UNITED STATES COPYRIGHT OFFICE

Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies

Docket No. RM 2005-11

JOINT REPLY COMMENTS

of

AAP: ASSOCIATION OF AMERICAN PUBLISHERS
AAUP: ASSOCIATION OF AMERICAN UNIVERSITY PRESSES
ASMP: AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS
THE AUTHORS GUILD, INC.
BSA: BUSINESS SOFTWARE ALLIANCE
DGA: DIRECTORS GUILD OF AMERICA
ESA: ENTERTAINMENT SOFTWARE ASSOCIATION
IFTA: INDEPENDENT FILM & TELEVISION ALLIANCE
MPAA: MOTION PICTURE ASSOCIATION OF AMERICA
NMPA: NATIONAL MUSIC PUBLISHERS' ASSOCIATION
PPA: PROFESSIONAL PHOTOGRAPHERS OF AMERICA
RIAA: RECORDING INDUSTRY ASSOCIATION OF AMERICA
SAG: SCREEN ACTORS GUILD
SIIA: SOFTWARE AND INFORMATION INDUSTRY ASSOCIATION

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DMCA Rulemaking

Joint Reply Comments

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Section I: Introduction/Summary

The undersigned organizations, representing copyright owners and creators, and most of the U.S. copyright industries, appreciate this opportunity to submit reply comments in this proceeding.[1] Throughout this submission we will refer to the fourteen signatory organizations as the "Joint Reply Commenters." As in the two preceding triennial rulemakings under the Digital Millennium Copyright Act, we are pleased to offer the unified perspective of our diverse groups on many of the proposals that have been made for exemptions to be applicable, during the next three years, from the statutory prohibition on technological measures used to control access to copyrighted works, 17 USC § 1201(a)(1)(A).

Besides this introduction and summary (Section I), our submission has four main parts.

Section II deals with the ground rules for this proceeding. These are much more settled and stable than they were in 2003 (and certainly than they were in the first proceeding in 2000). However, a few initial round submissions assert that either Congress or the Copyright Office has changed the ground rules, on issues such as the required evidentiary showing, from those that applied in the last cycle. We believe these assertions are without merit and maintain that the ground rules set out in the Notice of Inquiry in this proceeding are consistent with Congressional intent. See 2005 NOI.[2]

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[1] A list and brief description of Joint Reply Commenters is attached to this submission as Attachment A.

[2] These Joint Reply Comments will use the following abbreviations for official materials from the two prior rulemakings and the legislative history of the DMCA: 2005 NOI – Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Notice of Inquiry, 70 Fed. Reg. 57,526 (Oct. 3, 2005), which is available at http://www.copyright.gov/fedreg/2005/70fr57526.html; 2003 Joint Reply Comments – The Joint Reply Comments filed in 2003 which are available at http://www.copyright.gov/1201/2003/reply/023.pdf; 2003 Recommendation – The Recommendation of the Register of Copyrights in RM 2002-4; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies (Oct. 27, 2003), which is available at http://www.copyright.gov/1201/docs/registers-recommendation.pdf; 2003 Final Rule – Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 68 Fed. Reg. 62,011 (Oct. 31, 2003), which is available at http://www.copyright.gov/fedreg/2003/68fr2011.pdf; 2000 Rec. - Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies; Final Rule, 65 Fed. Reg. 64,556 (Oct. 27, 2000), which is available at http://www.copyright.gov/fedreg/2000/65fr64555.pdf; House Managers' Report - Staff of House Committee on the Judiciary, 105th Cong., Section-By-Section Analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4, 1998 (Rep. Coble)(Comm. Print 1998). In referring to the comments and hearing materials, the Joint Reply Comments will use the following abbreviations and conventions: C - Initial Comment; R - Reply Comment; T-Transcript; and PHR - Post Hearing Response. When comments or reply comments include a parenthetical number, e.g., C5(1), this refers to the number of the proposal referenced within the comment. Citations to page numbers of a transcript are dated and refer to the pages of the official 2003 transcripts that are currently posted on the Copyright Office website at http://www.copyright.gov/1201/2003/hearings/schedule.html. References to post hearing responses will include the date only if there are multiple responses from the same individual or organization. References to comments include the year where they are not from this 2005-06 proceeding.

In Section III, the Joint Reply Commenters provide some examples of how the use of access control technologies has contributed to the growth and comprehensiveness of the "digital cornucopia." We use this phrase to refer to the unprecedented range of copyrighted materials to which the American public has access today, both online and offline, in both digital and analog formats, through an ever-widening choice of media and distribution channels. We continue to believe that Congress' decision to provide legal protection to access control technologies in the DMCA has made a critical positive contribution to this development, and that this contribution should be borne in mind as the Copyright Office and the Library of Congress carry out this rulemaking process, faithful to the statutory direction to "examine the availability for user of copyrighted works." 17 USC § 1201(a)(1)(C)(i).

Section IV of the Joint Reply Comments responds to the initial round proposals that call for exemptions that were recognized in the last rulemaking cycle to be recognized again in this one. It is indisputable that Congress intended that any exemption be considered de novo in each triennial rulemaking, and in our view the record thus far in this cycle does not establish that the burden of persuasion as to any of these proposed exemptions has yet been met.

In Section V, we respond to all the proposals made in the initial round comments for exemptions that have not previously been recognized. We have organized these into nine general categories. The first two are new.

In Section V-A, we consider proposals to allow an exemption for circumvention of access controls that threaten security or privacy. Such access control technologies have been the subject of recent public debate and controversy; but in our view, the effort to convert these concerns into cognizable proposals for exemptions to § 1201(a)(1)(A) all come up short. While the problems of security threats and privacy intrusions are real, none of these submissions carries the burden of establishing that these problems implicate the DMCA, much less that an exemption to § 1201(a)(1)(A) would resolve the problems, or even contribute to ameliorating them. None of the proponents has persuasively demonstrated that any exemption to the statute is needed, or would even help, to facilitate the activity addressed by their submissions; none has satisfactorily explained why the issues are not adequately addressed by existing provisions of the law; none has shown a substantial impact on non-infringing uses that is attributable to the law; and none has proposed an exemption with clear, objective and predictable contours. In sum, these submissions reflect a fundamental mismatch between the concerns that have arisen in recent months, and the goals and boundaries of this proceeding.

Section V-B addresses a proposal for circumvention of "software locks" on mobile phones. Here too, in our view, proponents have not carried the burden of showing a causal link between § 1201(a)(1)(A) and substantial non-infringing uses; indeed, the nexus between that statutory provision and the issues raised in the submission are tenuous. This proposal, too, is addressed to the wrong forum; the concerns of the proponents can be more effectively addressed (and with less risk of collateral damage to the interests of other copyright owners and creators) as matters of communications or antitrust law.

The remaining seven subsections of the Joint Reply Comments address proposed exemptions that are either identical to, or that closely resemble, proposals that were

painstakingly reviewed by the Copyright Office during previous rulemaking cycles, and that were found not to meet the statutory standards for recognition of an exemption. Besides pointing to these prior determinations, the Joint Reply Commenters have sought in each case to identify and respond to any new arguments or examples that have been brought forward by the initial round submitters. These categories include:

- Section V-C: clip compilations for educational uses
- Section V-D: circumvention for the purpose of format- or platform-shifting or for personal use or fair use
- Section V-E: works tethered to particular operating systems (e.g., DVDs on Linux)
- Section V-F: obsolete operating systems or hardware
- Section V-G: circumvention to make back-up copies
- Section V-H: public domain materials
- Section V-I: miscellaneous proposals

The Joint Reply Commenters thank the Register and her colleagues for their consideration of our views, and look forward to participating in further phases of this rulemaking process.

Section II: Ground Rules Issues

At the outset, the Joint Reply Commenters wish to respond to two challenges in initial round comments to important aspects of the ground rules applicable to this proceeding, as they have been spelled out by the Copyright Office in reliance upon the statute and its legislative history.[3]

A. *Response to CCIA/OSAIA*

Commenters CCIA and OSAIA (submission 8) argue that language from the free trade agreement signed among the Dominican Republic, five Central American nations, and the U.S. (the "DR-CAFTA") somehow trumps the text and legislative history of the DMCA on the evidentiary standard applicable in this proceeding, and overturns the consistent approach of the Copyright Office and Library of Congress on this issue in the two preceding rulemaking cycles. This argument is creative but ultimately unavailing.

The DR-CAFTA requires signatory countries to prohibit the circumvention of access controls used in connection with copyrighted works, but provides, in Art. 15.5.7.e.iii, that signatories may recognize exemptions to this prohibition for "noninfringing uses of a work, performance, or phonogram, in a particular class of works, performances, or phonograms, when an actual or likely adverse impact on those noninfringing uses is demonstrated in a legislative or administrative proceeding by substantial evidence."[4] The commenters suggest that when Congress endorsed DR-CAFTA by passing the Dominican Republic-Central America-United States Free Trade Agreement Implementation Act, Pub. L. No. 109-553, 119 Stat. 462 (2005), it thereby dictated that "the Section 1201(a)(1)(C) rulemaking proceedings must be *and must always have been* governed by the 'substantial evidence' burden of proof." C8 at 3. Characterizing the substantial evidence standard as more lenient than the "preponderance of evidence" test applied heretofore and reaffirmed in the NOI initiating this proceeding, see 2005 NOI at 57528, these commenters argue that the Librarian must recognize an exemption so long as there is "more than a mere scintilla" of evidence in support of it. C8 at 5.

The most basic flaw in this argument is that it overlooks that the cited provisions of DR-CAFTA provide a floor below which signatories cannot sink, not a ceiling above which they may not rise, in safeguarding technological protection measures. Art. 15.1 of DR-CAFTA states that "[e]ach Party shall, at a minimum, give effect to this Chapter. A Party may, but shall not be obliged to, implement in its domestic law more extensive protection and enforcement of intellectual property rights than is required under this Chapter, provided that such protection and enforcement does not contravene this Chapter." (emphasis added). Thus, even if the term

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[3] The Video Software Dealers Association (VSDA) also complains that "the rules set forth in the *NOI* have the effect of stifling legitimate comment and debate over possible misuse and abuse of the anti-circumvention provisions…" C43 at 1. The VSDA comment seems primarily directed at which comments the Copyright Office will choose to receive and consider. Of course, despite the fact that VSDA seeks remedies outside of the scope of this proceeding, we note that their comments have been accepted and will, we are sure, be given appropriate consideration.

[4] Dominican Republic-Central America-United States Free Trade Agreement, Aug. 5, 2004, art. 15.5.7.e.iii, *available at* http://ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/asset_upload_file934_3935.pdf.

"substantial evidence" in DR-CAFTA means what the commenters say it does[5], that does not bind the U.S. to grant all exemptions for which supporting commenters provide "substantial evidence." Section 15.5.7.e, which includes the language relied upon by the commenters, also directs (in language they fail to mention) that signatories "shall confine exceptions to" those supported by substantial evidence; it does not forbid signatories to use more exacting standards in evaluating proposed exemptions, just as it does not require them to recognize any exceptions at all in this sphere. U.S. law governing this proceeding, including the evidentiary standards articulated by the Register and Librarian in this and prior rulemakings, is thus fully consistent with U.S. obligations under DR-CAFTA.

Beyond this, commenters point to no evidence indicating that the President, in negotiating the DR-CAFTA, or the Congress, in implementing it, intended the entry into this agreement to alter the ground rules laid out by the Register for this proceeding. Neither Public Law 109-553 nor its legislative history suggests anything of the sort or makes any reference to this rulemaking process. If Congress believed that the previous rulemakings were inconsistent with the standards articulated in DR-CAFTA, and that the latter standards ought to govern, it inexplicably gave no hint of that in the text or background of the statute. It seems inescapable that the goal of the negotiators and of Congress was to conclude an agreement that was consistent with U.S. law, including § 1201. The CCIA/OSAIA interpretation to the contrary, unsupported by anything in the record, can best be described as fanciful.

Commenters also do not explain why the "substantial evidence" language in the DR-CAFTA, which has not yet come into force, does not appear in three other free trade agreements which post-date the DMCA and which are already in effect and binding on the United States.[6] If the inclusion of the term in DR-CAFTA carried with it the import that the commenters suggest, surely it would be a part of all of the agreements. Instead, their mode of analysis makes sense only if one assumes that Congress simply could not make up its mind about the proper evidentiary standard. A much more plausible assumption is that, if there is any substantive difference between the minimum standards contained in the various agreements, the standard set by Congress for this proceeding is consistent with either one.

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[5] In fact, the commenters have cited to nothing indicating what "substantial evidence" is intended to mean within the context of DR-CAFTA or the two other trade agreements that use the term, and there is no basis to assume that the term was intended to have the same meaning that U.S. courts have given it in a wholly different context.

[6] *See* United States-Chile Free Trade Agreement, June 6, 2003, art. 17.7.5.d.i, *available at* http://ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html; United States-Singapore Free Trade Agreement, May 6, 2003, art. 16.4.7.f.iii, *available at* http://ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file708_4036.pdf; United States-Australia Free Trade Agreement, May, 18, 2004, art. 17.4.7.e.viii, *available at* http://ustr.gov/assets/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/asset_upload_file469_5141.pdf. *See* Press Release, United States Trade Representative, Landmark U.S.-Australia Free Trade Agreement Goes Into Effect Today, Jan. 1, 2005, *available at* http://ustr.gov/Document_Library/Press_Releases/2005/January/Lmark_US-Australia_Free_Trade_Agreement_Goes_Into_Effect_Today.html; *see also* Press Release, United States Trade Representative, Zoellick Statement Following House Approval of Chile and Singapore FTAs, Jul. 7, 2003, *available at* http://ustr.gov/Document_Library/Press_Releases/2003/July/Zoellick_Statement_Following_House_Approval_of_Chile_Singapore_FTAs.html.

B. *Response to LCA and MLA*

Commenters LCA and MLA (submission 2) also attempt to call into question the applicable burden of proof for this proceeding. Rather than providing an argument for why the ground rules should be changed, however, the submission asserts that the Copyright Office's 2005 NOI "backed away from the rigid application of the 'substantial adverse impact' standard articulated in the previous rulemakings." C2 at 2. We do not read the NOI to alter the applicable standard whatsoever and hope that the Register will clarify that this is the case. Although the NOI does state that "[h]ow much evidence is sufficient will vary with the factual context of the alleged harm," this has always been so. 2005 NOI at 57528. The Register's 2003 Recommendation thoroughly explained the meaning of the "substantial adverse impact" standard and never implied that it was "rigid." Instead, the Register stated that the standard required "real, verifiable, and reasonable evidence" rather than "mere speculative or theoretical harm." *Id*. at 18. We believe that this is the appropriate standard and that it should apply in this proceeding as it did in 2003.

LCA and MLA grasp at another straw when they state that "the Office has qualified the standard for actual harm from always requiring such a showing of 'actual instances of verifiable problems' to 'generally' requiring such a showing." C2 at 2. Once again, we believe that the submission reads too much into the NOI. The Register's 2003 Recommendation clearly stated that first hand knowledge is not a "requirement." However, the Register also stood "by her preference to hear from persons with actual knowledge of the facts they are asserting as a basis for requesting an exemption." 2003 Rec. at 18. It is important that the Register continue to do so because "participants (or their representatives) with no actual knowledge of the facts have been of little assistance in evaluating a proposed exemption." *Id*. at 18-19.

Section III: The Digital Cornucopia – How Widespread Use of Access Controls Has Led to Increased Access to Copyrighted Works

In their 2003 submission, the Joint Reply Commenters pointed to the "rapid increase in the public availability of all kinds of copyrighted material in digital formats, including through online dissemination," as a critical development that must be taken into account when evaluating the net impact of "any adverse effects attributable to section 1201(a)(1)(A)." 2003 Joint Reply Comments at 6-7, *available at* http://www.copyright.gov/1201/2003/reply/023.pdf. Since the last rulemaking proceeding, the pace of that increase, already formidable, has accelerated dramatically. It would be no exaggeration to say that the digital marketplace has exploded since 2003. Consumers increasingly embrace the DVD medium and rely on the Internet and other digital networks for fast and efficient methods of obtaining copyrighted material; and copyright owners have relied on access controls to make these advances possible.

The Joint Reply Commenters urge the Copyright Office to take this context into account as it evaluates all the claims for exemption in this proceeding. While, in subsequent sections of these Joint Reply Comments, we will discuss the availability of particular kinds of works in particular settings, it is worth pausing at the outset to review the big picture.

The "availability for use of copyrighted works" is perhaps the most important statutory factor to be considered when assessing the impactof § 1201. The Joint Reply Commenters believe that the undeniable success of the current digital marketplace, which has given consumers of copyrighted material more choices than ever before, should weigh heavily against the recognition of any exemption in this proceeding. When the Register and the Librarian "carefully balance the availability of works for use, the effect of the prohibition on particular uses and the effect of circumvention on copyrighted works," it will become clear that the DMCA has come a long way toward achieving its goals without burdening noninfringing uses in any significant way. 2003 Rec. at 6. This same conclusion has been reached by noted copyright scholars.[7]

Below, we provide a few examples of the cornucopia of digital material available to the American public, through legitimate services that generally employ access control measures:

- The availability of audio-visual materials in DVD and other digital formats: Although the Digital Versatile Disc was already successful in 2003, since then it has become

[7] *See, e.g.*, Jane C. Ginsburg, *Legal Protection of Technological Measures Protecting Works of Authorship; International Obligations and the US Experience*, 29 COLUM. J. L. & ARTS 11 (2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=785945 (stating that "[t]he US experience to date indicates that legal protection for technological measures has helped foster new business models that make works available to the public at a variety of price points and enjoyment options, without engendering the 'digital lockup' and other copyright owner abuses that many had feared."); June M. Besek, *Anti-Circumvention Laws and Copyright: A Report from the Kernochan Center for Law, Media, and the Arts*, 27 COLUM. J. L. & ARTS 385, 486 (2004), *available at* http://lsr.nellco.org/cgi/viewcontent.cgi?article=1017&context=columbia/pllt (finding that, "[s]ection 1201has been successful in stimulating new means of distribution and promoting consumer choices with respect to a variety of works, particularly sound recordings, motion pictures and television programming, and literary works.").

almost ubiquitous. Currently, over 82 million U.S. households have DVD players.[8] In 2005, over 12,000 titles were released on DVD (both new titles and back catalog), and over 1.664 billion DVDs were sold.[9] 192 million of these DVDs were sold for rental to the public, and online services such as NetFlix have made it easier for consumers to rent the DVD titles of their choice.[10] These numbers clearly indicate that U.S. consumers have embraced the DVD format. As the Register stated in 2003, "permitting circumvention of CSS … would be likely to have an adverse effect on the availability of … DVDs to the public." 2003 Rec. at 120. The evidence supporting such a finding is even more persuasive today. In addition, new access-controlled digital formats for audio-visual materials, such as the UMD (Universal Media Disc) format for discs playable on Sony PlayStation Portable devices, have recently been introduced and provide a completely new distribution channel for consumers.[11] Moreover, next generation, high-definition DVD formats are expected to come to market as soon as this year. As with the current generation of DVD, appropriate content security has been central to the roll-out of these new, highly sought-after formats.

- The availability of online music services: Dramatic changes have occurred in this sector since 2003. Then, the Register observed that online download services were "beginning to show signs of greater variety." *Id.* at 140. Today, this observation qualifies as an understatement. There are now more than a dozen online services offering legal music downloads and streaming. These services rely on a variety of business models, including songs priced per download and subscription pricing for unlimited downloads. Most of these business models are dependent upon access controls, which are constantly evolving to adapt to a fast-changing market.

  The success of these services is remarkable. Nearly 300 million single-song downloads were sold in 2005.[12] Apple's iTunes service sells 3 million songs a day, and has sold 850 million downloads overall.[13] iTunes offers over 2 million songs from which its more than 20 million users may choose.[14] And many other services offer similar catalogues. MSN Music, MusicNow, Napster, RealPlayer Music Store, Rhapsody, Ruckus, Yahoo!

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[8] *See* Redmond Carolipio, *Stage Set for Showdown Between New DVD Formats*, SAN BERNADINO SUN, *available at* http://www.sbsun.com/news/ci_3422888. In addition, 32.7 million households contain games consoles with DVD playback capability, and a computer with a DVD-ROM drive can be found in over 47 million U.S. households. *See* 12(5) HOLLYWOOD AFTERMARKET (Dec. 31, 2005).

[9] *See* 12(5) HOLLYWOOD AFTERMARKET (Dec. 31, 2005); *see also* DVD RELEASE REPORT: week number 458/459, year 9: week 42/43.

[10] *See* Netflix Homepage, http://www.netflix.com/Default (offering online DVD rentals at subscription rates).

[11] *See Coming Soon To UMD: Every Movie Ever Made* (May 27, 2005), *available at* http://psp.ign.com/articles/620/620112p1.html.

[12] *See* Phil Gallo, *Singles Swing for Music Biz*, VARIETY, *available at* http://www.variety.com/article/VR1117933427?categoryid=18&cs=1&s=h&p=0.

[13] *Apple Online Media Dominance Rolled on in Q4, Jobs Gloats*, WASH. INTERNET DAILY, at 4 (January 11, 2006).

[14] *See* The Best Jukebox and Onload Download Store, http://www.apple.com/itunes/overview/; *see also* NIELSEN/NETRATINGS, ITUNES REACHES 14 PERCENT OF ACTIVE INTERNET UNIVERSE, SKYROCKETING 241 PERCENT YEAR-OVER-YEAR, ACCORDING TO NIELSEN/NETRATINGS (2005), *available at* http://www.netratings.com/pr/pr_060119.pdf.

Music, Virgin Digital and iMesh all offer over 1 million songs each.[15] Worldwide, 420 million songs were downloaded from legitimate music services in 2005 alone; this is 20 times more activity than just two years ago.[16]

As these services spread, copyright owners will be able to make more and more high quality content available to consumers. For example, Vivendi Universal recently announced that it is digitizing 100,000 previously out-of-print recordings for online distribution.[17] Such endeavors demonstrate that consumers are benefiting from the existence of access controls and the legitimate distribution methods that they make possible.

- New distribution channels for movies and television programming: Following on the success of these music services, and stimulated by more pervasive broadband access to the Internet, increasing Internet speeds and improved access controls, robust new markets have emerged for delivery of movies and television programs over the Internet and through other digital networks. These video services also offer consumers choices between single downloads and subscription services. iTunes has sold 8 million videos for $1.99 each in three months from a selection of over 3,000 videos and television shows.[18] Starz! Real Movies offers over 300 movie titles to choose from each month for a subscription fee of $12.95.[19] Other services such as Akimbo, CinemaNow, ifilm, MovieFlix, and Peer Impact all offer consumers access to video downloads for affordable prices.[20] And CBS has recently started making popular televisions shows available for download through its website.[21] As with the DVD market, the new online dissemination channels are even stimulating the production of new works specifically for those channels, works that probably would not have been created were it not for the security provided by access controls. For example, ABC is producing mini-episodes of the hit show *Lost* exclusively for distribution to mobile devices.[22] Current movies and TV shows have also been widely licensed for Video On Demand (VOD) delivery through direct broadcast satellite services (e.g., DirectTV-NBC Universal deal), cable (e.g., Viacom-Comcast deal), and new video subscription services offered by

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[15] For more on these services see http://music.msn.com/; www.MusicNow.com; www.napster.com; www.RealPlayer.com; www.Rhapsody.com; www.Ruckus.com; http://music.yahoo.com/; www.imesh.com; http://digitalmusic.weblogsinc.com/2005/11/14/review-virgin-digital-and-red-pass/.

[16] IFPI, DIGITAL MUSIC REPORT 2006, *available at* http://www.ifpi.org/site-content/library/digital-music-report-2006.pdf. Indeed, the 20 million track download mark was recently surpassed in a single week. *See* Garrity, *Digital Music's Dream Week*, BILLBOARD, Jan. 14, 2006, at 7.

[17] *Vivendi Universal SA: Music Group to Make Available Out-of-Print Recordings Online*, WALL STREET J., Jan. 19, 2006.

[18] *See Apple Online Media Dominance Rolled on in Q4, Jobs Gloats*, WASH. INTERNET DAILY, at 4 (January 11, 2006); *see also* http://www.apple.com/itunes/overview/.

[19] *See* Starz! Real Movies Homepage, http://starz.real.com/partners/starz/starz.html (describing the service).

[20] For descriptions of these services see http://www.akimbo.com/; http://www.cinemanow.com/; http://www.ifilm.com/; http://www.movieflix.com/; http://www.movielink.com; http://www.peerimpact.com/; http://starz.real.com/partners/starz/index.html.

[21] Frazier Moore, *Two CBS Sitcoms Can Now Be Viewed Online*, FORBES, *available at* http://www.forbes.com/fdc/welcome.shtml.

[22] Maria Elena Fernandez, *'Lost' Leads TV Past the Screen*, KANSAS CITY STAR, *available at* http://www.kansascity.com/mld/kansascity/entertainment/13675411.htm.

telecommunications companies (e.g., FiOS-Disney deal). What the Register concluded in 2003 is far truer today: "Given these expanding options in the online environment as well as the continued availability in existing formats, the claim that the prohibition is adversely affecting noninfringing uses appears wanting." 2003 Rec. at 140.

- The availability of entertainment software on a variety of platforms: Since 2003, the entertainment software industry has experienced rapid growth. Three major new platforms have been introduced, and these platforms have seen great success. 1.3 million Xbox 360s have been sold in the U.S. since its release in November, nearly 4 million Nintendo DS systems have been sold in the U.S., and an estimated 6 million Sony Play Station Portables have been sold in North America.[23] Since the 2003 rulemaking, over 1800 new console games, 700 handheld games, and over 2200 PC games have been produced and made available to the public.[24] Entertainment software is also increasingly being offered through online delivery methods. An OECD study on "the online computer and video game industry" estimated the value of the U.S. online gaming industry to be over 1 billion dollars in 2005, and projected a substantial increase in value during 2006.[25] Access controls are spurring the growth of this industry, for instance, by making subscription gaming services possible, as well as "try before you buy" offerings of games such as Blizzard's *World of Warcraft* and LucasArts' *Star Wars Galaxies*.[26] The access control measures employed by these services allow a consumer to experience playing a game at an affordable subscription rate prior to making a purchase. They exemplify how the legal protection provided by § 1201 delivers benefits to consumers. Access controls have also been a prominent feature of new services enabling consumers to download videogames to their cell phones.[27] These increases in the availability of entertainment software should weigh heavily against the need for any exemptions.

- The availability of text and database products in digital formats: E-book downloads have increased greatly since 2003. eBooks.com now offers a selection of over 45,000 e-books for consumers to choose from. The site also allows consumers to sample "free excerpts of new or noteworthy titles" prior to purchase.[28] Other services such as eReader.com and Amazon.com also make e-books available to consumers. In addition to the growing e-book market, there is a large universe of online delivery services, such as NetLibrary, making copyrightable databases and text more available to consumers, scholars, and

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[23] Ty Adams, *1.3 Million Xbox 360's Sold*, Xbox Today, *at* http://www.xboxtoday.ca/01042006/12/1_3_million_xbox_360s_sold; Rob Fahey, *Nintendo Europe Reports 3.5m DS Sales; World Wide Sales Top 13m*, Gamesindustry.biz, Jan. 5, 2006, *at* http://www.gamesindustry.biz/content_page.php?aid=13896; *Sony on Track to Double PSP Sales*, CNet News.com, Dec. 17, 2005, *at* http://news.com.com/2102-1043_3-5999687.html?tag=st.util.print.

[24] The NDP Group / NDP Funworld (R) / TRSTS (R) and NDP Techworld (SM).

[25] *See* ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT WORKING PARTY ON THE INFORMATION ECONOMY, DIGITAL BROADBAND CONTENT, THE ONLINE COMPUTER AND VIDEO GAME INDUSTRY, 13 (2005) (projecting a rise to 1.692 billion in 2006), *available at* http://www.oecd.org/dataoecd/19/5/34884414.pdf.

[26] *See* http://www.worldofwarcraft.com/ (providing information on *World of Warcraft*); *see also* http://starwarsgalaxies.station.sony.com/ (describing *Star Wars Galaxies*).

[27] *See, e.g., EA to Offer Games to Amp'd Mobile*, *available at* http://news.com.com/EA+to+offer+games+to+Ampd+Mobile/2100-1043_3-6025679.html.

[28] *See* eBooks Homepage, http://www.ebooks.com/.

businesses, sometimes free of charge.[29] Audiobook availability has also increased dramatically, with audiobooks widely available on iTunes and through other services. Continued legal protection for access control technologies will help these services continue to thrive in the future.

- The availability of business software applications through a range of delivery mechanisms: Whether delivered through remote access applications, downloading, or distribution of computer programs in optical media formats, access control measures are a key feature of the distribution options that have made software applications available to American businesses and institutions large and small. Access control technologies are also critical to the ongoing task of upgrading the security of computer networks and resources and reducing their vulnerability to viruses and other attacks. Virtually all commercial software applications (except those too large for current "pipes" to handle) can be accessed online or downloaded, whether directly from the developer or through third parties.

These are only examples of the myriad methods of online delivery and digital availability of copyrighted works that § 1201 protection for access controls has helped to encourage. The marketplace is developing in the way Congress thought "most likely to occur, with the availability of copyrighted materials for lawful uses being enhanced, not diminished, by the implementation of technological measures and the establishment of carefully targeted legal prohibitions against acts of circumvention." House Managers Report at 8. This reality provides the context within which the exemptions proposed by the various commenters must be evaluated, and these are the benefits against which any claim of adverse impact attributable to § 1201(a)(1)(A) must be balanced.

[29] *See* NetLibrary Homepage, http://www.netlibrary.com/company/aboutus.aspx.

Section IV: Responses to Proposed "Particular Classes of Works" – Existing (2003-06) Exemptions

As the NOI makes abundantly clear, there is no presumption in this proceeding that an exemption recognized for the current (2003-06) triennial period will be extended for the next three years. Indeed, the opposite is true: "There is a presumption that the Sec. 1201 prohibition will apply to … previously exempted classes, unless a new showing is made that an exemption is warranted…. Exemptions are reviewed de novo and prior exemptions will expire unless sufficient new evidence is presented in each rulemaking that the prohibition has or is likely to have an adverse effect on noninfringing uses." 2005 NOI at 57,529.

In the 2003 Final Rule, four exemptions were recognized. One or more submissions in the initial round of this proceeding call for each of these exemptions to be recognized anew during 2006-09. However, in each case, the evidence in the initial round falls far short of the "new showing" that the NOI requires.

A. Compilations consisting of lists of Internet locations blocked by commercially marketed filtering software applications

Submissions 2, 54

Neither submission adduces any evidence whatsoever that an exemption is warranted, nor that the existing exemption has even been used.[30]

B. *Computer programs protected by dongles that prevent access due to malfunction or damage and which are obsolete.*

Submissions 2, 54

Neither submission adduces any evidence whatsoever that an exemption is warranted, nor that the existing exemption has even been used.[31]

C. *Computer programs and videogames distributed in formats that have become obsolete and which require the original media or hardware as a condition of access*

Submissions 2, 4(1), 19, 54, 68

[30] To whatever extent the recognition of this exemption in 2003 was premised on the likeilhood of future adverse impacts on non-infringing uses, in the current state of the record it can only be concluded that these impacts did not occur during 2003-06, and that this fact is not attributable to the availability of the exemption (since there is no evidence that it has been used).

[31] Several comments (see submissions 4, 19, 21) call for recognition of a new exemption which some of them characterize as a "modest expansion" of this previously recognized class, see C4 at 12. The Joint Reply Commenters do not agree with this characterization, and we address this proposed new exemption in section V(F) of these reply comments. See also preceding footnote on the implication of the lack of evidence that the existing exemption has been used.

Only one of these submissions (submission 4, from the Internet Archive) attempts to adduce any evidence that an exemption is warranted. The submission describes in some detail how the Internet Archive has made use of the exemption, and also explains why it should be recognized for an additional three years, primarily to allow for the completion of archiving projects that take more than three years.

If, at the conclusion of this proceeding, the Register and the Librarian believe that on the record as a whole the recognition of this exemption for another three years is warranted, the Joint Reply Commenters urge them to take this opportunity to clarify that the exemption does not apply to works that were distributed in formats that have become obsolete and that employ "original-only" access controls, but that subsequently (but prior to the time that circumvention is carried out) have been distributed in formats that are not obsolete or do not use this type of access control. A cornerstone of the Internet Archive's argument that non-infringing users are being adversely impacted is the assertion that these are works "for which no contemporary market, real or potential, is likely to exist." C4 at 9. In the works to which this paragraph applies, which may include "legacy" videogames that are reissued in new formats, this assertion is not well founded. The existence of a market impact weakens the assertion that the use which the prohibition on circumventing access controls impedes is a fair use under § 107 and thus non-infringing.[32] Furthermore, if the work is being currently exploited in a new format, this increases the likelihood that the copyright owner's permission, and perhaps its assistance in dealing with the obsolete format, could be obtained for the use in question.[33]

D. *Literary works distributed in e-book format etc*

Submissions 1, 2, 54

None of these submissions give any indication that the exemption has actually been used in the more than two years since it was recognized. Submission 1, from the American Federation for the Blind (AFB), makes some assertions about continued need for the exemption.[34] However, its assertion that "eliminating the current exemption will make matters even worse" (C1 at 5), is difficult to evaluate in the absence of evidence about the extent to which use of the current exemption has made things better.

AFB's assertion that the needs of visually impaired people "continue to go unmet in much of the marketplace" is based upon an evaluation in which five books were downloaded and

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[32] *Cf.* American Geophysical Union v. Texaco, 60 F.3d 913, 931 (2d Cir. 1994) (finding that "it is sensible that a particular unauthorized use should be considered 'more fair' when there is no ready market or means to pay for the use, while such an unauthorized use should be considered 'less fair' when there is a ready market or means to pay for the use.").

[33] Similarly, the current exploitation of the work may bear upon the requirement of § 108 (c)(1) that the archives first determine whether an unused copy of the work can be obtained at a fair price.

[34] The AFB submission characterizes the current exemption in several different ways, some of which more closely resemble the sweeping exemption they sought in the last cycle than the more carefully tailored exemption the Librarian ultimately recognized in 2003. The Joint Reply Commenters assume that AFB is seeking a renewal of the existing exemption without change. In any event, if any exemption is recognized in this area for the next three years, no basis has been presented for any expansion of the existing exemption, subject to the same conditions that have applied since October 2003.

four proved inaccessible. C1 at 5. However, three of the four inaccessible books are available in formats other than those tested by AFB; and in two of these three cases, a popular e-book website indicates that the edition of the book in one of the other formats is enabled for "reading aloud."[35] Since the exemption which was recognized in 2003, and which AFB asks to have recognized again, only applies when "all existing e-book editions" are subject to access controls which prevent read-aloud or screen-reader functions, this evaluation may be of limited use in making the requisite "new showing" of the need for the exemption in the future.

The Joint Reply Commenters agree (as they did three years ago) that blind and visually impaired people enjoy less comprehensive access to literary works than do the fully sighted. For this proceeding the relevant question remains to what extent, if any, this state of affairs is attributable to the use of access controls. AFB asserts that "as digital publishing matures, this situation can only grow worse." C1 at 5. We cannot agree. Overall, the use of secure e-book formats has been "use-facilitating," and these formats have been used to support new ways of disseminating copyrighted works to users, including visually impaired users. There remains no evidence that the growth of the e-book market is crowding out other accessible formats, nor that, to the extent this is occurring, it is not offset by the growing pool of works for which a fully accessible digital version is available.

[35] AFB tested "The Business of Software" in Microsoft Reader format. *See* http://www.ebooks.com/ebooks/book_display.asp?IID=205727. However, this title is also available in Adobe format, and the listing at eBooks.com indicates that reading aloud is enabled for this edition. The same facts apply with regard to "The Imitation of Christ." *See* http://www.ebooks.com/ebooks/book_display.asp?IID=195669. (The Joint Reply Commenters have not verified the assertion that the read aloud function is enabled in these titles.) "The Amber Spyglass" is available in three formats besides the Microsoft format tested by AFB, but it is unclear from the materials available online whether any of these editions is accessible to the visually impaired. *See* http://www.ebookmall.com/ebooks/amber-spyglass-pullman-ebooks.htm.

Section V: Responses to Proposed "Particular Classes of Works" – New Exemptions

A. *Access controls that threaten security/privacy*

Submissions 2(4), 6, 7, 8, 18, 26, 31, 36, 42, 57, 63, 66, 74

Summary of Argument

All these submissions generally call for an exemption for the circumvention of access controls that pose security risks for users. Many assert that the recent controversy regarding technological protection measures employed by Sony BMG on some audio compact discs exemplifies the situation in which the submitters believe that an exemption is required. While some of these submissions may identify a real problem, none of them carries the burden of establishing that an exemption to § 1201(a)(1)(A) would resolve that problem, or even contribute to ameliorating it. Nor have any of these submissions presented evidence that this provision of the law has placed consumers' privacy and security interests at risk. While much evidence is available that security threats and intrusions of privacy are serious matters which the Congress is addressing, there is no evidence of a causal link between these troubling developments and the operation of Section 1201.

While numerous formulations are used in the various submissions, the one that seems closest to the requisites for a "particular class of works," as that statutory phrase has been authoritatively interpreted in previous rulemaking proceedings, is the following proposal put forth by Felten and Halderman (C6):

> sound recordings and audiovisual works distributed in compact disc format and protected by technological measures that impede access to lawfully purchased works by creating or exploiting security vulnerabilities that compromise the security of personal computers. The creation of security vulnerabilities includes running or installing rootkits or other software code that jeopardize the security of a computer or the data it contains. The exploitation of security vulnerabilities includes running or installing software protection measures without conspicuous notice and explicit consent and failing to provide a permanent and complete method of uninstalling or disabling the technological measures.[36]

The Joint Reply Commenters do not believe that any of these submissions, including submission 6, meets the statutory criteria for recognition of a temporary exemption to Section 1201(a)(1). Primarily, this is because these submissions fail to demonstrate that the activities which they seek to bring within an exemption constitute a prima facie violation of § 1201(a)(1)(A); or, even assuming arguendo that they do, that they have not already been

[36] The Register explained in the 2003 Recommendation that a proper formulation of a "particular class of works" would generally "start with a section 102 category of works, or a subcategory thereof." 2003 Rec. at 12. Felten and Halderman's proposed formulation actually starts with two section 102 categories – sound recordings and audiovisual works – but the submission apparently seeks to encompass the works in the latter category only to the extent that they constitute "'bonus' or 'enhanced' multimedia content, such as music videos" that are provided on the same CD "in addition to audio content." C6. at 4, n.2. It would be useful to clarify that these are the only audiovisual works that the submitters seek to include in their proposed "class of works."

anticipated by Congress in existing statutory exceptions. In addition, proponents have not carried the burden of establishing that the prohibition against circumvention has caused or is likely to cause a sufficient adverse impact on non-infringing uses, nor of demonstrating that their proposed exemption is workable and well-defined.

Argument

1. Does the conduct in question constitute a prima facie violation of Section 1201(a)(1)(A)?

Felten and Halderman explain that their proposed exemption is limited to access control measures that "rely on the installation of software on the consumer's computer to prevent certain forms of access and use of audio files." C6 at 3. It is this software, in their view, that creates or exploits security vulnerabilities on personal computers. The conduct which they wish to immunize from liability under § 1201(a)(1)(A) appears to be the deletion or uninstallation of that assertedly harmful software, since, if this uninstallation is handled properly, it eliminates the vulnerability that has been created, or puts an end to the exploitation of the vulnerability that resulted from installation of the software in the first place.

However, uninstallation of software alone does not constitute circumvention of an access control[37] within the meaning of the DMCA when this act does not result in the user obtaining access to the sound recording in question. Uninstallation of the objectionable software could leave consumers in the same position as if it had never been installed in the first place: unimpaired with regard to security, and able to play the CD on a wide range of playback devices. Put another way, if the software that is installed acts as a key, then a consumer who throws away the key by uninstalling the software does not thereby gain access to the sound recording through the door which the key would have unlocked. It seems very doubtful that this constitutes circumvention within the meaning of the DMCA.

Another critical aspect of the definition of circumvention under § 1201(a)(3)(A) is that the conduct must be carried out "without the authority of the copyright owner." But from all that appears in these submissions, to date, the uninstallation of the access control software to which the submission objects has been undertaken with the active encouragement, or at least the undisputed acquiescence, of the copyright owner. The submission points to "posts on artists' and labels' websites as well as technical support emails from the labels [that] offer step by step instructions" on how to uninstall the software, and asserts that "the labels and the artists they represent have gone to great lengths to inform unsatisfied customers of methods" for achieving this. C6 at 12-13. Indeed, in the case of the Sony BMG technical protection measures that triggered this submission, the label has incurred considerable expense to recall CDs that employ the measures in question, to make uninstallation tools available to customers, and to encourage customers to use them.[38] Since the Sony BMG example is the only one provided in the

[37] In 2003 the Register found that in at least some cases, technological measures that are generally referred to as "copy protection" for CDs "are intended to deny access to sound recordings under certain circumstances" and thus may meet the statutory definition of access controls. *See* 2003 Rec. at 153-54. We believe this finding remains valid.

[38] *See Sony BMG Offers Free Music Downloads to Settle Suit,* BLOOMBERG, *available at* http://www.bloomberg.com/apps/news?pid=10000101&sid=aVyJRbXsyxiQ&refer=japan. The settlement agreement in one law suit and other materials are available at http://www.eff.org/IP/DRM/Sony-BMG/.

submission,[39] these facts raise an inescapable question: what is the evidence that access control measures meeting the description of the proposed "particular class of works" have ever been employed in the US market, or employed to more than a de minimis extent, in a context in which the right holder did not authorize their removal? [40] Unless the proponents can demonstrate that this has occurred or is likely to occur, they cannot meet their burden of establishing grounds for an exemption.

2. Do existing statutory exceptions address the problem?

Assuming that the proponents have demonstrated that the conduct which they seek to shelter from liability would in fact constitute a prima facie violation of § 1201(a)(1)(A), the next inquiry must be whether the statute already addresses the problem. If so, it is clearly established that recognizing an exemption in this rulemaking proceeding would be inappropriate. In the first rulemaking proceeding under the DMCA, the Register noted that "[w]hen Congress has specifically addressed the issue by creating a statutory exemption … in the same legislation that established this rulemaking process, the Librarian should proceed cautiously before, in effect, expanding the … statutory exemption by creating a broader exemption pursuant to § 1201(a)(1)(C)." 2000 Rec. at 64571. As the Register concluded in the 2003 Recommendation:

> There is no basis for the Register to recommend an exemption where the factual record indicates that the statutory scheme is capable of addressing the problem. Where a statutory scheme exists for particular activity, persons must utilize such statutory exemption to accomplish their goals or provide evidence why the statutory exemption is unavailable to accomplish a noninfringing use, not simply that the user could have accomplished his or her goal more conveniently by deviating from the congressional design. Even then they must justify issuance of any exemption that would appear to permit more than Congress intended when it enacted the statutory exemptions covering the same type of conduct.

2003 Rec. at 181-82. None of the submissions seeking an exemption in this proceeding comes close to shouldering this burden.

The most clearly relevant provision of the statute is the security testing exception in § 1201(j), which shelters from liability under § 1201(a)(1)(A) any "act of security testing," defined as "accessing a computer, computer system or computer network, solely for the purpose of good faith testing, investigating or correcting, a security flaw or vulnerability, with the authorization of the owner or operator of such computer, computer system, or computer network." 17 USC § 1201(j)(1),(2). The uninstallation of software that creates or exploits security vulnerabilities certainly appears to fall within the range of activities that Congress was seeking to address when

[39] The submission contains a reference to "other measures that protect releases by Sony BMG and other labels," but without identifying any other labels. C6 at 5.

[40] The submission complains that "consumers should not be forced to rely on the discretionary good faith efforts of copyright holders." C6 at 13. But when those efforts are as widespread, as well publicized, and as far-reaching as those involved in the Sony BMG example, they certainly are relevant to whether the proponents of an exemption have met their burden to show that "there has been or is likely to be a substantial adverse effect on noninfringing uses," or whether, by contrast, the record shows only "isolated harm" in the past, or future harm that is speculative, as contrasted with "more likely than not" to occur. 2003 Rec. at 10.

it enacted this subsection. Assuming arguendo that the uninstallation constitutes an act of circumvention, under § 1201(j) the issue would be whether it is carried out solely for the purpose of correcting a security flaw or vulnerability; whether it is performed in good faith; whether it is done with the authorization of the owner or operator of the computer; and whether it constitutes copyright infringement or a violation of another applicable law. § 1201(j)(2). Congress decided that the resolution of these factual questions, along with other factors set forth in § 1201(j)(3), ought to resolve whether or not there is liability under § 1201(a)(1)(A) in these circumstances. Under the precedent established in the 2003 rulemaking, proponents of an exemption must show why § 1201(j) is "unavailable" to resolve the problem they discern, and then "justify" why the Librarian should, in effect, second-guess the congressional determination by providing a temporary exemption for conduct not reached by the permanent statutory provision.

Submission 6 does not even begin to meet these two requirements. Surprisingly, this submission does not even mention § 1201(j). Submission 8, from the CCIA and OSAIA, does discuss § 1201(j), asserting that it is "insufficient" for two reasons. C8 at 9. First, it does not permit "accessing the offending work itself, so as to disable it." But it is not the work (the sound recording) that offends, but the software code that the access control causes to be installed. CCIA/OSAIA do not explain why § 1201(j) is "unavailable" in circumstances in which access to a computer system is being made in order to correct a security vulnerability or flaw. Second, CCIA/OSAIA assert that § 1201(j) does not cover "accessing an electronic device that is not a computer." Section 1201(j) does not define "computer, computer system or computer network," but it seems probable that a court would be guided by the long-established definitions in the Computer Fraud and Abuse Act, which broadly define a "computer" as "an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions," a definition that surely is capacious enough to cover the products CCIA is concerned about.[41] 18 USC § 1030(e)(1) (2005). Finally, in submission 2, the LCA and MLA argue that section 1201(j) may not be applicable because it only covers "detecting security flaws in the firewall protecting [a computer] system." C2 at 9. There is no indication of any statutory basis for this assertion.

Submission 6 also skims over another statutory exception, § 1201(i). This exception would clearly be applicable to any access control measure that "collects and transmits data about consumers despite statements in both the software EULA and [the software provider's] website denying any such behavior."[42] C6 at 5. Footnote 12 of the submission concedes that § 1201(i) would apply in this circumstance, which may be why the alleged privacy-invasiveness of the access controls in question is not a central focus of the submission.[43] None of the submissions

[41] Indeed, it seems inescapable that any device on which offending software code could be installed would fit within the definition of "computer" under the CFAA.

[42] Submission 6 accuses "other measures …. including SunComm's MediaMax technology" of having the "privacy-invasive" features that make § 1201(i) applicable. C6 at 5, n.12. The Joint Reply Commenters note that both SunComm and Sony BMG (which used the MediaMax technology in some CD releases) vigorously contest this characterization.

[43] Submission 8 complains that § 1201(i), which aims to protect personal privacy, can only be invoked on behalf of natural persons. If, as this submission argues, the "only means" to achieve the objective of § 1201(i) is to uninstall the offending software, then (as we have already pointed out) this may not constitute circumvention at all – particularly where no one "attempted to access – or was even aware of the existence of – the underlying work." C8 at 8.

demonstrates why § 1201(i) is "unavailable" and, to the extent it is, why the Librarian should expand it beyond the bounds that Congress concluded were appropriate.

3. What impact has been shown on non-infringing use?

To the extent (if any) that the activity addressed by submission 6 is actionable under § 1201(a)(1)(A), and to the extent (if any) that such activity does not fall within the zone addressed by existing statutory exceptions, proponents of an exemption must next demonstrate the degree and nature of an adverse impact on non-infringing uses attributable to the prohibition on circumvention of access controls on the particular class of works. Submission 6 identifies four such uses, but only one of these is clearly non-infringing and not otherwise addressed; and here, the applicable standard of demonstrating a substantial adverse impact has not been met. Moreover, to the extent that removal of the software in question does not enable access to the sound recording (see discussion above), that activity does not in any way facilitate these uses.[44]

The first non-infringing use listed in the submission is "listening;" but the submission does not make a persuasive case that there has been a substantial adverse impact on this use attributable to § 1201(a)(1)(A). Of course, "playback [of a lawfully acquired CD] on a modern CD device installed in personal computers … is unquestionably non-infringing," as the Register found in 2003. 2003 Rec. at 154-55. But even in the circumstances described in these submissions, consumers may listen to their CDs, without the installation of any additional software (objectionable or otherwise), on other platforms, notably including stand-alone players that are compatible with CD Audio Redbook Format. The Register found in 2003 that this state of affairs was not "more than a mere inconvenience," because "standard CD players are readily available and inexpensive." *Id*. at 157. That is, if anything, even more true today.[45] Furthermore, as documented in Section III of this Joint Reply Comment, consumers can and increasingly do use online services to listen to sound recordings – and to download copies for their use, including by playing them on the CD drives of their computers, precisely the use they wish to make of the access-controlled CDs. Virtually all titles that are initially released in CD format in the U.S. market today are also available through authorized download services and can be listened to in this manner. The submitters have made no attempt to demonstrate that this is not the case for the titles that fall within the "particular class of works" they describe.

Submission 6 lists "engaging in security research" as the second non-infringing use, but as discussed above, § 1201(a)(1)(A) does not have an adverse impact on this activity, because such research falls within the range of activities addressed in § 1201(j).

The submission asserts in its third example, "device and format shifting," that such activities "are unquestionably fair uses" of lawfully purchased CDs, (C6 at 8); but among those

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[44] Security research is a possible exception to this statement, but, as noted above, the statute already explicitly addresses this non-infringing use.

[45] A cursory online search turns up portable CD players for prices as low as $13.49, see http://www.bestbuy.com/site/olspage.jsp;jsessionid=PJE5LW1HDLWV3KC4D3GFAGI?type=category&id=pcmcat27600050006, and CD players with speakers for as little as $19.99, see http://www.bestbuy.com/site/olspage.jsp?navLevel=4&type=category&navHistory=cat00000%2Bcat03000%2Bcat03056&id=cat03061.

questioning this conclusion is the Register, who noted in 2003 that "proponents have not established that space-shifting or platform-shifting is a noninfringing use."[46] 2003 Rec. at 139.

Similarly, creating a back-up copy of a music CD is not a non-infringing use, for reasons similar to those the Register canvassed in detail in her 2003 determination that back-up copying of DVDs cannot be treated as noninfringing.[47] 2003 Rec. at 102-08. While we recognize that access controls may in some circumstances affect copying, the fact remains that there is no general exception to the reproduction right to allow back-up copying (except the limited exception in § 117 for computer programs)[48] and thus no justification for allowing circumvention of access controls for this purpose.

4. Is the proposed formulation sufficiently well-defined?

All the exemptions recognized during the first two rulemaking cycles have been reasonably well defined, with clearly demarcated boundaries that can be objectively determined. For example, the read-aloud and screen reader functions of a particular e-book either are or are not enabled; access to a given computer program or videogame either does or does not require the original media or hardware. 37 C.F.R. § 201.40(a). Accordingly, persons considering circumventing access controls can be reasonably certain, based on objective criteria, whether or not their conduct falls within the scope of an exemption.

But none of the formulations proposed in this category of submissions takes this approach. While many of the terms they employ could perhaps be satisfactorily defined in other contexts, neither the Register nor the Librarian have the institutional expertise to do so, and it is difficult to imagine that Congress, having already dealt with the general subject in sections 1201(j) and (i), intended to give these officials any such assignment when it established this proceeding. Yet, without such a definition, no exemption in this area would be workable. Even if there were agreement on examples of sound recordings that fell within the defined "particular class of works" in the past, the application of that definition to future examples would be inherently subjective and unpredictable. Who would decide, to use the language of submission 6, if a particular access control measure "jeopardizes the security of a computer," or if "conspicuous notice and explicit consent" have been obtained in connection with the installation or running of the software involved? If this determination were to be made entirely subjectively by the person considering whether to circumvent the measure, the scope of the proposed exemption could be nearly limitless. Furthermore, the claimed beneficial impact of recognition of the exemption – that it would "provide an incentive for the creation of protection measures that respect the security of consumers' computers while protecting the interests of the record

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[46] *See, infra*, Section V(D), which addresses in detail space-shifting and format-shifting. Nor does the fact that permission to make a copy in particular circumstances is often or even "routinely" granted, see C6 at 8, necessarily establish that the copying is a fair use when the copyright owner withholds that authorization. In this regard, the statement attributed to counsel for copyright holders in the *Grokster* case, see id.,is simply a statement about authorization, not about fair use.

[47] *See, infra*, Section V(G), for a further discussion of the back-up copy issue.

[48] Submitters assert that consumers have a right under § 117 to make archival copies of the very software that they assail as constituting a "major security threat to both individual consumers' personal computers and the nation's information infrastructure." C6 at 4, 5, 9. But the consumer's goal is presumably not to copy and archive this assertedly dangerous software, but to eliminate it from his or her computer.

labels" (C6 at 10) -- would be fundamentally undermined if copyright owners – and everyone else -- were left in such serious doubt about which measures were or were not subject to circumvention under the exemption.[49]

In conclusion, the motivation behind some of the submissions in this category is clear and understandable. As one submitter bluntly put it, a "punative [sic] measure" is needed if "companies … exploit US copyright laws to cause damage to customers." C63. But punishment is not the purpose of this proceeding; creating an exemption to § 1201(a)(1)(A) would do nothing to solve the problem; and for all the reasons reviewed above, none of the submissions satisfies the requirements of the statute for an exemption. None should be recognized in this area.

[49] This uncertainty would be even more severe under the formulations proposed in submissions 2 (in which the terms "privacy or security" are left completely undefined) or 8 (in which the boundaries of the proposed exemption would turn on whether access controls "threaten critical infrastructure and potentially endanger lives").

B. *Software locks for mobile phone reprogramming*

Submission 3

Summary of Argument

The proposal contained in this submission fails to demonstrate any causal link between § 1201(a)(1)(A) and any substantial adverse impact on access to copyrighted material. To the contrary, the devices in question are rapidly becoming tools for accessing and using copyrighted materials, not simply communications devices, and any exemption in this area could substantially interfere with the use of access controls applied to those materials. For this reason, the relief claimants seek here is better sought in other fora.

Argument

Submitters Wireless Alliance and Pinkerton ask for the Copyright Office and the Librarian to intervene to help solve what they clearly view as an irksome market problem. They assert that mobile telephone carriers use a variety of anti-competitive practices to make it difficult for subscribers to switch to other carriers. In their words, "carriers' anti-competitive practices continue to include the tying policy that forces customers to purchase handsets from the carrier or a designated agent, limits on the availability of handsets from other sources, restrictions on the ways in which dealers are permitted to market handsets, and locking the handset to prevent use with a competitor carrier." C3 at 4. Having evidently failed thus far to persuade the FCC or other agencies to take effective action against these anti-competitive practices, these submitters now seek to use this proceeding to attack the last item on their list by insulating from liability under § 1201(a)(1)(A) those mobile phone subscribers who use self-help to unlock their handsets so that they can reprogram them and continue to use them with a different carrier.

Whatever the merits of the policy objectives of these submitters, the Joint Reply Commenters believe that, by injecting them in this proceeding, the submitters have brought them to the wrong forum. These submitters have also failed to take into account the substantial impact on access to many kinds of copyrighted works other than mobile phone firmware that could result if the exemption they seek were recognized. In the other fora available to the submitters – such as the FCC and antitrust authorities – some of the legal difficulties which plague their application here would not apply. Those fora are also in a position to fashion a much more comprehensive and appropriate solution to their grievances than could possibly be obtained in this proceeding, as well as one that is less likely to implicate the concerns of third parties seeking to maintain control over access to their own copyrighted works.

At the outset, submitters have not demonstrated a causal link between § 1201(a)(1)(A) and the substantial adverse impact on access to copyrighted material which they allege. The threshold question, of course, is whether it would violate that provision for mobile phone users to do what the submitters advocate, and even whether anyone other than themselves has claimed that it is or might be a violation of § 1201(a)(1)(A). A close review of the submission itself does not dispel doubts on this issue, but rather reinforces them.

Submitters assert that on one occasion in October 2005, a third party ("a business that distributes phone unlocking software," which does not describe either Wireless Alliance or Mr. Pinkerton) received a "legal threat" from a major mobile handset manufacturer. The submission asserts that the threat "claim[ed] Digital Millennium Copyright Act violations," but two sentences later concedes that "the threat did not identify a specific statute." C3 at 5. The attorney representing these submitters also represents the business that received the threat, and this attorney "believes that the manufacturer is claiming that provision of unlocking software, because it circumvents the software locks that control access to the mobile firmware, violates section 1201(b)."[50] *Id*.

In other words, neither submitter has adduced evidence that anyone has ever been threatened with liability under § 1201(a)(1)(A), the only DMCA provision relevant to this proceeding. The most that can be gleaned from the submission is that counsel to the submitters believes that a client of hers has been threatened with liability under § 1201(b). Of course, this a wholly different provision, and one entirely unrelated to this proceeding. 2005 NOI at 57527.

These facts provide virtually no support for a claim that is fundamental for anyone seeking an exemption in this proceeding: that whatever adverse impact on non-infringing use the submitters can prove is causally related to § 1201(a)(1)(A). While, of course, it is not necessary that a submitter actually have been sued for violating § 1201(a)(1)(A), or even directly threatened with such a suit, before he or she can seek an exemption from that provision in this proceeding, it is equally clear that the submitter must show that it is not making a "purely theoretical critique" of the potential scope of that provision. *Id*. at 57528.

Turning to the argument underlying this submission, it seems in effect obsolete, and is almost certain to become more outdated in the immediate future. In an era in which subscription to a mobile phone service basically purchased a dial tone and little more, the issue of which carrier's dial tone the user heard had few if any copyright implications. That era is fading fast and may soon be gone. The instrument through which mobile subscribers now receive their dial tone is not exclusively or even primarily a telephone, but also (and to an increasing extent, predominantly) a device for accessing, storing, and using copyrighted materials – music, sound recordings, entertainment and other software, and audio-visual material.[51] Increasingly, mobile telephone service is bundled with this contractual right to access works of authorship: the dial tone is a commodity but the main value of the transaction is in the copyright license and the

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[50] The submission also cites to an article published by counsel to the submitters which describes a cease and desist letter received, evidently in late September 2005, by a client of hers, in the business of selling software that unlocks mobile phones, under circumstances very similar to those described in the submission. The article describes the mobile phone provider as "turning to a provision of the Digital Millennium Copyright Act intended to prevent people from disabling technology that protects games, songs and movies from illegal duplication." *See* Jennifer S. Granick, *Free the Cell Phone!*, Wired News, Sept. 28, 2005, *available at* http://www.wired.com/news/culture/0,1284,68989,00.html. This description also more closely tracks § 1201(b) than § 1201(a).

[51] *See* ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *Digital Broadband Content: Mobile Content New Content for New Platforms*, 21-50 (2005) (describing a variety of developments in the "handsets designed for mobile content" industry). "Mobile devices today push the limits of multimedia functionality. Mobile devices perform multiple functions for the consumer, including voice and data (SMS, MSS and email) communications, photographs, music and games. As phones gain functionality, it is easier for users to obtain, use and generate mobile content." *Id.*

device that makes it possible to reap the benefits of that license. The relationship between mobile phone firmware and these copyrights is hardly "attenuated," as the submitters assert (C3 at 10); rather, this firmware is increasingly integrated with the rights management structure of a wide range of copyrighted materials.[52] In such circumstances, the ability to unilaterally reprogram the firmware may well extend to the ability to unilaterally revamp the permissions system for accessing and using ringtones, music samples, games, software, and video programming, whether already stored on the handset at the time of "unlocking" or later accessed by the user through either the old or new mobile service.

The submitters candidly concede that granting their exemption could "implicate copyrights, not of the carrier or manufacturer, but of their content partners that sell games, ringtones, photos, and videos for mobile devices." C3 at 10. They believe that they are avoiding this danger because the exemption would extend only to "circumvention of locking codes to access the class of computer programs that operate mobile devices," and because, they assert, it is only "other portions of the firmware" that control access to these other works. *Id*. This assertion must be viewed skeptically. For the modern "mobile devices" whose operation are at issue, their functions of accessing, receiving, playing back, storing and copying copyrighted materials may be controlled by the same programs that connect the user to the dial tone provided by a particular network. These developments are steadily diminishing the likelihood that an exemption such as the one sought here can be focused narrowly enough to avoid serious detrimental impacts on a dynamic new medium for content distribution – wireless distribution to mobile devices.

[52] *See id.* at 29 (discussing DRMs used to protect content on mobile devices and stating that effective DRMs are "crucial to the spread of mobile content").

C. *Clip compilation for educational uses*

Proposed Class: Audio visual works and sound recordings for the purpose of making clip compilations for educational use.

Initial Round Submissions: 2(5), 5(1), 28

Summary of Argument

Two submissions proposed similar, yet significantly distinguishable exemptions that we will address under this heading. We oppose the recognition of either proposal. The submissions of the Library Copyright Alliance and Music Library Association (C2) and University of Pennsylvania professors (C5) both "attempt to transform an essentially use based exemption into a class of works" and thereby fail to articulate an appropriate class. 2003 Rec. at 85. Both also fall short in articulating a clear noninfringing use on which the prohibition on the circumvention of access controls is having a substantial adverse impact; both fail to consider the readily available alternatives; and both overlook the "use facilitating" effects that access controls have had on the distribution of the relevant works as well as the danger posed to copyright owners should the requested exemptions be granted.

Argument

The Library Copyright Alliance (LCA) and Music Library Association (MLA) request an exemption for "[a]udiovisual works and sound recordings distributed in digital format when all commercially available editions contain access controls that prevent the creation of clip compilations and other educational uses." C2 at 4. Similar to some submissions rejected by the Register in 2003, the LCA and MLA have "packaged their proposed use-based exemptions by referring to certain types of works in an attempt to transform an essentially use-based exemption into a class of works more consistent with the requirements identified in the last rulemaking proceeding." 2003 Rec. at 85. The "and other educational uses" attached to the end of the proposed exemption is a clear indicator that the LCA and MLA seek a broad right to circumvent for educational purposes. Congress declined to recognize such an exemption when it enacted the DMCA in 1998, and did not give this proceeding the authority to recognize it either.

The University of Pennsylvania professors who filed submission 5 propose an exemption for "[a]udiovisual works included in the educational library of a college or university's film or media studies department and that are protected by technological measures that prevent their educational use." C5 at 4. Similar to the LCA and MLA proposal, the submission attempts to mask a use-based approach by selecting one specific type of work for which they seek an exemption for "educational use." The fact that the proposal attempts to limit the "class" to audiovisual works in the educational library of a college or university's film or media studies department further accentuates this deficiency by highlighting the precise type of users that the proposal seeks to exempt. However, as the Register has repeatedly made clear, "it is not permissible to classify a work by reference to the type of user or use (e.g., libraries, or scholarly research)." 2003 Rec. at 13.

In addition, the professors do not attempt to narrow their proposal further, as the LCA and MLA do, by limiting the exemption to works that are only available in formats containing access controls. Instead, the professors seek a much broader exemption because "the library of the University of Pennsylvania has put in place a policy requiring the purchase of audiovisual works on DVD, if the work is available on that format." C5 at 8. Thus, the submission seeks an extremely broad "class" due to a policy choice made by an educational institution not to use copies that lack access controls. Much of the harm that these submitters assert is attributable to that policy decision, not to § 1201(a)(1)(A). The lack of "a causal nexus between the prohibition on circumvention and the alleged harm" is fatal to the proposed exemption. 2003 Final Rule at 62012.

These submissions also fall short of articulating a specific noninfringing use that has experienced a substantial adverse effect as a result of access controls. Although the LCA/MLA submission references 17 U.S.C. § 110, that provision only authorizes teachers and students to perform or display lawful copies of works in a classroom setting; it in no way authorizes the copying of works. Seeking to justify the creation of clip compilations as fair use, the submission cites 17 U.S.C. § 107. However, the submission merely asserts that such copying is "unquestionably lawful" without providing an analysis of the four statutory factors or citing any case law in support. C2 at 7. In 2003, the Register stated that "it is improper in this context to generalize about the parameters of § 107. Fair use involves a case-by-case analysis that requires the application of the four mandatory factors to the particular facts of each particular use. Since disparate works may be involved … and the effect on the potential market for the work may vary, sweeping generalizations are unfounded." 2003 Rec. at 55. Although some of the copying that the LCA and MLA seek to aid may be fair, all educational copying is by no means a per se fair use.[53]

Submission 5 goes a step further by offering an analysis of the four statutory factors. C5 at 3-4. However, this analysis is based on educated guesses regarding the types of copying that users are likely to engage in based on the statements of the University of Pennsylvania professors. It then proceeds to equate "educational use" with limited copying of small portions of audiovisual works for the purpose of classroom display. As discussed above in reference to the LCA and MLA submission, educational copying is not per se fair.

Perhaps the most important flaw in the arguments for this exemption is that they fail to acknowledge the readily available alternative means by which the main noninfringing use in question (showing film clips in a classroom instructional setting) may be achieved without circumventing access controls. For example, with regard to audio-visual works, the Register recognized in 2003 that "analog copies can be made by using digital camcorders to record the rendering of these works on an ordinary television screen." 2003 Rec. at 116. Rather than circumventing CSS to make a clip compilation of works on DVDs, teachers can merely point a digital camcorder at a screen and record the portions of various films that they wish to show their classes. The submitters of Submission 5 complain about the quality of the resulting copies, but without acknowledging two critical conclusions of the last rulemaking proceeding. First, the Register correctly recognized in 2003, "[e]xisting case law is clear that there is 'no authority for the proposition that fair use, as protected by the Copyright Act, much less the Constitution,

[53] *See* H.R. REP. NO. 94-1476, at 68-74 (1976) (providing 'guidelines" for what educational uses were fair in 1976).

guarantees copying by the optimum method or in the identical format of the original.'" 2003 Rec. at 117 (quoting *Universal City Studios v. Corley*, 273 F.3d 429, 458 (2d Cir. 2001). Second, in the specific situation involved here, the Register relied upon the use of screenshots in 2003 after a persuasive presentation by the MPAA demonstrated that this method offers an effective alternative. *Id*. at 116 (citing the testimony of Fritz Attaway on May 2, 2003).

Nor are clip compilations the only alternative available. Educators are free to do as they have always done and screen the desired scenes in the classroom directly from DVD. Available devices allow a user to pre-mark scenes on DVD discs to cue automatically to the desired location.[54] A professor could cue up as many DVDs as she required, prior to the start of her class, and thereby avoid "wasting valuable class time." C2 at 5. DVD "jukeboxes" are also readily available in the market. Even if the teacher were required to use more than one DVD player in a single class session, this inconvenience does not rise to a level that would justify granting an exemption.

The University of Pennsylvania professors would also have the option, if their library's acquisition policy did not foreclose it, of using VHS copies of the works at issue. They assert that "the DVD format is fast becoming the only ready option for educators wishing to use these works in their teaching." C5 at 8. If that is true, it is only because of library acquisitions policies; it is not because the works are no longer available in VHS format. Appendix C of submission 5 lists about 710 film titles which constitute the full holdings of the Cinema Studies Collection of the University of Pennsylvania Library. We picked 70 of these titles (the 1st, 5th, 15th, 30th, and 40th titles listed on each page of Appendix C) and checked a handful of online sites where videos are sold. We found that every single one of the titles was available in VHS format.[55] This strongly suggests not only that the exemption sought by the professors is unnecessary to fulfill their goals, but also that the exemption sought by the LCA/MLA , which applies only "when all commercially available editions contain access controls," may apply to only a vanishingly small set of works.

A similar analysis is applicable to the sound recordings encompassed within the LCA/MLA proposed exemption. The vast majority of CDs at this time do not contain access controls that prevent the creation of clip compilations by educators, and there has been no showing that this situation is likely to change.[56] In any case, numerous alternatives are available that do not require circumvention of access controls, including analog clip compilations, using multiple CD players or drives with pre-cued CDs, and the audio equivalent of the "screenshot."

At bottom, these submissions ask the Register and the Librarian to grant an exemption in order to relieve educators of some degree of inconvenience. This request must be evaluated within the context of the other statutory factors of § 1201(a)(1)(C). As the Register has previously recognized, "permitting circumvention of CSS … would be likely to have an adverse effect on the availability of … DVDs to the public. As noted above, the motion picture industry's

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[54] Please see the 2006 reply comments of Time Warner for a thorough description of this technology.
[55] *See, infra*, Attachment B to these Joint Reply Comments.
[56] Instead, the submission merely asserts, after describing the inconveniences confronting teachers wishing to use clip compilations of films, that "[t]he same will be true in the very near future with respect to music teachers." C2 at 7. This is unquestionably insufficient to meet the evidentiary standards applicable to claims of "likely" future harm. 2005 NOI at 57528.

willingness to make audiovisual works available in digital form on DVDs is based in part on the confidence it has that CSS will protect it against massive infringement. Encouraging circumvention of CSS even for laudable goals threatens to undermine that confidence." 2003 Rec. at 120. Although educational uses are important and deserving of encouragement, the very medium that educators have grown to appreciate and desire to use in their classrooms would be threatened by the recognition of the requested exemption.

The threat to the success of this medium that digital piracy presents far outweighs the inconveniences to educators described in these submissions. While one submission suggests that widespread unauthorized distribution of audio visual works is unlikely to occur as a result of CSS circumvention at American universities, the likelihood that a student working in a university library and making clip compilations for a professor will decide to "share" a copy of a current movie title with the rest of the world via the Internet is not a far fetched possibility. In fact, it is very likely that such activity would result from the recognition of this proposal. Preventing such unauthorized online dissemination of works of authorship is one the main factors that motivated Congress to pass the DMCA. The substantial risk that recognition of the proposed exemption would undermine this critical goal makes a compelling argument for its rejection.

D. *Format shifting/platform shifting/personal use/fair use*

Proposed Class: works sought to be copied for personal use; such as space-shifting or format-shifting or time-shifting.

Initial Round Submissions: 12, 15, 17, 22, 23, 25, 27, 29, 30, 33, 34, 35, 41, 45, 46, 47, 48, 49, 52, 53, 54, 56, 59, 60, 61, 62, 64, 67, 68, 70, 71, 72, 73

Summary of Argument:

The exemptions proposed by these submissions are primarily based on a type of use rather than a particular class of works, and as such are inappropriate for this forum. Furthermore, the submissions fail to demonstrate that access controls are having, or are likely to have, a substantial adverse effect on any noninfringing use.

Argument

These submissions request exemptions already rejected, for the most part, by the Register in 2003. Generally they offer no new evidence or legal arguments or authorities in support of their requests. Several of the submissions request an exemption for all works for personal copying; including space-shifting or format-shifting. (15, 29, 30, 33, 41, 47, 52, 60, 61, 62, 64, 68, 71, 73).[57] However, other submissions request specific exemptions for these purposes for sound recordings and musical works - in CD and/or downloadable format (22, 23, 25, 27, 34, 33, 35, 45, 48, 49, 53, 67), motion pictures –in DVD and/or downloadable format (12, 22, 27, 35, 45, 48, 49), television and radio broadcasts (17, 27, 46, 48, 52, 56, 59), and audio books and ebooks (67). Many of the submissions assert that "shifting" of all kinds is within the bounds of fair use or seek exemptions for all fair uses in general (a request already twice rejected by the Register and the Librarian). However, none of the commenters have offered any support for the argument that space-shifting or format-shifting is necessarily a noninfringing use; much less that all forms of personal copying are fair.

The submissions fail to articulate a proper class of works. Rather than defining a class or classes based on "the attributes of the works themselves," they seek an exemption "by reference to some external criteria such as the intended use or users of the works." 2003 Rec. at 13. As a result, these submissions should be rejected as being outside the scope of this proceeding.

To the extent that the submissions articulate specific classes of works, they nevertheless fail to meet their burden of demonstrating a substantial adverse effect on a noninfringing use. The Register was right in 2003 to be "skeptical" of the merits of any fair use analysis that asserts that space-shifting or format-shifting is a noninfringing use. *Id*. at 130. This is particularly the case in today's market, where inexpensive legitimate digital copies of most types of works are readily available, and increasingly can be obtained through online download services. Where a

[57] Although some of these submissions request exemptions for "personal copying" generally, we take it that the types of copying they seek to engage in are space-shifting and format-shifting based on their comments. To the extent that some of the submissions intended to seek an exemption for the making of back-up copies, please see our discussion in section V(G).

market is functioning to serve the demand otherwise being fulfilled by unauthorized copying, the likelihood that the unauthorized copying is fair use is diminished.[58] In such a market, the inconvenience that faces consumers of works tethered to specific devices is far outweighed by the threat to the enjoyment of copyright posed by illegal digital distribution facing copyright owners. As the Register stated in 2003, "[c]ertainly, where the [unauthorized] online distribution of works is a potential concern, space-shifting will be incompatible with fair use." *Id*.

Furthermore, the submissions tend to assert that access controls are preventing them from space-shifting or format-shifting without providing any evidence that this is the case. For example, submitter Meyer (C67) claims that he "can no longer copy music from the cd to tape to play in [his] car or walkman" and that he "cannot load the music onto [his] laptop to listen while [he's] on a plane." Although Mr. Meyer does not offer specific examples of which CDs have caused him this difficulty, we know of no CDs currently in the market that use access controls that prevent the consumer from listening to the recording on a CD-drive within a laptop, nor from making an audio tape copy for use with a portable tape player.

While it is true that CSS prevents the space-shifting and format-shifting of motion pictures on DVDs, CSS is exactly the type of access control that Congress intended to encourage when it passed the DMCA. As the Register stated in 2003, "as a general proposition the DVD medium has increased the availability of motion pictures for sale and rental by the general public, and as noted above, the motion picture studios' willingness to distribute their works in this medium is due in part to the faith they have in the protection offered by CSS." *Id*. at 145.

The Register also recognized in 2003 that distributors of e-books have been willing to make digital copies of books available, in part, due to their ability to tether the works to specific devices and platforms. "By placing an ebook in a particular format for access only on a particular reader, the copyright owner has some assurance that this digital version of the work will obtain a predictable degree of protection." *Id*. at 127-28. An exemption allowing users to undo this protection would decrease the security of e-books and make it more difficult for copyright owners to continue distributing books in digital formats.

Similarly, copyright owners have relied on access controls, some of which are very flexible, while developing the market for online downloads over the past few years. Stripping copyright owners of the ability to manage access to works in digital formats could slow the rapid growth of this emerging distribution channel, to the detriment of all consumers. On the whole, the Register's observation in 2003 remains equally apposite today: "in essence, the commenters seek to have their cake and eat it too – they want copyright owners to provide works in digital formats, but do not want to live with the reasonable measures copyright owners feel they must take to guard against the risks that this digital distribution entails." *Id*. at 130.

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[58] *Cf.* American Geophysical Union v. Texaco, 60 F.3d 913, 931 (2d Cir. 1994) (finding that "it is sensible that a particular unauthorized use should be considered 'more fair' when there is no ready market or means to pay for the use, while such an unauthorized use should be considered 'less fair' when there is a ready market or means to pay for the use.").

Those submissions focusing on television and radio broadcasts may be placing far too much weight on the holding in the *Sony* Betamax case.[59] 2003 Rec. at 106, 139. That case dealt solely with the copying of free over-the-air analog television broadcasts for the purpose of time-shifting. Virtually by definition, such broadcasts are not subject to access controls, and thus the *Sony* precedent tells us very little about whether copying that can only take place after circumvention of access controls is non-infringing. As the Register noted in 2003, "recording freely available, over-the-air broadcasts for purposes of time-shifting viewing (but not librarying) as a fair use in a pre-Internet age does not lead to the conclusion that all 'shifting' is noninfringing, particularly considering that these works may just as easily be shifted to a peer-to-peer network ." 2003 Rec. at 139. Similarly, those submissions that target broadcast flag technology (e.g., C27, C46, C56) are at best premature; since no such flag regime has yet been adopted, it is impossible to determine whether such flags would have a substantial adverse effect on a noninfringing use. These submissions are clearly inappropriate for this forum, since they are based neither on actual adverse impacts nor on future impacts that can be demonstrated to be more likely than not to occur.

The confusion demonstrated in some of these submissions as to what uses have actually been determined by courts to be fair exemplifies why a broad exemption for all fair uses is properly outside of the bounds of this proceeding. Misunderstandings about the scope of § 107 are one reason why "it is improper in this context to generalize about the parameters of § 107." *Id*. at 55. As the Register stated in 2003, "this rulemaking is not the forum in which to break new ground on the scope of fair use." *Id*. at 106. She also concluded that "had Congress wished to exempt all circumvention when it is for the purpose of "noninfringing use" or "fair use", it could easily have done so. [The authority given to the Librarian in this proceeding] is not designed to accomplish that end, or even to accommodate such an end." *Id*. at 84.

[59] Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984).

E. *Works tethered to particular operating systems*

Proposed Class: Works which are tethered to operating systems or devices that prevent access on alternative operating systems or devices.

Initial Round Submissions: 12, 13, 14, 15, 23, 24, 30, 32, 39, 40, 41

Summary of argument:

These submissions seek, in one form or another, an exemption previously rejected by the Register in 2000 and 2003. They should be rejected again because the law does not require copyright owners to make their works available to consumers on the platform or device of their choosing. Especially where the market provides myriad choices for consumers, the inconveniences that some consumers may encounter are de minimis when they are compared to the threat of substantial harm confronting copyright owners.

Argument:

Several submissions in this category repeat concerns about playing DVDs on Linux operated computers which were already addressed by the Register in the 2000 and 2003 proceedings (12, 13, 14, 24, 32, 39, 41). Some submissions seek an exemption for all works that contain access controls that prevent a user from accessing the works on any platform of his choosing (15, 30, 41), another seeks a library specific exemption (40), and another focuses its complaints on the use of the .wma format for sound recordings (23). These submissions should be rejected for the same reasons that they were rejected previously. As the Register stated in 2000 and reiterated in 2003, "there is no unqualified right to access works on any particular machine or device of the user's choosing." 2000 Rec. at 64569; 2003 Rec. at 143. Copyright owners have never been legally required to enable access to their products from a multiplicity of platforms, and there have been no changes in the law or the marketplace that would justify a change in the Register's treatment of these submissions. In fact, the plethora of available devices for viewing DVDs and other works has grown since 2003, decreasing the already slight burden placed on consumers.

While at least some of these submissions seek to articulate a class of works (e.g., audio visual works on encrypted DVDs) and a noninfringing use (e.g., viewing DVDs so long as no copy is made in the process), they fail to demonstrate a substantial adverse effect on this use due to the prohibition on circumventing access controls.[60] Myriad platforms exist for viewing DVDs and other media. Over eighty million U.S. households now own a DVD player.[61] DVD players can be purchased for less than fifty dollars and portable DVD players can be purchased for less than one hundred dollars.[62] Despite the assertions of submission 32, portable DVD players are available with screen sizes similar to those of most lap top computers.[63] And, even if this were

[60] Submission 41 fails to articulate a class to the extent that he forms a class around the type of user or use rather than the class of works. In addition, submission 41 fails to articulate a noninfringing use to the extent that he wishes to make "copies of [works] for [his] own use." Such copying is not a per se fair use.
[61] *See* Carolipio, *supra* note 7.
[62] *See* Best Buy Homepage, http://www.bestbuy.com (offering a CyberHome DVD player for $39.99 and an Axion portable DVD player for 89.99 as of January 10, 2006).
[63] *See* http://www.amazon.com/gp/product/B0001W01LK/103-4543761-0934217?v=glance&n=172282 (describing the Toshiba SD-P5000 Portable 15" LCD TV / Progressive Scan DVD Combo).

not the case, viewing a DVD on a slightly smaller screen is undoubtedly a de minimis inconvenience.

In addition, the CSS license is not platform specific, and is available to licensees employing any technological platform. It does not discriminate against Linux systems.[64] As the Register recognized in 2003, if the philosophy behind the Linux platform is inconsistent with protecting copyrighted works, this is in no way the fault of copyright owners. *Id*. at 144. In fact, products available on the market, such as the MediaReady Digital Media Center product line from Video Without Boundaries, already include Linux-based DVD players, and current publicized developments indicate that consumers will have increased access to Linux-based DVD players in the near future.[65]

As the Register stated in 2003, "[w]hen the factors set forth in §1201(a)(1)(C) are taken into account, the balance falls fairly decisively against an exemption." *Id*. at 145. Access controls on digital works in general, and DVDs specifically, have greatly increased the availability of copyrighted works. They have not had a negative impact on nonprofit archival, preservation, and educational purposes or on criticism, comment, news reporting, teaching, scholarship, or research. And, the market in such works would be threatened by an exemption that allowed the circumvention of the very tools which encouraged copyright owners to make the works available in the first place.

There is certainly no legal requirement that copyright owners make digital works accessible by way of every device that a user may choose to utilize. The ability of copyright owners to tie the use of a work to a particular device is "use facilitating," and the explosion of digital content discussed previously in section III of these comments details the exciting marketplace that consumers now enjoy as a result.

"The balancing of the incremental benefit of allowing circumvention for the purposes of watching a movie on a Linux-based computer is outweighed by the threat of increased piracy that underlies Congress' motivation for enacting §1201." *Id*. at 146. This is also the case for other works. To the extent that some consumers are inconvenienced by the inability to access works on the device of their choosing, this inconvenience is overshadowed by the necessity of protecting digital works from widespread unauthorized distribution.

In a marketplace where consumers enjoy many choices when deciding how they wish to watch their DVDs and use their other lawfully purchased works, an exemption should not be granted to deny copyright owners the enjoyment of providing their works to the consumers in a manner consistent with their rights. Thus, we oppose the exemptions requested in these submissions.

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[64] *See* 2000 RC of DVD Copy Control Association (stating that the license is not specific to any particular operating system or similar platform, *available at* http://www.copyright.gov/1201/comments/reply/074hoy_dvdcca.pdf.

[65] *See* Press Release, Video Without Boundaries, VWB, Inc. Linux-based Media Centers to Support Apple iPod and iTunes, Google Video, AOL Optimized 9.0, and More (Dec. 29, 2005) (describing the Linux based MediaReady Digital Music Center); *see also* Robert Jaques, *Toshiba Switches on Linux DVD Players, available at* http://www.vnunet.com/vnunet/news/2141958/toshiba-switches-linux-dvd.

F . *Obsolete operating systems/hardware*

Proposed Class: Obsolete operating systems and hardware.

Initial Round Submission: 4(2), 19, 21

Summary of Argument:

While packaged, in at least one instance, as a modest expansion of an existing exemption, these proposals are actually much broader. Not only was this proposed exemption specifically rejected in 2003, the proposals closely resemble the platform and device shifting exemptions repeatedly rejected in the past. The exemptions could have a significant current market impact, especially on classic videogames, and proceed from the untested premise that an operating system constitutes an "access control" under the statute.

Argument:

Commenter Internet Archive seeks an exemption for "computer programs and video games distributed in formats that require obsolete operating systems or obsolete hardware as a condition of access." C4 at 12. Although the submission describes this proposed class as "a modest expansion" of the 2003 exemption for "computer programs protected by dongles that prevent access due to malfunction or damage and which are obsolete," the proposal is in fact much broader than the recognized exemption. *Id*. Whereas the current exemption only applies where a dongle is both obsolete and preventing access due to damage or malfunction, Internet Archive's proposal seeks an exemption for all obsolete operating systems and hardware that prevent access, regardless of whether they are damaged or malfunctioning. Not only does this expand the recognized class to include all types of hardware, rather than only dongles, it also brings all operating systems within its reach. To call this expansion modest is a misnomer.

As the Register recognized in 2003, there are serious consequences related to granting an overly broad exemption in this area. These consequences caused the Register to find that "the unavailability of dongle replacement or repair from the original vendor in and of itself is not sufficient to justify an exemption when the computer program and dongle are still providing access to a work." 2003 Rec. at 39. In addition, the Register stated that she did not "believe that an exemption is warranted simply when a dongle is malfunctioning or damaged, but where a replacement is reasonably available." *Id*. at 40. It was only where these two circumstances came together, and a dongle was both obsolete and malfunctioning or damaged that the Register found sufficient adverse impact on a noninfringing use and an insufficient threat to the copyright owner to exist to justify an exemption. An exemption for a broader class "would adversely affect the market for and value of software." *Id*. at 41.

Internet Archive now seeks precisely the sort of exemption that the Register rejected in 2003, without providing any compelling justification for why the Register should make such an about-face. Although the submission claims that this new proposal "should lead to no additional risk to the interest of copyright owners because … there is no consumer market for such works," this is inaccurate. C4 at 13. There is, in fact, a market for many of these works, particulary

videogames. The nostalgia that consumers carry for the videogames that they played in their youth often causes them to seek out the old video game systems and games that they played when they were younger.[66]

The only specific work discussed in the submission is *Robocop 3*. The Amiga and Commodore operating systems, for which *Robocop 3* was created, are available for purchase on oldsoftware.com. Since they are "reasonably available in the commercial marketplace," they are not actually obsolete under the definition of that term used in the existing exemption, and adapted from § 108 by the Register.[67] 2003 Rec. at 40. The enthusiasm for Amiga games also led the company to license the development of a new operating system, compatible with today's chips, that would also be capable of supporting play of many games previously released for use with the original operating system.[68] The Nintendo Revolution system is another example of nostalgia for back catalogue games encouraging copyright owners to release innovative new products which enable users to access all of their old favorites.[69] And, online sites such as GameTap and StarROMs allow consumers to play video game classics.[70] This type of rejuvenation, which is evidence that there is a strong consumer market for the type of works that Internet Archive seeks to exempt, could be threatened if the exemption were granted.

Moreover, even where old operating systems and hardware do become obsolete, this does not justify an exemption where old works are being repackaged in new platforms for commercial purchase. If a game like *Robocop 3* is re-released on a new gaming platform that uses a new operating system, consumers have access to the work and do not need an exemption. It bears repeating that, as the Register has stated, "[t]here is no unqualified right to access works on any particular machine or device of the user's choosing." 2000 Rec. at 64569; 2003 Rec. at 143. Where copyright owners have made new versions of games available on non-obsolete operating systems, the proposed exemption could inflict significant harm.

We appreciate that from the Internet Archive's perspective, "the exemption is intended only to permit archival activities," (C4 at 12), and perhaps that is how this particular submitter would use the exemption if it were granted. But the Register has repeatedly emphasized that in this proceeding, a "particular class of works" cannot validly be defined based upon "the status of

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[66] *See* Ina Fried, *Is Commodore Poised for a Comeback?*, CNet News.com, Dec. 16, 2005, *at* http://news.com.com/Is+Commodore+poised+for+a+comeback/2100-1041_3-5998732.html.

[67] *See* Amiga Computer Products, http://www.oldsoftware.com/Amiga.html. We acknowledge the legislative history, cited by the Register in her 2003 Recommendation, suggesting that a machine or device might not be "reasonably available" for purposes of applying the definition of "obsolete' in § 108 if it can only be purchased in "second-hand stores." 2003 Rec. at 54. We do not read this legislative history as dictating that a copyrighted work is also "obsolete" under the same circumstances. In this regard, we believe the reference in the 2003 Recommendation to this factor in determining the "obsoleteness" of a "*work*" is erroneous. *Id*. at 51. In any case it is not clear that oldsoftware.com is a "second hand store" within the meaning of the legislative history of § 108.

[68] *See Welcome to Amiga OS4.0*, http://www.hyperion-entertainment.com/; *see also* Stephen Shankland, *Welcoming Back an old Amiga*, CNet News.com, October 24, 2000, *available at* http://news.com.com/Welcoming+back+an+old+Amiga/2100-1040_3-247540.html?tag=nl.

[69] *See* Huge Revolution News Unleashed!, http://www.nintendo.com/newsarticle?page=newsArchive&articleid=5aa8631e-d4a0-45d9-a88c-e5931b807091&page=archive.

[70] *See* GameTap: Expand Your Playground, http://www.gametap.com/home/explore_gametap.jsp; *see also* StarROMs: Your Legal Source for MAME ROM Downloads, http://www.starroms.com/.

the user or the nature of the intended use." 2003 Rec. at 46. In the 2003 proceeding, the Register evaluated Internet Archive's proposed exemption as "dangerously close" to flouting this rule. *Id*. The proposal was only saved by judicious trimming carried out by the Register, notably including a restriction to "obsolete formats" which "help[ed] ensure that use of the exemption will likely be made only or at least largely by some libraries and archives, since consumers are less likely than libraries and archives to have an interest in using a copying out-of-date software and video games." *Id*. at 60. The facts about the thriving market in classic games cited above strongly suggest that, whatever the merits of this statement about the likelihood of who would use the 2003 exemption, it cannot validly be carried over to the expanded exemption that Internet Archive now seeks.

Furthermore, as the submitters candidly admit, the basic premise of the proposal – that operating systems are indeed access controls – is subject to dispute. Although some operating systems may have characteristics which would justify their classification as access controls under the statute, we know of no precedent for doing so. This fact in itself should place the submission's proposal, at least in part, outside of the scope of this proceeding.

Similarly, the submission provides little evidence of specific types of hardware which are access controls and which they seek to circumvent. The only hardware mentioned is the dongle on the *Robocop 3* game, and the circumstances under which dongles can be circumvented are comprehensively treated in an entirely different exemption. C4 at 14. The submission thus provides an extremely thin basis on which to justify an expansion of the current exemption to include all types of obsolete hardware regardless of whether they are damaged or malfunctioning.

In effect, this proposed exemption is akin to those discussed in the preceding section of this Joint Reply Comment, and relies upon some of the same flawed assumptions. Like many other submitters, they seek to circumvent access controls in order to port a copyrightable work from one device to another, or from one platform to another, asserting that such a use is non-infringing. The Internet Archive submission is more limited only in the sense that it characterizes the initial platform or device as obsolete. As the foregoing demonstrates, that characterization is factually dubious in the only specific example given in the submission; and even if it were true, that fact is not dispositive about the degree of impact of the migration on more modern versions of the same work that run on non-obsolete platforms. The uncertainty about this market impact is by itself sufficient to cast doubt on the assertion that such uses are necessarily non-infringing.

G. *Back up copies*

Proposed Class: Works sought to be used for personal use "back up" copying.

Initial Round Submissions: 9, 10, 11, 15, 16, 20, 35, 38, 40, 44, 50, 51, 53, 59, 65, 67, 70

Summary of Argument:

These submissions seek exemptions that were, for the most part, rejected by the Register and the Librarian in 2003. Although most of the submissions focus on the making of backup copies of all works for personal use (9, 15, 40, 44, 50, 51, 65, 70), one focuses on software and video games (20), two mention ebooks and audiobooks (40, 67), and several seek the exemption for sound recordings and audio visual works on CDs, DVDs, VHS tapes, etc. (10, 16, 38, 53, 59, 67). As the Register explained in her 2003 Recommendation, the making of back up copies for personal use has never been held to be a per se noninfringing use. 2003 Rec. at 106-08. Given that none of the submissions demonstrates that the state of the law has changed since 2003, we oppose the recognition of any of these exemptions.

Argument:

The first major deficiency of these submissions is their failure to articulate a proper "class of works." As the Register made clear in her 2003 Recommendation, "it is not permissible to classify a work by reference to the type of user or use." *Id*. at 13. The majority of the submissions requesting an exemption for the making of back up copies do exactly that. Rather than proposing a class, the submissions request an exemption for the making of back up copies in general. This is outside of the scope of this proceeding.

To the extent that any of the submissions do articulate classes of works, they fail to offer any argument or supporting authority that making back up copies is a noninfringing use of copyrighted material. Although some of the submissions assert that making back up copies has always been a recognized fair use (15, 16, 59), the Register's Recommendation in 2003 specifically rejected this assertion in regard to DVDs. *Id*. at 106. The justifications offered by the submissions for making back up copies mirror those offered in 2003: possible damage that would render a copy unusable and the convenience of travel copies. Neither of these justifications is compelling. None of the submissions provides evidence that any of the relevant media are "unusually subject to damage in the ordinary course of their use." *Id*. at 108. And, as the Register stated in 2003, to endorse copying for the convenience of travel "as noninfringing would be tantamount to sanctioning reproduction of all works in every physical location where a user would like to use the work, e.g., the purchase of a book would entitle the user to reproduce copies for multiple locations." *Id*.

In 2003, the Register based her finding that "no authority under current law … would justify an exemption to enable the making of backup copies of motion pictures on DVDs" on several features of the emerging DVD market. *Id*. at 107. The state of the more fully developed DVD market today has only made the argument against an exemption stronger. DVDs remain an incredibly popular medium that consumers are choosing over VHS copies, which indicates that

the majority of consumers are not encountering significant problems with damaged DVDs.[71] A plethora of online video download services also now exist and offer varying types of terms of use which provide consumers choices regarding what price they choose to pay for varying uses.[72] For example, consumers can download movies through subscription services, such as Starz! Ticket on Real Movies, and pay a reasonable monthly fee to access movies with no fear of damaged copies.[73] Consumers concerned about the ability to make backup copies may prefer subscribing to such services. In addition, the price of DVDs has declined, making it even more affordable for consumers to replace damaged copies of DVDs.[74] On the other side of the equation, widespread unauthorized distribution of motion pictures over the Internet remains a substantial threat to the success and future creativity of the motion picture industry. As the Register stated in 2003, granting an exemption "based on speculation of future failure" would "sanction widespread circumvention to facilitate reproduction for works that are currently functioning properly" and would merely exacerbate the threat that online piracy presents. *Id*.

To the extent that the submissions propose a similar exemption with regard to CDs, the Register's analysis of DVDs is equally applicable. The submissions provide no arguments or legal authority that making back up copies of CDs is a noninfringing use. In addition, the submissions provide no evidence that access controls are currently preventing them from making back up copies of CDs or that they are likely to do so in the future. Myriad online downloading services are available and offer varying types of digital rights management alternatives.[75] For example, the Apple FairPlay technology allows users to make a limited number of copies for personal use.[76] Presumably, consumers concerned with the ability to make back up copies would choose to purchase music from a service that allowed such copying. Even if CDs do become damaged, replacements are readily available at affordable prices. Similar to the motion picture industry, the recording industry has faced, in online piracy, a direct attack on its ability to enjoy its copyrights. Granting the requested exemption would further weaken the industry's ability to protect its copyrights in the digital marketplace.

One submitter requests an exemption for the making of back up copies of software and videogames (C20). The feature of the SecureRom and Star Force technologies which submitter Erickson attacks appears to be a copy control function, not an access control. As the Register stated in her 2000 Recommendation, "while the backup of [a videogame] may be a noninfringing use, no evidence has been presented that access control measures, as distinguished from copy

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[71] There are over 82 million Amerian Homes with DVD players. *See* Carolipio, *supra* note 7.

[72] Legal video downloading services include Akimbo, Atom Films, Cflix, CinemaNow, ifilm, iTunes-Videos, Movieflix, Movielink, Peer Impact, Ruckus, and STARZ! Ticket on RealMovies.

[73] *See* Unlimited Movie Downloads, http://starz.real.com/partners/starz/starz.html.

[74] The cost for replacement of a damaged DVD is even lower for titles issued by those studios that operate DVD replacement programs. For example, under the Disney program, damaged discs are replaced for a cost of $6.95, while the price tag under the Fox Home Entertainment program is $6.99. *See* Replacement Request Form, http://www.foxhome.com/replacement/; *see also* How Do I Replace a Damaged DVD?, http://disney.go.com/disneyvideos/dvdsupport/faq.html. Most of the major film distributors have similar programs.

[75] Legal music downloading services include iTunes, Yahoo, Napster, Virgin Digital, Rhapsody, Sony Connect, and emusic. Some services, such as Audio Lunchbox, do not place any DRM restrictions on use of their downloads. *See* Unrestricted Indie Music, http://www.audiolunchbox.com/.

[76] "FairPlay allows you to play your music on up to five computers at a time (and enjoy unlimited syncing with iPods), burn an unlimited number of individual songs to disc, and burn playlists up to seven times each." *See* Browse and Buy Music and Books, http://www.apple.com/support/ipod101/musicstore/3/.

control measures, have caused an inability to make a backup, and the latter is the more likely cause." 2000 Rec. at 64470. This language applies with equal force to Mr. Erickson's comments in this proceeding.[77] Furthermore, to the extent that access controls are involved, if they can be uninstalled with the authority of the copyright owner, and/or in a way that does not enable access to the work protected, then, as explained in section V-A supra, Sec. 1201(a)(1)(A) would have no applicability.

Similarly, the submission requesting an exemption for making backup copies of e-books and audio books (67) fails to provide an argument for why making back up copies of such works is a noninfringing use and also fails to provide evidence that access controls are preventing him from making backup copies. Audiobooks are offered through the iTunes service, which allows users interested in backup copying to make limited copies for personal use.[78]

In sum, all of the submissions focusing on exemptions for back up copying fail to demonstrate an actual or likely substantial adverse effect on a noninfringing use. In addition, most, if not all, of the submissions fail to articulate a class of works suitable for consideration in this proceeding. The current marketplace offers consumers a variety of choices in regards to the format in which they purchase copyrighted material, some of which allow some form of copying. Thus, we oppose the recognition of any of the classes proposed by these submissions, to the extent that any of them propose actual classes of works.

[77] Erickson's other concerns seem unrelated to the focus of this proceeding. However, for the record, they appear to be without merit. While some consumers may encounter errors with copy protection measures, almost all retail centers will allow a consumer to exchange a faulty disc for an identical (but working) replacement so they are not left "holding a $60 piece of plastic." Should a retail center not honor the exchange policy, a software publisher in almost all cases will. Optical discs are not indestructible and proper care should be taken when handling them. In the event that a disc does become damaged through acceptable use, almost all publishers will provide a replacement. The ability to make a backup copy is not as necessary as this submitter asserts.

[78] *See* One for the Books, http://www.apple.com/itunes/audiobooks/.

H. *Public domain material*

Proposed Class: Public domain material on DVDs.

Initial Round Submissions: 5(2), 37

Summary of Argument:

There are two submissions proposing slightly different exemptions for public domain material on DVDs. Both of the submissions propose exemptions which are very similar to proposals already rejected by the Register in 2003. Neither submission offers persuasive evidence as to why the Register's treatment of these proposals should differ from 2003. It remains the case that § 1201(a)(1) does not apply to access controls which prevent access to public domain works. However, where an access control protects a public domain work along with other copyrighted material, § 1201(a)(1) does apply. Nevertheless, a exemption allowing circumvention of access controls in such a circumstance is unnecessary because the "proponents have provided virtually no examples of public domain audiovisual works that are protected by access controls and not otherwise available." 2003 Rec. at 102. In addition, to the extent that the submitters are able to identify public domain works that are only available with access controls, they fail to take into account the fact that the works would likely not be available to the public at all if it were not for the DVD medium and the access controls that made a marketplace for that medium viable. We address each of the similar, yet substantially distinct, submissions separately in order to adequately address their differences.

Argument:

The first major deficiency with the proposal of the University of Pennsylvania professors (C5(2)) is that they fail to articulate a particular class of works. Instead, they "attempt to transform an essentially use based exemption into a class of works." 2003 Rec. at 85. Essentially, this proposal seeks an exemption to allow educational users to circumvent access controls used to protect all audiovisual derivative and collective works that contain some public domain material. The submitters argue that Congress intended that "a 'particular class of works' can be (and perhaps must be) defined partially in terms of a would-be user group's legitimate interest in access." C5 at 15. They apparently recognize that the Register, after an exhaustive analysis of the statute and legislative history, concluded otherwise (2003 Rec. at 11-13), but provide no compelling reason why that issue should be re-opened and that conclusion reversed.

Even if the submission did articulate a proper class of works, it is an extremely broad one. Audiovisual works in the public domain may include a brief newsreel clip in a documentary or a silent film image appearing in a dramatic production set in the early 20th century. The works in which these public domain elements appear may be incorporated, as "separate and independent works," into a collective whole[79]; or the elements may appear in a film that is based upon a pre-existing novel, and thus is a "derivative work," though not of anything that is in the public domain. In both these instances, the presence of a single public domain audio-visual element would sweep the collective or derivative work within the

[79] 17 U.S.C. § 101 (2005).

exemption these professors seek, and thus allow anyone to set its access controls at naught, at least for any "educational use," whether or not infringing of the work as a whole. Recognizing the exemption sought would cut a wide swath through the protections the copyright owners enjoy by releasing audio-visual works with access controls. At the same time, the submission fails to specifically identify the public domain works that are included in derivative or collective audiovisual works that educators are unable to copy because of access controls. It gives the examples of *Treasures from the American Film Archives* and the *Edison-The Invention of the Movies (1891-1918)* set as collective works which include some public domain works and are only available on DVD. However, the Joint Reply Commenters are advised by the publishers of both these compilations that these titles are not protected by copy controls and thus the educators are not prevented from copying the public domain works included in them.[80] If there are other examples of collective works containing public domain materials which are protected by copy controls, it should be recalled that both of the referenced collections are examples of materials that never would have been available if not for the advent of DVDs, and thus the net impact of technological protection measures on their availability is positive.

Even if educators are prevented from making clip compilations of public domain works[81] contained in such collections by access controls, they still have at their disposal the alternative methods that we discussed above in response to the request for exemptions for the creation of educational clip compilations. Educators can use the screen shot method, which the Register found to be sufficient in 2003 (2003 Rec. at 116), or utilize DVD players capable of pre-marking scenes on DVD discs to cue automatically to the desired location.[82]

Mr. Konop (C37) makes a similar proposal but does not base the class on the prevention of educational uses. Instead, Mr. Konop seeks a broad exemption for all public domain material, while he focuses on audiovisual works on DVDs. As the Register stated in 2003,

> there is considerable doubt whether the Librarian has the power to grant an exemption the sole purpose of which is to enable "noninfringing" uses of public domain works. The purpose of this rulemaking is to determine whether the prohibition on circumvention has adversely affected users "in their ability to make noninfringing uses under this title of a particular class of copyrighted works." Because public domain works are not copyrighted works, it does not appear that adverse effects on users' abilities to use public domain works can be considered.

2003 Rec. at 100.

To the extent that Mr. Konop does articulate a class of works cognizable in this proceeding, he nevertheless fails to provide any evidence that he is prevented from copying

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[80] *Cf.* PHR Steven Metalitz, July 10, 2003 at 3, *available at* http://www.copyright.gov/1201/2003/post-hearing/post14.pdf (stating that the *Treasures* set is not copy protected).

[81] The submitters' discussion of clip compilations is somewhat beside the point because the exemption they seek would allow copying of the derivative and collective works in their entirety. Here, we reiterate our concern that students, or others, would distribute copies of the protected works (that contain public domain elements) after engaging in circumvention allowed by this exemption, even if the initial purpose of the exemption was to carry out an "educational use" (which might itself be infringing).

[82] See our discussion in section V(C) for a more thorough treatment of this topic.

public domain works by access controls. All of the examples of public domain films on DVDs that Mr. Konop provides are also available on VHS.[83] As the Register stated in 2003, where alternative versions of a public domain work exists, "noninfringing uses appear to be unaffected by the prohibition on circumvention. Although the 'digital' version of a work may prevent certain noninfringing uses of that particular copy, that fact alone does not justify an exemption if other versions are unrestricted." *Id*. at 101. Although Mr. Konop objects that VHS copies are "substandard" versions of DVDs, there is no legal obligation requiring distributors to make public domain works available in a digital format. And to the extent that a film is in the public domain, and unaccompanied by other copyrighted material, § 1201(a)(1)(A) does not prevent Mr. Konop from circumventing technological protections in order to copy the public domain material.

[83] *See* http://www.amazon.com/exec/obidos/ASIN/B000094J7A/imdb-adbox/103-4543761-0934217 (offering *Blind Husbands* on VHS); *see also* http://www.amazon.com/exec/obidos/ASIN/B000094J7A/imdb-adbox/103-4543761-0934217 (offering *The Great Gabbo* on VHS); *see also* http://www.amazon.com/exec/obidos/ASIN/B00009XN8Z/qid%3D1136933039/sr%3D11-1/ref%3Dsr%5F11%5F1/103-4543761-0934217 (offering *Assunta Spina* on VHS).

I. *Miscellaneous*

Initial Round Submissions: 55, 58, 69, 72

Summary of Argument:

None of the proposals made in these submissions should be recognized. Submissions 55, 58, 69 and 72 fail to articulate classes of works or noninfringing uses.

Argument:

Submission 55 seeks an exemption for "any digital work" where an end-user license agreement (EULA) prohibits "publishing benchmarking results or criticism…" This submission fails to articulate a particular class of works because it seeks an exemption for all works. In addition, the submission does not provide any specific example of a EULA that prohibits him from making any noninfringing uses, and he fails to establish that § 1201(a)(1)(A) has any connection to his complaints. The content of EULAs between consumers and copyright owners is outside of the scope of this proceeding. 2003 Rec. at 149.

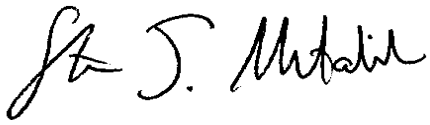
Submission 58 proposes that all copyrighted works which have been available for purchase for more than one year be exempt from § 1201's prohibition on the circumvention of access controls. Such a request fails to identify a particular class of works in that it does not start with a § 102 category of works. 2003 Rec. at 12. It also fails to identify any specific non-infringing use that it claims has been adversely impacted by § 1201.

Submission 69 clearly exceeds the scope of this proceeding – "all digital works" is not a "particular class of works." This submitter wishes to avoid transactions in which he must disclose his identity in order to acquire copyrighted materials. While this may foreclose some online transactions, including some in which access control measures are used, there are many other ways in which copyrighted works can be obtained. In enacting § 1201, Congress considered the impact on personal privacy, and provided a statutory exception for disabling surreptitious collections of personally identifiable information in some circumstances. 17 USC § 1201(i). If this submitter finds this exception too narrow, his resort must be to Congress, not to this proceeding. Mr. Patrick also complains that his ability to lend a copy of a work to a friend is being frustrated, but never explains how access control measures are having this effect (clearly many works in digital form, such as a CD or DVD, can be lent freely) or how an exemption allowing circumvention of those measures would solve the problem. Finally, his objection to "lawmaking" by copyright owners on the issues of privacy and lending concludes that "the DMCA hampers legislative and practical means to redress these problems," but this concern extends far beyond the jurisdiction of this proceeding.

Similarly, submission 72 complains of being prevented from making uses that may well be infringing, but that in any event are not prevented by access controls. First, Mr. Hall wishes to be able to provide samples of the music on CDs he owns to prospective buyers of those CDs. Although the first sale doctrine protects Mr. Hall's right to resell his CDs, it does not authorize him to stream music clips of musical works or offer downloads of parts of the recording in

furtherance of a sale. Recognizing an exemption for such a purpose would legitimize widespread distribution of copyrighted works over the Internet. The submitter does not explain how the prohibition on circumvention of access controls is preventing him from making this use in any case. Mr. Hall's second proposal, an exemption to allow him to copy vinyl records onto CDs and then sell both the analog and digital copies, far exceeds the first sale doctrine and is clearly infringing. In any event there does not seem to be an access control on the records that prevents this activity.

Respectfully submitted,



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Counsel to Joint Reply Commenters:

AAP: Association of American Publishers
AAUP: Association of American University Presses
ASMP: American Society of Media Photographers
The Authors Guild, Inc.
BSA: Business Software Alliance
DGA: Directors Guild of America
ESA: Entertainment Software Association
IFTA: Independent Film & Television Alliance
MPAA: Motion Picture Association of America
NMPA: National Music Publishers' Association
PPA: Professional Photographers of America
RIAA: Recording Industry Association of America
SAG: Screen Actors Guild
SIIA: Software and Information Industry Association

[*] Counsel gratefully acknowledges the assistance of Matthew Williams, law clerk, Smith & Metalitz LLP, in the preparation of these Joint Reply Comments.

Attachment A

AAP: Association of American Publishers

The Association of American Publishers, Inc. is the principal national trade association for the U.S. book publishing industry, representing more than 300 commercial and non-profit member companies, university presses, and scholarly societies that publish books and journals in every field of human interest. In addition to their print publications, many AAP members are active in the emerging market for e-books, while also producing computer programs, databases, and a variety of multimedia works for use in online, CD-ROM and other digital formats.

AAUP: Association of American University Presses

The Association of American University Presses' 120 members represent a broad spectrum of non-profit scholarly publishers affiliated with both public and private research universities, research institutions, scholarly societies, and museums. Collectively, they publish about 10,000 books and 700 scholarly journals each year.

ASMP: American Society of Media Photographers

ASMP is a non-profit trade association founded in 1944 by a handful of the world's leading photojournalists to protect and promote the rights of photographers whose work is primarily for publication. Today, ASMP is the largest organization of editorial and media photographers in the world, with 40 chapters in this country and over 5000 members in the United States and more than 30 other countries. Its members are the creators of the most memorable images found in newspapers, advertising, magazines, books, multimedia works, and Internet web sites.

The Authors Guild, Inc.

The Authors Guild, Inc., founded in 1912, is a national non-profit association of more than 8,000 professional, published writers of all genres, including journalists, historians, biographers, academicians from many fields of study, and other authors of nonfiction and fiction.

BSA: Business Software Alliance

BSA is the foremost organization dedicated to promoting a safe and legal digital world. BSA is the voice of the world's commercial software industry and its hardware partners before governments and in the international marketplace. Its members represent one of the fastest growing industries in the world. BSA programs foster technology innovation through education and policy initiatives that promote copyright protection, cyber security, trade and e-commerce.

DGA: Directors Guild of America

The Directors Guild of America represents 13,433 directors and members of the directorial team who work in feature film, film/taped and live television, commercials,

documentaries, and news. DGA represents and protects its members' collective bargaining and creative/artistic rights, serving as an advocate for their rights within the industry, before Congress, state legislatures, judicial proceedings, and in international policy fora.

ESA: Entertainment Software Association

The ESA is the U.S. association dedicated to serving the business and public affairs needs of the companies publishing interactive games for video game consoles, handheld devices, personal computers, and the Internet. ESA members collectively account for more than 90 percent of the $7.3 billion in entertainment software sales in the U.S. in 2004, and billions more in export sales of American-made entertainment software. The ESA offers services to interactive entertainment software publishers including a global anti-piracy program, owning the Electronic Entertainment Expo trade show, business and consumer research, government relations and First Amendment and intellectual property protection efforts.

IFTA: Independent Film & Television Alliance

The Independent Film & Television Alliance (formerly AFMA) is the global trade association of the independent motion picture and television programming industry. Headquartered in Los Angeles, the organization represents and provides significant entertainment industry services to more than 150 member companies from 15 countries, consisting of independent production and distribution companies, sales agents, television companies, studio-affiliated companies, and financial institutions engaged in film finance. Forty percent of the Independent Film & Television Alliance's membership and thirty percent of the association's board of directors are from outside the U.S. Collectively, the Independent Film & Television Alliance's members produce more than 400 independent films and countless hours of television programming each year and generate more than $4 billion in distribution revenues annually.

MPAA: Motion Picture Association of America

MPAA is a trade association representing major producers and distributors of theatrical motion pictures, home video material and television programs. MPAA members include: Metro-Goldwyn-Mayer Studios Inc., Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLLP, The Walt Disney Company, and Warner Bros. Entertainment Inc.

NMPA: National Music Publishers' Association

Founded in 1917, The National Music Publishers' Association (NMPA) is a trade association representing over 600 American music publishers. The NMPA's mandate is to protect and advance the interests of music publishers and their songwriter partners in matters relating to the domestic and global protection of music copyrights. Music publishers control the copyrights for the underlying compositions of songs on behalf of the songwriters they represent. The NMPA is the leading trade association in the United States for music publishers, and advocates for their interests, as well as for their songwriter partners, by protecting, upholding,

and advancing their valuable copyrights. The Harry Fox Agency, Inc., a subsidiary of the NMPA, is the premier U.S. mechanical rights organization.

PPA: Professional Photographers of America

Professional Photographers of America is the world's oldest and largest non-profit trade association for professional photographers. Consisting of some 15,000 individual members who are engaged in every aspect of photography and imaging, PPA also includes nearly 200 independent photography organizations that have elected to affiliate themselves with the association. For more than 125 years, PPA has dedicated its efforts to protecting the rights of photographers and to creating an environment in which these members can reach their full business and creative potential.

RIAA: Recording Industry Association of America

The Recording Industry Association of America is the trade group that represents the U.S. recording industry. RIAA® members create, manufacture and/or distribute approximately 90% of all legitimate sound recordings produced and sold in the United States.

SAG: Screen Actors Guild

Screen Actors Guild is a labor union, representing over 120,000 professional actors who work in motion pictures, television programs, commercials and interactive media. Affiliated with the AFL-CIO, Screen Actors Guild represents its members through: negotiation and enforcement of collective bargaining agreements for compensation, benefits, and working conditions for professional performers. SAG is active is organizing new media and pursing public policy on behalf of its members and is proud to be a part of the labor movement.

SIIA: Software and Information Industry Association

SIIA represents over 700 companies that develop and market software and electronic content for business, education, consumers and the Internet. Membership includes some of the largest and oldest technology enterprises in the world, as well as many smaller and newer companies.

Attachment B

VHS Availability of Selected DVD Titles in Cinema Studies Collection, University of Pennsylvania Library

Methodology:

Appendix C of initial round Submission 5 lists about 710 film titles which constitute the full holdings of the Cinema Studies Collection of the University of Pennsylvania Library. For 70 of these titles (the 1st, 5th, 15th, 30th, and 40th titles listed on each page of Appendix C), Joint Reply Commenters checked a handful of online sites for availability of titles in VHS format. Results follow.

Film Title	Director	URL for the VHS sale
Abigail's Party	LEIGH, Mike	http://www.amazon.com/exec/obidos/tg/detail/-/B000006E1Q/qid=1137608393/sr=1-1/ref=sr_1_1/103-5852304-4876642?v=glance&s=video
Age D'Or, L'	BUNUEL, Luis	http://www.amazon.com/exec/obidos/ASIN/B00064AMBW/qid%3D1137608531/sr%3D11-1/ref%3Dsr%5F11%5F1/103-5852304-4876642
Amadeus	FORMAN, Milos	http://www.amazon.com/exec/obidos/tg/detail/-/6302842557/qid=1137608774/sr=1-1/ref=sr_1_1/103-5852304-4876642?v=glance&s=video
Applause	MAMOULIAN, Rouben	http://www.amazon.com/exec/obidos/tg/detail/-/B0000UX4VW/qid=1137608814/sr=1-1/ref=sr_1_1/103-5852304-4876642?v=glance&s=video
Bank Dick, The	CLINE, Edward	http://www.amazon.com/exec/obidos/tg/detail/-/630018305X/qid=1137608854/sr=1-1/ref=sr_1_1/103-5852304-4876642?v=glance&s=video
Bay of Angels	DEMY, Jacques	http://www.buyindies.com/listings/5/9/FCT4-59563.html
Before Sunrise	LINKLATER, Richard	http://www.amazon.com/exec/obidos/tg/detail/-/6303483712/qid=1137609054/sr=1-1/ref=sr_1_1/103-5852304-4876642?v=glance&s=video
Big Deal on Madonna Street	MONICELLI, Mario	http://www.amazon.com/exec/obidos/ASIN/6303818331/qid%3D1137609035/sr%3D11-1/ref%3Dsr%5F11%5F1/103-5852304-4876642
Blood Simple	COEN, Joel	http://www.amazon.com/exec/obidos/tg/detail/-/6300184110/qid=1137609088/sr=1-1/ref=sr_1_1/103-5852304-4876642?v=glance&s=video
Boycott	MAKHMALBAF, Mohsen	http://www.amazon.com/exec/obidos/tg/detail/-/B00005JHAR/qid=1137609180/sr=1-3/ref=sr_1_3/103-5852304-4876642?v=glance&s=video
Casablanca	CURTIZ, Michael	http://www.amazon.com/exec/obidos/tg/detail/-/6302482585/qid=1137609256/sr=1-1/ref=sr_1_1/103-5852304-4876642?v=glance&s=video
Charade	DONEN, Stanley	http://www.amazon.com/exec/obidos/tg/detail/-/B00005LC6T/qid=1137609313/sr=1-3/ref=sr_1_3/103-5852304-4876642?v=glance&s=video
City Lights	CHAPLIN, Charlie	http://www.amazon.com/exec/obidos/tg/detail/-/6302561833/qid=1137609380/sr=1-1/ref=sr_1_1/103-5852304-

Film Title	Director	URL for the VHS sale
		4876642?v=glance&s=video
Cook, the Thief, his Wife, and Her Lover, The…	GREENWAY, Peter	http://www.amazon.com/exec/obidos/tg/detail/-/B000059PQV/qid=1137609501/sr=1-4/ref=sr_1_4/103-5852304-4876642?v=glance&s=video
Damned, The	VISCONTI, Luchino	http://www.amazon.com/exec/obidos/tg/detail/-/6300268551/qid=1137609627/sr=1-3/ref=sr_1_3/103-5852304-4876642?v=glance&s=video
Decameron, The	PASOLINI, Pier Paolo	http://www.amazon.com/exec/obidos/tg/detail/-/6301149580/qid=1137609831/sr=1-2/ref=sr_1_2/103-5852304-4876642?v=glance&s=video
Diary of a Chambermaid	BUNUEL, Luis	http://www.amazon.com/exec/obidos/tg/detail/-/0782008453/qid=1137609872/sr=1-1/ref=sr_1_1/103-5852304-4876642?v=glance&s=video
Donnie Darko	Kelly	http://www.amazon.com/exec/obidos/tg/detail/-/B00006G8O1/qid=1137609897/sr=1-1/ref=sr_1_1/103-5852304-4876642?v=glance&s=video
Elephant	Van Sant	http://www.amazon.com/exec/obidos/tg/detail/-/B0001EQIL0/qid=1137609919/sr=1-4/ref=sr_1_4/103-5852304-4876642?v=glance&s=video
Eyes Without a Face	Franju	http://www.amazon.com/exec/obidos/tg/detail/-/6301304993/qid=1137609954/sr=1-1/ref=sr_1_1/103-5852304-4876642?v=glance&s=video
Fidanzati, I	Olmi	http://www.buyindies.com/listings/2/2/FCTS-22562.html
Firemen's Ball, The	FORMAN, Milos	http://www.amazon.com/exec/obidos/tg/detail/-/0780023633/qid=1137610039/sr=1-1/ref=sr_1_1/103-5852304-4876642?v=glance&s=video
400 Blows, The	TRUFFAUT Francois	http://www.amazon.com/exec/obidos/tg/detail/-/1572524448/qid=1137610074/sr=1-1/ref=sr_1_1/103-5852304-4876642?v=glance&s=video
Generation, A	WAJDA, Andrzej	http://www.amazon.com/gp/product/offer-listing/6303031374/ref=dp_pb_a//103-5852304-4876642?condition=all
Giant	Stevens	http://www.amazon.com/exec/obidos/tg/detail/-/6304252013/qid=1137610142/sr=1-3/ref=sr_1_3/103-5852304-4876642?v=glance&s=video
Grand Illusion	RENOIR, Jean	http://www.amazon.com/exec/obidos/tg/detail/-/6302919630/qid=1137610256/sr=1-1/ref=sr_1_1/103-5852304-4876642?v=glance&s=video
Grey Gardens	Maysles	http://www.amazon.com/exec/obidos/ASIN/B00005KHLN/qid%3D1137610323/sr%3D11-1/ref%3Dsr%5F11%5F1/103-5852304-4876642
Harder They Come, The	HENZELL, Perry	http://www.amazon.com/exec/obidos/tg/detail/-/630537189X/qid=1137610384/sr=1-1/ref=sr_1_1/103-5852304-4876642?v=glance&s=video
Hours, The	Daldry	http://www.amazon.com/exec/obidos/tg/detail/-/B0000AUHOQ/qid=1137610404/sr=1-3/ref=sr_1_3/103-5852304-4876642?v=glance&s=video
Importance of Being Earnest, The	ASQUITH, Anthony	http://www.amazon.com/exec/obidos/tg/detail/-/0792844629/qid=1137610471/sr=1-1/ref=sr_1_1/103-5852304-4876642?v=glance&s=video
Irma La Douce	WILDER, Bill	http://www.amazon.com/exec/obidos/tg/detail/-/6304508484/qid=1137610505/sr=1-2/ref=sr_1_2/103-5852304-4876642?v=glance&s=video

Film Title	Director	URL for the VHS sale
Ivan the Terrible	EISENSTEIN, Sergei	http://www.amazon.com/exec/obidos/tg/detail/-/6301815785/qid=1137610952/sr=1-3/ref=sr_1_3/103-5852304-4876642?v=glance&s=video
Kandukondain Kandukondain	MENON	http://www.kino.com/video/item.php?product_id=845
L.A. Confidential	HANSON, Curtis	http://www.amazon.com/exec/obidos/tg/detail/-/0790734834/qid=1137610993/sr=1-2/ref=sr_1_2/103-5852304-4876642?v=glance&s=video
League of their Own, A	Marshall	http://www.amazon.com/exec/obidos/tg/detail/-/6302655862/qid=1137611023/sr=1-1/ref=sr_1_1/103-5852304-4876642?v=glance&s=video
Like Water for Chocolate	Arau	http://www.amazon.com/exec/obidos/tg/detail/-/6303153356/qid=1137611390/sr=1-1/ref=sr_1_1/103-5852304-4876642?v=glance&s=video
Lola	DEMY, Jacques	http://www.amazon.com/exec/obidos/tg/detail/-/630191029X/qid=1137611521/sr=1-1/ref=sr_1_1/103-5852304-4876642?v=glance&s=video
Lost in La Mancha	Fulton	http://www.amazon.com/exec/obidos/tg/detail/-/B000096FUE/qid=1137611551/sr=1-1/ref=sr_1_1/103-5852304-4876642?v=glance&s=video
Man and a Woman, A	Lelouch	http://www.amazon.com/exec/obidos/tg/detail/-/6300271226/qid=1137611586/sr=1-4/ref=sr_1_4/103-5852304-4876642?v=glance&s=video
Marriage of the Blessed	MAKHMALBAF, Mohsen	http://www.amazon.com/exec/obidos/ASIN/B00005JHAP/qid%3D1137611621/sr%3D11-1/ref%3Dsr%5F11%5F1/103-5852304-4876642
Mighty Wind, A	Guest	http://www.amazon.com/exec/obidos/ASIN/B0000ALFVE/qid%3D1137611675/sr%3D11-1/ref%3Dsr%5F11%5F1/103-5852304-4876642
Mirror, The	Panahi	http://www.buyindies.com/listings/4/0/FCTS-40265.html
Musashi Miyamoto	Inagaki	http://www.amazon.com/exec/obidos/tg/detail/-/6302969328/qid=1137611740/sr=1-1/ref=sr_1_1/103-5852304-4876642?v=glance&s=video
Night and Fog	Resnais	http://www.amazon.com/exec/obidos/ASIN/0780020227/qid%3D1137611762/sr%3D11-1/ref%3Dsr%5F11%5F1/103-5852304-4876642
Notorious	HITCHCOCK, Alfred	http://www.amazon.com/exec/obidos/tg/detail/-/6301798503/qid=1137611789/sr=1-1/ref=sr_1_1/103-5852304-4876642?v=glance&s=video
Opening Night	CASSAVETES, John	http://www.amazon.com/exec/obidos/tg/detail/-/630276906X/qid=1137611822/sr=1-1/ref=sr_1_1/103-5852304-4876642?v=glance&s=video
Orphans of the Storm	GRIFFITH, D.W.	http://www.amazon.com/gp/product/offer-listing/6302054451/ref=dp_pb_a//103-5852304-4876642?condition=all
Peeping Tom	Powell	http://www.amazon.com/exec/obidos/tg/detail/-/6302969255/qid=1137611872/sr=1-1/ref=sr_1_1/103-5852304-4876642?v=glance&s=video
Postino, Il	RADFORD, Michael	http://www.amazon.com/exec/obidos/tg/detail/-/6303977898/qid=1137611933/sr=1-1/ref=sr_1_1/103-5852304-4876642?v=glance&s=video
Protest	Kimiaee	http://www.iranianmovies.com/Merchant2/merchant.mvc?Screen=PROD&Store_Code=IranMall&Product_Code=135
Rebecca	HITCHCOCK, Alfred	http://www.amazon.com/exec/obidos/tg/detail/-/6301670140/qid=1137612039/sr=1-1/ref=sr_1_1/103-5852304-4876642?v=glance&s=video

Film Title	Director	URL for the VHS sale
Red and the White, The	JANCSO, Miklos	http://www.amazon.com/exec/obidos/tg/detail/-/6301696859/qid=1137612092/sr=1-3/ref=sr_1_3/103-5852304-4876642?v=glance&s=video
Rock, The	BAY, Michael	http://www.amazon.com/exec/obidos/tg/detail/-/6304258984/qid=1137612127/sr=1-1/ref=sr_1_1/103-5852304-4876642?v=glance&s=video
Sacrifice	TARKOVSKY, Andrei	http://www.amazon.com/exec/obidos/tg/detail/-/6304574657/qid=1137612155/sr=1-6/ref=sr_1_6/103-5852304-4876642?v=glance&s=video
Say Anything	CROWE, Cameron	http://www.amazon.com/exec/obidos/tg/detail/-/6301412761/qid=1137612210/sr=1-1/ref=sr_1_1/103-5852304-4876642?v=glance&s=video
Secrets and Lies	Leigh	http://www.amazon.com/exec/obidos/tg/detail/-/6304393121/qid=1137612501/sr=1-1/ref=sr_1_1/103-5852304-4876642?v=glance&s=video
Seven	Fincher	http://www.amazon.com/exec/obidos/tg/detail/-/630394518X/qid=1137612522/sr=1-5/ref=sr_1_5/103-5852304-4876642?v=glance&s=video
Short Cuts	ALTMAN, Robert	http://www.amazon.com/exec/obidos/tg/detail/-/6303995705/qid=1137612548/sr=1-1/ref=sr_1_1/103-5852304-4876642?v=glance&s=video
Spellbound	HITCHCOCK, Alfred	http://www.amazon.com/exec/obidos/tg/detail/-/6301670159/qid=1137612581/sr=1-1/ref=sr_1_1/103-5852304-4876642?v=glance&s=video
Strangers on a Train	HITCHCOCK, Alfred	http://www.amazon.com/exec/obidos/tg/detail/-/6305076170/qid=1137612615/sr=1-2/ref=sr_1_2/103-5852304-4876642?v=glance&s=video
Supplement Fassbinder Trilogy	FASSBINDER, Rainer W.	http://www.amazon.com/exec/obidos/tg/detail/-/6302348730/ref=imdbdpov_vhs_1/103-5852304-4876642?%5Fencoding=UTF8&v=glance, http://www.amazon.com/exec/obidos/tg/detail/-/6302180244/ref=pd_sim_video_1/103-5852304-4876642?v=glance&s=video, http://www.learmedia.ca/product_info.php/products_id/219
Talk to Her	ALMODOVAR, Pedro	http://www.amazon.com/exec/obidos/ASIN/B00008R9LY/qid%3D1137613378/sr%3D11-1/ref%3Dsr%5F11%5F1/103-5852304-4876642
That Obscure Object of Desire	BUNUEL, Luis	http://www.amazon.com/exec/obidos/tg/detail/-/6303413234/qid=1137613406/sr=1-1/ref=sr_1_1/103-5852304-4876642?v=glance&s=video
Time Regained	RUIZ, Raoul	http://www.amazon.com/exec/obidos/tg/detail/-/B0000584ZE/qid=1137613444/sr=1-1/ref=sr_1_1/103-5852304-4876642?v=glance&s=video
Touchez Pas Au Grisbi	BECKER, Jacques	http://www.amazon.com/exec/obidos/ASIN/1572524413/qid%3D1137613470/sr%3D11-1/ref%3Dsr%5F11%5F1/103-5852304-4876642
21 Grams	Inarritu	http://www.amazon.com/exec/obidos/ASIN/B0001WZUP2/qid%3D1137613499/sr%3D11-1/ref%3Dsr%5F11%5F1/103-5852304-4876642
Under the Roofs of Paris	Clair	http://www.amazon.com/exec/obidos/tg/detail/-/078002303X/qid=1137613520/sr=1-1/ref=sr_1_1/103-5852304-4876642?v=glance&s=video
Victoria and Albert, I	ERMAN, John	http://www.amazon.com/exec/obidos/tg/detail/-/1577423291/qid=1137613551/sr=1-5/ref=sr_1_5/103-5852304-4876642?v=glance&s=video
Wild Bunch, The	Peckinpah	http://www.amazon.com/exec/obidos/tg/detail/-/B000006FXP/qid=1137613591/sr=1-2/ref=sr_1_2/103-5852304-4876642?v=glance&s=video

Film Title	Director	URL for the VHS sale
Woman is a Woman, A	GODARD, Jean-Luc	http://www.amazon.com/exec/obidos/tg/detail/-/1572523565/qid=1137613623/sr=1-2/ref=sr_1_2/103-5852304-4876642?v=glance&s=video