

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

In the Matter of :
: :
Exemption to Prohibition on Circumvention : Docket No. RM 2008-8
of Copyright Protection for Access Control :
Technologies :
_____ :

**REPLY COMMENTS OF THE
ADVANCED ACCESS CONTENT SYSTEM LICENSING ADMINISTRATOR**

Pursuant to the Notice of Inquiry (“Notice”) that the United States Copyright Office (“Office”) published in the Federal Register on October 6, 2008, and the Notice of Proposed Rulemaking published by the Office in the December 29, 2008 Federal Register, the Advanced Access Content System Licensing Administrator, LLC (“AACSLA”), by and through its attorneys, submits the following comments addressing initial comments that proposed exemptions from the “anti circumvention” prohibitions found in the Digital Millennium Copyright Act of 1998 (“DMCA”) for certain “classes of works,” access to which is protected by the Advanced Access Content System (“AACSLA”). Below the AACSLA specifically responds to certain initial comments requesting exemptions for (1) creating clip compilations from or using portions of DVDs for various types of uses (including individual uses and educational uses); (2) audiovisual works embedded in a physical medium which are marked for “down-conversion” or “down-resolutioning”; (3) allowing users and consumers of DRM-protected media to continue to access their lawfully purchased and non-infringing content in situations where the

authentication servers on which their access relies stop working; and (4) allowing researchers in good faith to study, analyze, and document the protection measures when needed, without fear of jeopardy for any necessary circumvention that is part of the research process.

I. THE AACCS LA

Founded in 2004, AACCS LA is a cross-industry effort founded by members from key industry sectors including studios, consumer electronics (“CE”), and information technology (“IT”). AACCS LA develops, promotes and licenses technologies designed to enhance digital entertainment experiences. This technology facilitates the ability to offer exciting, new, flexible entertainment experiences for consumers to enjoy in stand-alone, networked home and portable device environments.

AACCS LA developed AACCS, a specification for managing content stored on the next generation of prerecorded and recorded optical media for consumer use with PCs and CE devices. AACCS is “an effective technological protection measure” covered by the anti-circumvention provisions of the DMCA, including the “access control” anti-circumvention provisions of Section 1201(a). *See* 17 U.S.C. § 1201(a). Among its technology offerings, AACCS LA licenses AACCS for use to protect against unauthorized access to or use of prerecorded video content using the Blu-ray Disc format. For content providers, content aggregators, and device manufacturers, AACCS presents opportunities for new distribution and business models, while improving functionality and interactivity for the consumer. Using advanced, proven cryptographic methods, AACCS is flexible enough to interoperate with content protection technologies to enable consumers, to the extent authorized, to save licensed, protected copies of prerecorded movie titles onto

home media server hard drives, portable devices or authorized media while preventing unauthorized reproduction and distribution of this high value content.

The availability of AACS was critical to enabling high definition products to become the next generation of consumer electronics because AACS allows content owners to protect their copyright-based rights in the audiovisual content using the Blu-ray Disc format. The technology does so by allowing the content owner to encrypt the content in a manner that requires the use of a licensed decryption product to view the content. In order for a product to be licensed to decrypt the content, the manufacturer of the product is required by the AACS license to equip the product in a manner that adheres to certain rules that are specifically designed to protect copyright interests of the content owner. AACS is critical to the continuing success of the Blu-ray Disc market. Requests for exemption from the DMCA's circumvention prohibitions must be viewed in light of AACS' essential role in the next generation of optical media, the protection of high value content and the growing market for high definition playback products and displays.

II. THE COPYRIGHT OFFICE SHOULD REJECT PROPOSED EXEMPTIONS THAT CONSTITUTE IMPERMISSIBLE "USE-BASED EXEMPTIONS."

Many of the proposals at issue constitute impermissible "use-based exemptions" (i.e., the proponents justify their requested exemptions on the grounds that the proponent wishes to make a specific use of the content on an audiovisual work) and, hence, each of these requested exemptions identifies some use to be made by the user that justifies the request for exemption from the circumvention prohibition found at Section 1201(a). Consequently, AACS LA believes that these requested exemptions should be rejected as not identifying a proper "class of works" as required by the statute.

In previous DMCA rulemakings, the Register consistently interpreted a “class of works” to be “primarily based on attributes of works themselves, and not by reference to some external criteria such as the intended use or the users of the works.” Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Notice of Inquiry, 73 Fed. Reg. 58073, 58076 (Oct. 6, 2008). During the last triennial rulemaking, the Register admittedly modified her interpretation of the statutory phrase “particular class of works” by concluding that “in certain circumstances, it will also be permissible to refine the description of a class of works by reference to the type of user who may take advantage of the exemption or by reference to the type of use of the work that may be made pursuant to the exemption.” The Recommendation of the Register of Copyrights in RM 2005-11; Rulemaking on exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies (Nov. 17, 2006) (hereinafter “*2006 Recommendation of the Register of Copyrights*”) at 10; *see also* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 71 Fed. Reg. 68472, 68473 (Nov. 27, 2006).

The AACCS LA respectfully suggests that the initial interpretation of “class of works,” as applied by the Register in the 2000 and 2003 rulemakings, was the correct one based on both statutory construction and legislative intent. To the extent the Register continues to limit the scope of proposed exemptions by reference to the type of user or the type of use, the AACCS LA urges the Register to proceed with considerable caution to avoid treading any further down a path towards the creation of use-based exemptions of the kind consistently rejected by the Register in past proceedings. *See, e.g.*, Exemption to

Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 68 Fed. Reg. 62011, 62014-15 (Oct. 31, 2003) (rejecting proposed classes such as “Per se Educational Fair Uses Works,” “Fair Use Works,” and musical recordings and audiovisual works where the primary purpose of the circumvention is “to further a legitimate research project.”).

III. THE COPYRIGHT OFFICE SHOULD DENY EXEMPTION REQUESTS THAT MERELY REFERENCE BLU-RAY DISCS.

Proposed Class: Creating clip compilations from DVDs for various types of educational uses, or using portions of DVDs for inclusion in documentary films or non-commercial remixes.

Initial Round Submissions: 4A, 4B, 4C, 4D, 4E, 4F, 4G, 4H, 11A, 11B

Summary of Argument for Proposed Class:

The relevant proposed exemptions fall into three categories. First, in several comments, certain members of the academic community have requested an exemption that would permit circumvention of access controls for audiovisual works when circumvention is accomplished for various educational purposes that are said to be fair or otherwise non-infringing uses. *See* Comments 4A-4H. Second, the Electronic Frontier Foundation (“EFF”) has requested an exemption that would permit circumvention of access controls for DVDs “where circumvention is undertaken solely for the purpose of extracting clips for inclusion of non-commercial videos that do not infringe copyright.” *See* Comment 11A. According to the EFF, CSS technology is interfering with society’s ability to engage in legal “vidding” and/or “remixing.” Third, the proponents of Comment 11B seek an exemption that would permit circumvention of access controls for DVDs if such works are not generally available commercially to the public in an unprotected format. *See* Comment 11B. The proponents of the exemption

argue that because these works are otherwise unavailable to filmmakers in digital format, the DMCA is preventing filmmakers from “making certain points in their films” or not being able to make their films “at all.” *Id.* at 1.

Facts and Argument in Opposition to Proposed Class:

First, as to AACS, the above-referenced comments do not satisfy the standard required under Section 1201(a). As stated in the Notice of Inquiry for this rulemaking proceeding, in order to qualify for an exemption, the proposal “must be based on a showing that the prohibition has or is likely to have a substantial adverse effect on noninfringing uses of a particular class of works.” Notice of Inquiry, 73 Fed. Reg. at 58075 (Oct. 6, 2008). The comments focus on CSS technology and the DVD format, although a handful of them reference the Blu-ray format. None of the submissions mention AACS (although it is well known that the content protection system for movies on Blu-ray Discs is AACS), and none of the submissions make a specific case for exempting circumvention aimed at Blu-ray discs, as opposed to DVD discs protected by CSS. No such showing has been made with respect to AACS and accordingly, the Register and Librarian should limit any exemptions that are granted to the DVD format and the CSS technology.

Second, it is not “necessary” to extend any proposed exemptions to AACS and Blu-ray optical media because nearly all content available on Blu-ray is also available in other formats. This includes other protected formats (*e.g.*, DVDs) and, unprotected formats (*e.g.*, television) into which most content available on Blu-ray either already has been or eventually will be released. Thus, to the extent a particular proponent seeks a particular clip from a Blu-ray Disc, that content will also be available elsewhere,

rendering the proposed exemptions unwarranted. Further, there is nothing in the record that demonstrates that other formats are insufficient to provide users with the content and quality they require. Accordingly, to the extent an exemption is warranted for other protected formats (DVDs in particular), the record demonstrates no basis for such an exemption to extend to the same content in high definition format.

Third, it is important to note that the market for Blu-ray optical media and associated players and displays is a new and emerging market. Granting exemptions that would permit circumvention of AACS at this early stage could be particularly damaging to the development of the Blu-ray market. Therefore, the Register and Copyright Office should consider requests for exemption from the DMCA's circumvention prohibitions in light of AACS' essential role in the future of optical media and the growing market for high definition playback products and displays.

Finally, in the event that the Register decides to consider the requests in a broader context, and in so doing to include AACS within the technologies that might be circumvented, AACS LA requests that the Register afford AACS LA a further opportunity to respond to the specific requests, given that any such consideration would itself require additional information and argument from the requesting parties.

IV. THE COPYRIGHT OFFICE SHOULD REJECT ADDITIONAL PROPOSED EXEMPTIONS.

Proposed Class: Audiovisual works embedded in a physical medium which are marked for "down-conversion" or "down-resolutioning" (such as by the presence of an Image Constraint Token ("ICT")) when the work is to be conveyed through any of a playback machine's existing audio or visual output connectors, and therefore restricts the literal quantity of the embedded work available to the user (measured by visual resolution, temporal resolution, and color fidelity).

Initial Round Submissions: 9B

Summary of Argument for Proposed Class:

Mr. Perkins of Minnesota alleges that at some unidentified point in the future, the manufacturers of Blu-ray discs will increasingly use ICTs in Blu-ray discs. According to Mr. Perkins, an increase in ICT use would “cause user frustration,” and that accordingly, an exemption for circumventing access controls is warranted. *See* Comment 9B.

Facts and Argument in Opposition to Proposed Class:

First, Mr. Perkins proposed exemption fails to satisfy burden of proof required to qualify for an exemption. As stated in the Notice of Inquiry for this rulemaking proceeding, in order to qualify for an exemption under Section 1201(a) of the DMCA, the exemption “must be based on a showing that the prohibition has or is likely to have a substantial adverse effect on noninfringing uses of a particular class of works.” Notice of Inquiry, 73 Fed. Reg. at 58075 (Oct. 6, 2008). Further,

[i]n order to meet the burden of proof, proponents of an exemption must provide evidence either that actual harm currently exists or that it is “likely” to occur in the ensuing 3–year period. Actual instances of verifiable problems occurring in the marketplace are generally necessary in order to prove actual harm. The most compelling cases of actual harm will be based on first–hand knowledge of such problems.

Notice of Inquiry, 73 Fed. Reg. at 58075. Mr. Perkins has failed to make such a showing here, as he has provided no evidence or description of any actual harm or any adverse effect on noninfringing uses, nor, indeed, any evidence that the ICT has ever actually been used. Rather, he simply mentions the possibility that an increase in ICT use at some point in the future would “cause user frustration.” *See* Comment 9B. Accordingly, the proposed exemption, based purely on hypotheticals, should be denied.

Second, the proposed exemption is also unwarranted because the potential problem described by Mr. Perkins is a rapidly disappearing legacy issue related to early iterations of high definition televisions. Almost every high definition television manufactured now contains the HDMI connections necessary to allow a user to view the content on a Blu-ray Disc in its highest resolution.¹ Indeed, Mr. Perkins admits, “HDMI connections are ubiquitous.” *See* Comment 9B at 2. Further, to the extent there are some users affected by the existence of an ICT, this by no means renders even those users unable to access the work. To the contrary, it only means that the viewer cannot view the content in the highest resolution possible, but rather will be able to view the content in a resolution higher than DVD. This does not constitute “a substantial adverse effect on noninfringing uses of a particular class of works.” Notice of Inquiry, 73 Fed. Reg. 58073, 58075 (Oct. 6, 2008). Accordingly, the proposed exemption should be denied.

Proposed Class: Allow users and consumers of DRM-protected media to continue to access their lawfully purchased and non-infringing content in situations where the authentication servers on which their access relies stop working.

Initial Round Submissions: 10A

Summary of Argument for Proposed Class:

Christopher Soghoian and the Berkman Center for Internet and Society at Harvard University propose an exemption that would allow users to circumvent access technology on lawfully-purchased sound recordings, audiovisual works, and software

¹ *See* “HDMI Founders Look Toward the Future as they Win Emmy for Standard”, HDMI.org, Jan. 7, 2009, http://www.hdmi.com/press/press_release.aspx?prid=93 (“HDMI has reached an installed base of more than 600 million devices and now touches almost every consumer device that plays HD content. . . . over 394 million HDMI-enabled devices are expected to ship in 2009, and by the end of 2009 100% of digital televisions will have at least one HDMI input.”).

programs in situations where the authentication servers on which their access relies stop working. The proponents of the exemption argue that in the event other companies or services fail in the future, “users will be adversely affected in their ability to continue making noninfringing uses of lawfully purchased media due to the DRM measures and § 1201(a)’s prohibition on circumvention of those measures.” *See* Comment 10A at 2.

Facts and Argument in Opposition to Proposed Class:

To the extent this proposed exemption can be interpreted to apply to media relevant to AACS technology such as the Blu-ray Disc format, such an exemption is unwarranted. The situation described in the comments is distinguishable from a situation where a consumer purchased an audiovisual work in Blu-ray Disc format. Specifically, a Blu-ray Disc user does not rely upon any on-line server to access the content. To the extent an on-line server is at all relevant to a Blu-ray Disc, it would only be in a situation where a user is making an additional copy or using the on-line interactive features enabled by the Blu-ray format. In relation to the making of an additional copy of the content, AACS LA has taken steps to ensure that server failure will not occur, and if such failure ever did occur, there will be fallback servers in place. In any event, such servers do not relate to access to the content on the disc itself, and no showing of harm (actual or likely) has been made in specific reference to the situation in which the consumer is seeking to make an authorized copy of the content. In the case of the interactive features, the features are enabled by the Blu-ray format and the copyright owner for the particular movie, and AACS technology is not itself involved in the server-based functions. Accordingly, no such exemption is warranted with respect to AACS.

Proposed Class: Allow researchers in good faith to study, analyze, and document the protection measures when needed, without fear of jeopardy for any necessary circumvention that is part of the research process.

Initial Round Submissions: 10B

Summary of Argument for Proposed Class:

Christopher Soghoian and the Berkman Center for Internet and Society at Harvard University propose an exemption that would allow researchers and technologists to circumvent access controls when studying, evaluating and documenting how certain DRM schemes function “prior to a DRM-based service’s demise or the shutdown or failure of its authenticating servers.” *See* Comment 10B. The proponents of this exemption argue that such research (and circumvention of access controls) will ensure that information is available in the case of a service failure, thereby “increasing consumer confidence” in future purchases. *Id.*

Facts and Argument in Opposition to Proposed Class:

As discussed above in response to Comment 10A, Mr. Soghoian and the Berkman Center have failed to meet the requirements necessary to qualify for an exemption under Section 1201(a). *See* 17 U.S.C. § 1201(a). Just as Comment 10A fails to demonstrate a need for an exemption for consumers, Comment 10B similarly fails to demonstrate the need for an exemption for research activities.

In any event, this proposed exemption is also unnecessary because in enacting the DMCA, Congress specifically provided certain security-based and research-related exemptions. *See* 17 U.S.C. §§ 1201(g), (j). The relevant provisions of the DMCA describe the types of research activities permitted under the exemptions in detail. *Id.* Had Congress intended to exempt any other type of research, it would have done so.

Indeed, in the 2000 rulemaking proceeding, the Register and Copyright

Office rejected similar proposed exemptions:

As with reverse engineering, proponents of an exemption for encryption research are asking the Librarian to give them broader exemption than Congress was willing to enact. But they have not carried their burden of demonstrating that the limitations of section 1201(g) have prevented them or are likely in the next three years to prevent them from engaging in noninfringing uses.

Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 65 Fed. Reg. 64,556, 64571 (Oct. 27, 2000).

Accordingly, to the extent the proponents seek an exemption beyond the scope of the existing statutory exemptions in Section 1201, they have failed to meet their burden and such an exemption should be denied.

V. CONCLUSION

For all the reasons stated above AACCS LA urges the Copyright Office to reject the proposed classes. AACCS LA would be happy to provide further detail about its views and to answer any question that may arise from this submission.

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Respectfully submitted,

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