus, any given ACT has the potential to either further the objectives of copyright law or frustrate them. For example, the same ACT that prevents performance of a work reproduced by downloading may be used to ensure that the reproduction is not accessible until payment is received for the reproduction (protecting the copyright holder’s interest in the right of reproduction) or, once the reproduction is complete and lawful, to prevent non-infringing private performances without additional payment to the copyright holder (enlarging the scope of copyright-holder control beyond the boundaries demarcated by Congress).

In proposing the exemptions in Class 1 through Class 5, the focus has been upon preventing the copyright holder from misusing ACTs to erase the boundaries of copyright law imposed by Congress. In this Class 6, as previously proposed by the NTIA, the exemption would apply even if the ACT was imposed by a third party independent of the copyright holder’s actions.

But if actions by a third party do not raise the same antitrust and copyright misuse issues discussed in the proposals for Class 1 through Class 4, what, then, is the public interest in allowing circumvention of independently-imposed ACTs? It is simply this: Congress has no authority under the Constitution to protect private parties who are imposing restrictions upon access to copyrighted works they do not own as part of their own business models, independent of any copyright interest or interstate commerce nexus. Indeed, to the degree that Section 1201 gives them greater power to do so, it raises First Amendment concerns.

To be clear, we do not contend here that it would be unlawful for someone other than the copyright holder to impose ACTs – or any other access restrictions – upon access to copyrighted works. Bookstores may prevent patrons from reading books before purchase, retailers in general may use anti-theft devices, entities performing works publicly, be it in a physical space, over the Internet or using any other method, may restrict access to only those who have paid for access, all without raising the copyright law, First Amendment or antitrust issues raised above. What is at issue in this proposed Class 7 is whether these independent service providers may find shelter in Section 1201(a) when anyone circumvents the ACTs they have imposed. We believe the answer

must be in the negative. First, such entities have no standing to enforce the copyrights of others, but if the copyrights are infringed the copyright holder has civil and criminal tools at its disposal to deal with the infringement. (See Notice of Inquiry in this proceeding.) Second, the independent service provider may well have non-copyright-related tools available to deal with theft of goods or theft of services. Nothing in the Constitution or in any of the WIPO treaties, however, establishes any federal or international interest in protecting the use of ACTs by anyone, regardless whether it is the copyright holder, to control uses that fall beyond the scope of the copyright.

In particular, where ACTs are used to control behavior that in no way infringes the rights of the copyright holder, such conduct itself may raise antitrust concerns and, at a minimum, counsels against criminalizing acts which have no other purpose than to avoid the extra-copyright restraints being imposed by the copyright holder.⁶⁴

In short, where ACTS are used by copyright holders or by independent third parties to protect copyrighted works from infringement, circumvention of such ACTs for infringing use may be properly condemned and punished by civil and criminal law. Where ACTs are used to control uses beyond the scope of the copyright, however, the result is different. If such use is by the copyright holder itself, it would erase the boundaries of copyright law demarcated by Congress, and such use of the copyright monopoly itself to enlarge the scope of the copyright must be condemned “in reliance on the principle which forbids the owner of a patent to condition its use on the purchase or use of patented or unpatented materials,” *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 157 (1948). Where the ACT is used independently by a third party, it needn’t be condemned, and may, in a freely competitive environment, serve to protect positive business models. So employed, however, third party use of ACTs lack any nexus with the federal powers or international treaty obligations and, since denial of access runs directly counter to the “purpose of enriching the general public through access to creative works,” *Fogerty v. Fantasy, Inc.* at 527, there is simply no basis for using federal law to punish members of the public who circumvent such controls.

To reach any other conclusion would be to bring the weight of Section 1201(a) down upon any child who circumvents a theater’s ACT and sneaks in to watch a public performance without paying. Watching a copyrighted public performance without paying may be punished under state trespass or theft of services laws, but regardless whether the theater is owned by the holder of the copyright in the work being performed, it does not infringe any copyright. There is no federal interest in punishing such circumvention.

Additional Information Applicable to Proceeding

Some may say that the proposed exemptions would “swallow the rule,” but we urge the Librarian of Congress to be more realistic. While it may be true that circumvention

⁶⁴ See, e.g., Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy: Executive Summary*, London, September 2002, at 22 (recommending that “Where suppliers of digital information or software attempt to restrict ‘fair use’ rights . . . through technological means, measures to defeat the technological means of protection in such circumstances should not be regarded as illegal.”)

of an ACT that prevents lawful, non-infringing uses may make it easier for others to circumvent the same ACT when it is used only to protect copyrights from infringement, the net result of permitting circumvention for lawful, non-infringing uses is to create a very strong incentive for copyright holders themselves to exercise care in ensuring that their ACTs are being used only to protect what is truly theirs – the rights conferred by Section 106 together with their limitations – and not to take what belongs to others. As Professor Lessig wrote, “the real question for law is not, how can law aid in that protection? but rather, is the protection too great? . . . The problem will center not on copy-right but on *copy-duty* – the duty of owners of protected property to make that property accessible.” Lawrence Lessig, *Code and Other Laws of Cyberspace*, (New York: Perseus Books, 1999), p. 127.

For the foregoing reasons, we respectfully request that the exemptions proposed for Classes 1-7, above, be established by rule. Further, we respectfully request that any evidentiary examples applicable to any of these classes submitted in this proceeding, including examples supplied by others during the initial comment period and the reply period, and also including examples contained in submissions deemed not to meet the strict requirements set forth in the Notice of Inquiry (and which we incorporate herein by reference), be considered in evaluating the evidentiary record in support of these proposed classes.

Respectfully submitted,

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EXHIBIT A

Excerpt from “Movielink Terms of Use” effective September 16, 2002

(Footnotes added)

4. LICENSE TO SITE CONTENT AND PREMIUM CONTENT.

a. Site Content License. Movielink grants you a non-exclusive, non-transferable, limited right and license to access,¹ use² and privately display³ the Site Content for your personal use only, by way of one (1) computer connected to the Services over the internet, provided that you comply fully with this Agreement. You may "cache" pages of the Website for the sole purpose of increasing the speed and efficiency at which you access the Website in the future;⁴ however any other copy or use of a portion of the Website will constitute a copyright violation unless specifically provided for herein.⁵

b. Premium Content License. Upon payment of the License Fee, Movielink will grant you a non-exclusive, non-transferable, limited right and license to download,⁶ use⁷ and privately display⁸ in your Residence or for Permitted Non-Residential Use,⁹ the Premium Content purchased by you, by way of one (1) computer connected to the Services over

¹ There is not general right of “access” in Section 106 that a copyright holder may license. To the degree a service is offered, such as streaming media, a right of access could be licensed in the same sense that a ticket is a “license” to attend a public performance. It warrants emphasizing that no such license relates to copyrights however. Just as is the case where a person gains unlawful access to a theater to watch a performance without paying, such theft of services does not constitute copyright infringement.

² There is no general right of “use” in Section 106 that a copyright holder may license. Only the specific uses listed in Section 106 of the Copyright Act constitute rights that the copyright holder may license. All other uses are non-exclusive, so the public needs no license,

³ There is no right of “private display” in Section 106 that a copyright holder may license. Section 106 grants only the right to display a work “publicly.”

⁴ This clause does license a right of the copyright holder. Regardless whether such caching would be lawful under Section 107, it is helpful for a copyright holder to specifically license positive uses that a person might otherwise be hesitant to make.

⁵ Of course, this is a gross overstatement, as it only constitutes copyright infringement if it is unauthorized by law.

⁶ This license to download is a license to reproduce the work in a copy, pursuant to Section 106(1).

⁷ Once again, the copyright holder has no exclusive right of “use” that can be licensed apart from those specific uses set forth in Section 106.

⁸ This EULA refers to “display” in the context of an audiovisual work. In that context, the exclusive right to display a work publicly (Section 106(5)) applies to “the individual images” or the work. The drafters probably intended to license the right to “perform” the work (Section 106(4)), although the right to license performances extends only to public performances.

⁹ Here again, this EULA purports to give the copyright holder control over private displays – a use that Congress left to the public and which falls outside of the scope of the copyright. In purpose and effect, the EULA conditions the licensing of the lawful right of reproduction upon the consumer conferring upon the copyright holder a right denied to copyright holders by Congress

the Internet, provided that you comply fully with this Agreement. Movielink will save the Premium Content to your hard drive.¹⁰ You shall not be permitted to copy¹¹ or move¹² the Premium Content from its originally stored location on your hard drive. THIS LICENSE TO THE PREMIUM CONTENT IS LIMITED IN ITS TERM AND DURATION TO THIRTY (30) DAYS FROM ITS ORIGINAL DATE AND TIME OF DOWNLOAD OR TWENTY-FOUR (24) HOURS FROM THE START OF ITS INITIAL DISPLAY AND VIEWING, WHICHEVER OCCURS FIRST,¹³ UNLESS OTHERWISE SPECIFIED AS BEING LIMITED TO A SHORTER TERM AT THE TIME OF PURCHASE. YOU UNDERSTAND AND AGREE THAT THE MOVIELINK MANAGER SOFTWARE WILL AUTOMATICALLY DELETE EXPIRED PREMIUM CONTENT FROM YOUR HARD DRIVE WITHOUT FURTHER NOTICE TO YOU AND THAT YOU WILL NOT BE ABLE TO ACCESS AND VIEW SUCH PREMIUM CONTENT UPON EXPIRATION OF THE LICENSE TERM.¹⁴ For purposes of this Section 4(b) the following definitions apply, (i) "Residence" shall mean a private, residential dwelling unit or a private individual office unit, but excluding hotel rooms, motel rooms, hospital patient rooms, restaurants, bars, prisons, barracks, drilling rigs and all other structures, institutions or places of transient or work-related residence as well as places, areas, structures, rooms or offices which are common areas or open to the public or to occupiers of separate Residences or for which an admission fee is charged;¹⁵ (ii) "Permitted Non-Residential Use" shall mean the private viewing by one or more persons on a video

¹⁰ That is, Movielink will make the licensed reproduction into a copy for you.

¹¹ This restriction is appropriate insofar as it pertains to the license to reproduce.

¹² Unlike the restriction on copying, the restriction upon "moving" to another location on a hard drive is curious. First, there is no exclusive right to "move" except to the extent that moving implicates the right of reproduction. Though there appear to be no cases directly on point, it seems likely that the act of moving the bits of data on a hard drive from one location to another on the same hard drive would not be considered to be an infringing act of reproducing a work "in copies." Given the architecture of computers and ordinary software used to defragment disc space and maintain smooth operations, it is inconceivable that a typical user would have any real knowledge of or control over where the bits actually reside on the hard drive, nor have any real knowledge of how they might be moved from one location to another.

¹³ This is the heart of the restriction upon lawful use. Here, the copyright holder purports to extend control over its copyrighted works into uses that fall completely beyond the scope of the right. Having licensed the reproduction into copies (Section 106(1)), the copyright holder's EULA would have the consumer agree that the copyright holder may now exercise control over private performances of the work by limiting the time period in which the work can be performed. In the eyes of the Copyright Act and antitrust laws, it is the equivalent of the copyright holder agreeing with distributors of its works that they will distribute copies (books, DVDs, CDs) only to persons who agree to not let anyone read them after the time limit imposed in the agreement. This would, of course, have a devastating effect upon the public interest in ensuring the widest possible dissemination of these works.

¹⁴ Having licensed the reproduction into copies (Section 106(1)), the copyright holder's EULA would have the consumer agree that the copyright holder may now claim the right to destroy the lawfully made copy. In the eyes of the Copyright Act and antitrust laws, it is the equivalent of the copyright holder agreeing with distributors of its works that they will distribute copies (books, DVDs, CDs) only to persons who agree to destroy them after 30 days. No public interest is served by this, and lawful downstream trade is destroyed.

¹⁵ This clause brashly rewrites federal law. It is well-established that the copyright holder cannot exercise control over performances in private hotel and motel rooms, prison cells or army barracks. This provision allows the copyright holder to exercise such control nonetheless.

monitor (desktop, television monitor, laptop, hand-held device or otherwise) in a Non-Residential Venue; provided, however, that any such viewing for which an access fee or other admission charge (except a per viewing charge) is imposed (other than any fee related only to access such Non-Residential Venue for other general purposes) or any such viewing that is on a monitor provided by such Non-Residential Venue (or by a third party under any agreement or arrangement with such Non-Residential Venue) for display of programming in a common area shall not constitute a "Permitted Non-Residential Use"; and (iii) "Non-Residential Venue" shall mean any place, area, structure or room other than a Residence.

c. Restrictions. You may not: (i) frame or link to the Website except as expressly permitted in writing by Movielink;¹⁶ (ii) permit unauthorized individuals to use the Services;¹⁷ (iii) modify, translate, reverse engineer, decompile, disassemble (except to the extent that this restriction is expressly prohibited by law) or create derivative works based upon the Content or any portion thereof;¹⁸ (iv) copy the Content or any portion thereof, except as specifically provided for herein;¹⁹ (v) sell, rent, lease, transfer, distribute, broadcast, display or otherwise assign any rights to the Content to any third party;²⁰ (vi) remove any proprietary notices or labels on the Content; (vii) use the Services in conjunction with any device or service designed to circumvent technological measures employed to control access to, or the rights in, a content file or other work protected by the copyright laws of any jurisdiction; (viii) use the Services or Content for any commercial or illegal purpose; (ix) use the Services to invade the privacy of, or obtain personal information about, any Movielink account holder or user, or to obtain a list of Movielink account holders or users; (x) copy, modify, erase or damage any information contained on the Services, or any third party servers; (xi) use the Services to violate any legal right of any third party, including any publicity or privacy right, copyright or other intellectual property right, or to take any action that is harassing, libelous, defamatory,

¹⁶ The copyright holder has no right whatsoever under Section 106 to prohibit this linking to the site, such as this link – <http://www.movielink.com/commerce/help/terms.jhtml> – to the document reviewed here. To use the copyright as leverage to control lawful linking is an abuse of the copyright.

¹⁷ The Copyright Act grants no right to control who may watch a movie. The public performance may be licensed, but the right to control who watches the performance falls outside of the scope of the rights granted.

¹⁸ While some of these uses may be infringing, by forcing consumers to expressly agree to refrain from doing so has the purpose and effect of eliminating consumer reliance upon the rights set forth in Sections 107-122 of the Copyright Act – rights to which all Section 106 rights are subject. (Section 106 begins: “Subject to sections 107 through 122”) Thus, this clause and several to follow have only one function: to remove the limits Congress imposed upon the exclusive rights granted to authors.

¹⁹ See n. 18, *supra*.

²⁰ See n. 18, *supra*. Since Movielink’s service involves reproduction onto a computer’s hard drive, in addition to derogating rights left to the public in the Copyright Act, this provision would reach behavior largely unrelated to the copyrighted work. For example, owners of lawfully made copies may lend their copies to others (Section 109), and it is perfectly lawful and laudable for people to let others use their computers. This provision would prohibit Movielink subscribers from lending their computers to others once they agree to the Movielink EULA.

abusive, tortious, threatening, harmful or otherwise objectionable;²¹ (xii) use any data mining, robots, or similar data gathering and or extraction tools in connection with the Services; (xiii) use the Services to post or transmit any unsolicited advertising or promotional materials; (xiv) access or use any password protected, secure or non-public areas of the Services except as specifically authorized in writing by Movielink (unauthorized individuals attempting to access these areas of the Services may be subject to prosecution); (xv) impersonate or misrepresent your affiliation with any person or entity; (xvi) interfere or attempt to interfere with the operation of the Services in any way through any means or device including, but not limited to, spamming, hacking, uploading computer viruses or time bombs; or (xvii) attempt to disable, bypass, modify, defeat or otherwise circumvent any of the digital rights management or other security related tools incorporated into the software (including without limitation the tools that delete downloaded content for which the license rights have expired).²²

5. MINIMUM SPECIFICATIONS. The Services will operate only on those hardware and software platforms specified on the Movielink Website.²³ It is your responsibility to ensure that you have the appropriate software, hardware and Internet connection to operate the Services. Movielink reserves the right to cease supporting any hardware or software platform at any time, with or without notice.

²¹ This clause would give Movielink a contract claim over conduct in which it could not possibly have any copyright or business interest, covering any “harmful or otherwise objectionable” action.

²² To the degree that the circumvention is covered by Section 1201, this clause would have the effect of nullifying the very exceptions the Librarian of Congress is authorized to establish!

²³ This section effectively gives the copyright holders influence over the market for computer hardware and media players. It places them in a position to dictate to consumers that, as a condition of receiving a license to their copyrighted works, the consumer must agree to use computer hardware, operating systems and media player software specified by the copyright holders. Such power is far beyond any countenanced by Congress in granting the limited rights specified in Section 106, and raises serious antitrust concerns as well. This does not mean to imply that minimum technological standards might not be appropriate. But no hardware or software manufacturer who can build to brand-neutral specifications should be prevented from competing.