

Before  
The Copyright Office  
Library of Congress

In the Matter of )  
 )  
Exemption to Prohibition on Circumvention ) Docket No. RM 2011-7  
of Copyright Protection Systems for )  
Access Control Technologies )

**Comments of Public Knowledge**

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### **Requested Class of Work for Exemption**

Motion pictures on lawfully made and lawfully acquired DVDs that are protected by the Content Scrambling System when circumvention is accomplished solely in order to accomplish the noncommercial space shifting of the contained motion picture.

### **Summary of Argument**

Since the late 1990s, consumers have purchased billions of motion pictures on DVD. For most of that time, DVDs were the only widely available format on which motion pictures were available for purchase. As entertainment devices move away from containing DVD drives, many of those consumers have a legitimate desire to transfer their lawfully acquired motion picture from DVD into a format that is accessible on these newer devices. Currently, DVD access control mechanisms in the form of CSS prevent that type of lawful transfer. As the Register has noted, large copyright owners continue to make motion pictures available on DVD even in light of perceived widespread illegal copying. It is extremely unlikely that this exemption would have any meaningful impact on illegal copying, and even less likely that any impact would reduce the desire of copyright owners to make works available digitally. As such, granting this exemption would produce widespread public benefit for legitimate owners of motion pictures on DVD while creating no detrimental effects for copyright owners.

## Argument

DVDs are currently the most popular medium for the distribution of motion pictures – primarily feature films and television programs – in the United States.<sup>1</sup> Since their introduction to the market in 1997, over 12.5 billion DVDs have been shipped to retailers.<sup>2</sup>

The Content Scrambling System (CSS) protects access to motion pictures contained on most commercially distributed DVDs.<sup>3</sup> The terms of the license required to access works protected by CSS, which is controlled by the DVD Copy Control Association, inhibit the reproduction of those works.<sup>4</sup>

One of the results of this restriction is that users are unable to shift motion pictures they own on DVD to other media. This is especially problematic as the consumer electronics market moves away from including DVD optical drives in new devices. Almost no tablet computers, such as Apple's iPad and any number of devices running Google's Android operating system, contain DVD drives. Similarly, many new laptop computers such as the Apple Air, Lenovo X1, and Sony VAIO Z are shipping without DVD drives. This trend away from DVD drives is likely to continue in the next

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<sup>1</sup> The Digital Entertainment Group, *DEG Year-End 2010 Home Entertainment Report*, (Jan. 2011), [www.degonline.org/pressreleases/2011/f\\_Q410.pdf](http://www.degonline.org/pressreleases/2011/f_Q410.pdf) (DEG Report).

<sup>2</sup> *Id.*

<sup>3</sup> *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) at 12, available at [http://www.copyright.gov/1201/docs/1201\\_recommendation.pdf](http://www.copyright.gov/1201/docs/1201_recommendation.pdf) (2006 Rec.).

<sup>4</sup> *Recommendation of the Register of Copyrights in RM 2008-8; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies* (June 11, 2010) at 44-46, available at <http://www.copyright.gov/1201/2010/initialed-registers-recommendation-june-11-2010.pdf> (2010 Rec.).

three years. Although these cutting edge devices no longer have DVD drives, they do possess the high-resolution screens that benefit from the picture quality offered by DVD copies of motion pictures.<sup>5</sup>

The combination of widespread DVD ownership and trends away from DVD drives in devices leaves consumers with a dilemma: having invested tens, hundreds, or even thousands of dollars in motion picture DVDs, they are unable to play them on their newest devices. The only reasonable solution for these consumers is to copy the motion picture contained on the DVD into a format that can be viewed on the new device. Without the requested exemption, critical steps in the copying process violate the DMCA.

#### ***A. Personal Space Shifting is Legal***

In *RIAA v. Diamond Multimedia Systems Inc.*<sup>6</sup> the Ninth Circuit, citing the Supreme Court in *Sony Corp. of America v. Universal City Studios*,<sup>7</sup> described the process of converting music files contained on Compact Discs to the .mp3 format in order to make them more portable as “paradigmatic noncommercial personal use.”<sup>8</sup> That description is just as applicable to the practice of copying motion pictures from DVDs for use in personal devices.

The first fair use factor considers “the purpose and character of the use, including whether such use is of a commercial nature . . . .”<sup>9</sup> The reproductions in question are by definition non-commercial in nature. They are copies of motion pictures lawfully

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<sup>5</sup> Most current laptops and tablet devices currently support resolution greater than the 720x480 offered by DVD. In fact, many new smartphones such as the iPhone 4S and Galaxy Nexus possess screens with a resolution beyond 720x480.

<sup>6</sup> 180 F.3d 1072 (9<sup>th</sup> Cir. 1999).

<sup>7</sup> 464 U.S. 417 (1984).

<sup>8</sup> *Diamond*, 180 F.3d at 1079.

<sup>9</sup> 17 U.S.C. § 107(1).

acquired and owned by an individual for the use on devices within that individual's possession. Any attempt to reproduce the work for commercial purposes, which could raise questions about the applicability of fair use, would place the use outside of the scope of the exemption.

Additionally, personal space shifting can facilitate a transformative use of the work. Once transferred to a device such as computer, the motion picture can be easily integrated into a consumer's media management software. Programs such as Microsoft's Windows Media Center allow consumers to access all of their media in a single interface, and launch the video of their choosing at the touch of a button. As the Ninth Circuit found in *Perfect 10 Inc. v. Amazon.com, Inc.*, transformativeness in a fair use analysis is focused on the transformation of the use, not the transformation of the copy.<sup>10</sup> Integrating a thumbnail copy of an image into a search engine transforms the image by incorporating it into a new work – an electronic reference tool.<sup>11</sup> The same can be said of integrating a copy of a motion picture into an individual's media management software.

In the case of motion pictures “the nature of the copyrighted work,”<sup>12</sup> the second fair use factor, is “generally creative in nature and thus within the core of copyright's protective purposes.”<sup>13</sup> Importantly, however, in the case of motion pictures owned by consumers the works have been published. In fact, the works have been published and sold to the individuals hoping to make personal space shifting copies of the work. This

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<sup>10</sup> *Perfect 10 Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 720-23 (9th Cir. 2007).

<sup>11</sup> *Id.* at 721.

<sup>12</sup> 17 U.S.C. § 107(2).

<sup>13</sup> *2010 Rec.* at 50.

publication significantly reduces the copyright owner's "interests in confidentiality and creative control"<sup>14</sup> and can reduce this factor weighing against a finding of fair use.<sup>15</sup>

The third factor, "the amount and substantiality of the portion used in relation to the copyrighted work as a whole,"<sup>16</sup> traditionally favors limited uses of works.<sup>17</sup> Importantly, this favoritism is not universal. In *Sony*, the Court balanced the fact that the entire work was being reproduced with the fact that the reproduction "merely enable[d] a viewer to see such a work which he had been invited to witness in its entirety . . . ."<sup>18</sup> This is an analogous situation. The reproduction in question would merely enable a viewer to see such a work as she had lawfully acquired under the terms offered by the copyright owner.

Finally the fourth factor, "the effect of the use upon the potential market for or value of the copyrighted work," further supports noncommercial space shifting. The exemption would merely allow a user to make use of a motion picture she already lawfully acquired. While copyright owners are taking tentative steps to link motion pictures purchased on DVD to digital versions playable on new devices,<sup>19</sup> there is no indication that this program – if successful and sustainable – would apply retroactively to the millions of DVDs already lawfully owned by consumers and purchased when DVD was the only format available to them.

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<sup>14</sup> *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564 (1985)

<sup>15</sup> *See Perfect 10*, 487 F.3d at 723-24.

<sup>16</sup> 17 U.S.C. § 107(3).

<sup>17</sup> *See 2010 Rec.* at 51.

<sup>18</sup> *Sony*, 464 U.S. at 449-50.

<sup>19</sup> *See Emma Bazilian, UltraViolet Adds Streaming Access to DVD and Blu-Ray*, Adweek, October 11, 2011, <http://www.adweek.com/news/technology/ultraviolet-adds-streaming-access-dvd-and-blu-ray-135704>.

In the past the Register had raised concerns about disrupting the potential value that technical controls could bring to copyright owners.<sup>20</sup> More recently, in the case of motion pictures contained on DVDs, the Register has wisely abandoned those concerns:

“CSS-protected DVDs are now the dominant form of distribution for motions pictures to the public. CSS-protected DVDs have continued to be the dominant format even though circumvention tools have long been widely available online. At this point in time, the suggestion that an exemption for certain noninfringing uses will cause the end of the digital distribution of motion pictures is without foundation.”<sup>21</sup>

This noncommercial personal use would have no negative impact on the market for motion pictures – precisely why the Ninth Circuit joined space shifting with time-shifting as a “paradigmatic noncommercial personal use” constituting fair use.<sup>22</sup>

Furthermore, much has changed since the Register expressed concern that recognizing some types of space shifting would be “breaking new ground on the scope of fair use.”<sup>23</sup> In the wake of *Diamond*, the space shifting of music files from CD to the .mp3 format fueled the growth of the portable music industry and the creation of the iPod, one of the most beloved and successful consumer electronics devices in history.<sup>24</sup> Space shifting is widely accepted by both the public and industry. In fact, while representing a collection of large copyright owners, including a number of major record labels and movie studios, current Solicitor General Donald Verrilli assured the Supreme

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<sup>20</sup> See 2006 Rec. at 71-72.

<sup>21</sup> 2010 Recommendation at 57.

<sup>22</sup> *Diamond*, 180 F.3d at 1079.

<sup>23</sup> *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) at 106, available at <http://www.copyright.gov/1201/docs/registers-recommendation.pdf> (2003 Rec.).

<sup>24</sup> See, e.g. Amy-Mae Elliot, *The Impact of the iPod*, Mashable Tech, Oct. 23, 2011, <http://mashable.com/2011/10/23/impact-of-ipod/>.



Court that the practice of consumers transferring works from one medium to another for personal use enjoyed widespread support in the industry: “The record companies, my clients, have said, for some time now, and it’s been on their Website for some time now, that it’s perfectly lawful to take a CD that you’ve purchased, upload it onto your computer, put it onto your iPod. There is a very, very significant lawful commercial use for that device, going forward.”<sup>25</sup> Notably, Mr. Verrilli told the Court that space shifting was “perfectly lawful,” not that his clients were granting the public permission to space shift.

Mitch Singer, Chief Technology Officer of Sony Pictures Entertainment and one of the forces behind the Digital Entertainment Content Ecosystem UltraViolet program used his own space shifting of motion pictures on DVD to his own computer to explain the origins of the UltraViolet concept to author Robert Levine. Levine explains “Singer had the idea that evolved into UltraViolet in 2002, when he was messing around with his multimedia system, trying to transfer some movies to his PC so he could watch them on other screens in his house.”<sup>26</sup> The fact that the CTO of a major motion picture studio feels comfortable sharing this experience with an author illustrates just how widely accepted the practice of space shifting motion pictures has become.

Ultimately, any shortage of additional judicial guidance on the subject reflects the comfort that all parties feel with the current status quo of noncommercial personal space shifting operating under the protection of fair use.

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<sup>25</sup> Transcript of Oral Argument at 12, *MGM Studios, Inc. v. Grokster, Ltd.* 545 U.S. 913 (2005).

<sup>26</sup> Robert Levine, *Free Ride: How Digital Parasites are Destroying the Culture Business, and How the Culture Business Can Fight Back*, 184 (Doubleday 2011).

***B. Statutory Factors Weigh In Favor of the Exemption***

Noninfringing reproductions made in the process of space shifting motion pictures contained on DVDs are adversely affected by the prohibitions contained in 17 U.S.C. 1201(a)(1)(A). All relevant factors considered in the statute weigh in favor of granting an exemption in this proceeding.

i. *Factor One – the availability for use of copyrighted works.*<sup>27</sup>

In previous rulemakings, the Register has evaluated this factor by applying a three-part test.<sup>28</sup>

- a. Does the protection of the work enhance and/or inhibit the availability of the work for use?

This question recognizes that technological protection measures can, in addition to limiting legitimate and socially beneficial uses, potentially foster new business models.<sup>29</sup> In previous rulemakings, the Copyright Office had expressed concern that any exemption involving CSS would act as a disincentive to distribute motion pictures on DVD.<sup>30</sup> As the Register has recognized, these fears are no longer warranted.<sup>31</sup> CSS-circumvention tools have long been available to the public, with no discernable impact on

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<sup>27</sup> The factors considered here and below can be found in 17 U.S.C. § 1201(a)(1)(C).

<sup>28</sup> See 2010 Rec. at 56.

<sup>29</sup> *Id.*

<sup>30</sup> See, e.g. *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies; Final Rule*, 65 Fed. Reg. 64555 at 64569 (2000).

<sup>31</sup> See 2010 Rec. at 57.

the willingness of copyright owners to embrace DVD-based distribution.<sup>32</sup> The MPAA's own widely touted losses attributed to online infringement – much of which begins with someone, somewhere making a copy of a DVD – do not appear to influence MPAA members' interest in making works available in digital forms.

It is similarly unlikely that the requested exemption would lead to some sort of public “confusion” about the legality of reproducing motion pictures protected by CSS.<sup>33</sup> The public already recognizes the legitimacy of copying a legally owned motion picture from a DVD to another device, just as it recognizes the legitimacy of copying songs on CDs onto alternative devices.<sup>34</sup> This activity is easily distinguished from the infringing activity of downloading a motion picture from an illicit internet source. Rather than setting a disruptive precedent, this exemption would merely confirm legal distinctions and contours that are already widely understood and accepted. It is hard to imagine an individual, let alone a class of individuals, who would be confused by this exemption. In fact, any confusion related to this exemption would most likely flow from its non-existence up to this point.

- b. Is the protected work available in other formats (and are those formats protected by access controls)?

In 2010, the Register recognized that “CSS-protected DVDs are the primary, and often sole, source of the motion pictures for the public in general.”<sup>35</sup> That continues to be

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<sup>32</sup> *Id.*

<sup>33</sup> *See 2010 Rec.* at 57.

<sup>34</sup> National Consumers League, *Consumer Perceptions and Attitudes Regarding DVD Usage Rights* (April 2009) available at [http://www.nclnet.org/images/PDF/ncl\\_dvdsurvey\\_report\\_04062009.pdf](http://www.nclnet.org/images/PDF/ncl_dvdsurvey_report_04062009.pdf).

<sup>35</sup> *See 2010 Rec.* at 58.

the case. Although some motion pictures are becoming available in non-DVD digital formats (which can contain their own access control restrictions), DVD is by far the most popular medium for purchasing motion pictures for personal use.<sup>36</sup> These non-DVD formats are not cure-alls. Online streaming and rental services do not allow consumers to own motion pictures. All online formats require access to a high-speed broadband connection. This connection is necessary either to download the motion picture in advance or stream the motion picture for viewing. Finally, all of these alternative digital formats are encumbered by technical protection measures.

Equally important, if not more so, DVD was king for a number of years. As a result, consumers legitimately acquired large libraries of motion pictures on DVD when DVD was the only available format. It is not reasonable to require the public to re-purchase a motion picture they already own simply to watch it on a device they own. This is especially true for motion pictures that were purchased on DVD when DVD was the only available format for purchase.

- c. Are alternative means of accomplishing the noninfringing use available to users?

As described above, in many instances, consumers purchased motion pictures on DVD when DVD was the only available format. Newer digital formats might be supported by some devices, but do not represent a viable alternative for many works. Furthermore, it would be unreasonable to require members of the public to re-purchase motion pictures they already lawfully acquired. The potential existence of digital copies

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<sup>36</sup> In 2010, consumers spent \$14 billion on DVDs, compared to \$2.3 billion on Blu-ray and \$2.5 billion on digital. *DEG Report*.

of motion pictures compatible with DVD drive-less devices today is irrelevant for consumers who purchased their DVD copy when no such alternative digital copy existed.

In the past, the Register has considered two alternative methods for accessing motion pictures contained on DVDs – “camcording,” where an individual uses a video camera to record the motion picture from a television, and video capture software.

In 2010, the Register correctly dismissed the viability of camcording, noting that the expense related to effectively camcording a motion picture “becomes a practical impediment to use.”<sup>37</sup> While the prices of consumer electronics may have diminished somewhat since last year, there is no reason to believe that the cost has dropped below the threshold that makes it a practical impediment to use. Additionally, there has been no discernable change in technology that would address the problems of image/video quality and sound quality recognized by the Register.<sup>38</sup> Finally, camcording still requires a perfectly controlled environment for the entirety of the camcording process – likely hours. Camcording continues to be an insufficient mechanism to accommodate noninfringing uses.

Video capture software is also insufficient to accommodate the noninfringing use contemplated in this exemption request. It is time-intensive and technically demanding in a way that that simply copying a file from a DVD is not. Once CSS has been circumvented, copying a video file from a DVD is a matter of dragging and dropping. The entire process can be completed in a matter of minutes, mostly as a background process. In contrast, copying the motion picture with screen capture software requires hours, and potentially days.

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<sup>37</sup> *2010 Rec.* at 59.

<sup>38</sup> *Id.*

Video capture requires finding optimal settings for technical variables such as resolution, frame rate, and bitrate. These settings are hardware specific and will vary from machine to machine. Capturing the motion picture requires a user to dedicate her machine to the task and to turn off any automated alerts or programs that might interrupt the process. With computers performing a multitude of functions for many people, oftentimes this is only practically possible at night when all other tasks have been completed. If the user set any variable incorrectly, she will not know about the problem until the next morning and not be able to fix the problem until the following night. It could easily take a number of attempts, and therefore a number of days, before the “optimal” settings are discovered. Of course, no user can be assured they have properly reproduced the motion picture without watching the new copy in its entirety. This stands in stark contrast to simply making an identical digital copy of the work directly from the DVD.

In addition to the technical difficulties inherent in both camcording and video capture software, there is the lingering problem of diminished video and audio quality. The Register has recognized that this problem exists in the case of video capture software: “The frame rate is often reduced. Even when the frame rate is very high, the timing of the action can be distorted, creating staccato or jerky motion. More importantly, pieces of the video are simply missing. These ‘holes’ in the video can be particularly noticeable when analyzing a work of animation or Claymation, in which every frame has been composed individually by the filmmakers.”<sup>39</sup>

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<sup>39</sup> *Id.* at 29, quoting answers to post-hearing questions filed by Professor Peter Decherney, July 2009.

The Register has recognized that a reduction in video and audio quality can negatively impact noninfringing uses, although up to this point has not extended recognition of that impact to individuals viewing their own copies of motion pictures.<sup>40</sup> However, there is clear evidence that image quality is important to the full appreciation of a significant number of motion pictures by the general public.

Much of this evidence can be found in the Register's own prior recommendations and the prior record. Detail in film matters to everyone, not just media studies professors. Professor Decherney's media studies students saw Charlie Chaplin's *The Immigrant* as a cultural artifact when they viewed it on VHS. When they finally saw a high quality version on DVD, those same students were able to enjoy it as a "comedy film."<sup>41</sup> To Professor Decherney's (presumably pleasant) surprise, the students actually laughed when they saw the film on DVD. Image quality transformed a stodgy cultural artifact only relevant for its historical significance into a comedy that could be enjoyed on its own terms. The improved quality allowed the viewers to enjoy the work as Charlie Chaplin originally intended – as entertainment. The importance of high quality image and sound is just as true for members of the public as for the students who happened to catch the film in Professor Decherney's class.

In fact, quality video and sound may be more important to consumers than to media studies students or professors. The students in Professor Decherney's class who

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<sup>40</sup> *Id.* at 21-77.

<sup>41</sup> *Comments of Peter Decherney, Assistant Professor at the University of Pennsylvania's Cinema Studies Program, Michael Delli Carpini, Professor and Annenberg Dean, and Katherine Sender, Assistant Professor at the University of Pennsylvania's Annenberg School of Communications, Exemption to the Prohibition on Circumvention of Copyright Protection Systems For Access Control Technologies, Docket No. RM 2005-11 (2005) at 10 (Decherney).*

watched *The Immigrant* on VHS saw it as a cultural artifact. As media studies students, that cultural artifact possessed value to them. However, many consumers do not purchase motion pictures in search of cultural artifacts. Those consumers purchase motion pictures as entertainment. If inferior quality reproductions transform entertainment into cultural artifacts, those reproductions are essentially robbing the motion picture of value to the consumer.

To that end, “poor quality or out-of-sync sound”<sup>42</sup> is not only a problem for individuals who wish to study a motion picture. It can also significantly inhibit the enjoyment of that motion picture by the public. Understanding what is said or when it is said can be critical to simply understanding a plot, not just dissecting it.

Furthermore the public, not merely students in academia, enjoys foreign films. Problems associated with quality degradation identified by the Register such as legibility of subtitles and the loss of subtle sounds, gestures, and facial expressions<sup>43</sup> can prevent the public from fully enjoying, appreciating, and understanding films set in foreign cultures and containing foreign languages.

Filmmakers recognize the importance of high quality images and sound as well. Earlier this year an article in the Boston Globe sparked controversy among filmmakers and filmgoers alike. The article described disappointment related to films that were “strikingly dim and drained of colors” because the films were projected too dimly.<sup>44</sup> Less than a month later director Michael Bay was privately and publicly pushing theater

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<sup>42</sup> *2010 Rec.* at 61.

<sup>43</sup> *Id.* at 62.

<sup>44</sup> Ty Burr, *A Movie Lover’s Plea: Let There Be Light*, The Boston Globe, May 22, 2011, [http://articles.boston.com/2011-05-22/ae/29571831\\_1\\_digital-projectors-movie-exhibition-business-screens](http://articles.boston.com/2011-05-22/ae/29571831_1_digital-projectors-movie-exhibition-business-screens).



owners to increase the projection brightness for his summer blockbuster *Transformers: Dark of the Moon*.<sup>45</sup> Paramount announced that it was releasing the film on a print “aimed at delivering almost twice the brightness of standard 3D projection.”<sup>46</sup> Mr. Bay told the trade publication *Variety* that he insisted on the brighter image because image quality is critical to full appreciation of the motion picture: “[the version] is a superior look in the format. The brighter the image, the brain processes in a different way (sic) and the result sharpens and makes it more vibrant.”<sup>47</sup> *Transformers: Dark of the Moon* is not a film marketed only to media studies students and cinephiles; it was a mass market summer blockbuster that has grossed over \$1.1 billion since it was released.<sup>48</sup> Mr. Bay and Paramount understood that image quality matters to everyone.

One of the initial attractions of DVDs, and a major reason for the market’s preference for DVD over VHS, is the quality of the image. This quality goes beyond merely reproducing the original aspect ratio of the motion picture to include all of the characters in frame.<sup>49</sup> It also means moving towards the original image quality intended by filmmakers. The importance of accurately reproducing the images and sound in motion pictures is more than a mere preference – in “some significant number”<sup>50</sup> of cases, image and sound fidelity will be critical.

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<sup>45</sup> Brooks Barnes, *As 3-D Falls From Favor, Director of ‘Transformers’ Tries to Promote It*, N.Y. Times, June 21, 2011, <http://www.nytimes.com/2011/06/22/business/media/22transformers.html>.

<sup>46</sup> David S. Cohen, *‘Transformers’ to pump up 3D brightness*, *Variety*, June 22, 2011, <http://www.variety.com/article/VR1118038975>.

<sup>47</sup> *Id.*

<sup>48</sup> See Box Office Mojo, *Transformers: Dark of the Moon*, <http://boxofficemojo.com/movies/?id=transformers3.htm>.

<sup>49</sup> See Decherney at 19.

<sup>50</sup> *2010 Rec.* at 61.

The shortcomings of camcording and video capture software do not merely prevent the close textual analysis that is the hallmark of academic media study. They are both technically cumbersome processes that inject uncertainty into the simple process of reproduction. Camcording and video capture software also prevent the public from fully enjoying and appreciating the motion pictures they have lawfully acquired. Distorted, jerky images pull viewers out of the story. Holes create confusion and can obscure critical plot elements. This exemption would easily remedy these problems without harming copyright owners in any significant way.

- ii. *Factors Two and Three: availability for use of works for nonprofit archival, preservation, and educational purposes; impact the circumvention of technological measures applied to copyright works has on criticism, comment, news reporting, scholarship, or research.*

Collectively, these two factors do not directly apply to the exemption requested here. Although the statute does include them as factors the Librarian “shall examine,” there is nothing in 17 U.S.C. § 1201(a)(1)(C) to suggest that impacting every element is a prerequisite for granting an exemption.

- iii. *Factor Four: The effect of circumvention of technological measures on the market for or value of copyrighted works.*

This exemption will have no negative impact on the market or value of copyrighted works. Perhaps most importantly, the exemption only applies to owners of *lawfully acquired* DVDs. In almost all cases, that means that purchasing the motion picture on DVD is a prerequisite to taking advantage of the exemption. The ability to

circumvent CSS in order to watch a motion picture on another device may in fact increase the value of the DVD to consumers by increasing their utility and further encourage purchase.

Additionally, allowing the public to view lawfully acquired motion pictures on other devices will not contribute in any meaningful way to motion picture piracy. Copyright owners do have a legitimate interest in preventing illegal reproductions of their works. An exemption that would “lead to undue harm to copyright owners”<sup>51</sup> may be difficult to justify. Fortunately the personal, noncommercial reproductions of those works will not contribute to the “circulation of large numbers of unprotected copies”<sup>52</sup> of the works. Copyright infringement will continue to be illegal. Existing infringement is a result of the current state of the market, as well as the nature of unauthorized reproductions online.

MPAA-funded studies report that annual piracy losses to member studios are more than \$6 billion.<sup>53</sup> The group also asserts that 29 million American adults (13% the adult population) have downloaded or watched illegal copies of movies or TV shows online.<sup>54</sup> The MPAA claims to discover 140,000 or more active links to infringing movie

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<sup>51</sup> *2006 Rec.* at 19.

<sup>52</sup> *Id.*

<sup>53</sup> Gregory F. Treverton, et al., *Film Piracy, Organized Crime, and Terrorism*, RAND Safety and Justice Program and the Global Risk and Security Center (2009) at 33-34, [http://www.rand.org/pubs/monographs/2009/RAND\\_MG742.pdf](http://www.rand.org/pubs/monographs/2009/RAND_MG742.pdf) (RAND). This study has been subject to significant criticism since its release. See, e.g. Joe Karaganis, et al., *Does Crime Pay? MPEE's Findings on Piracy, Organized Crime, and Terrorism*, Social Science Research Council (2011) <http://piracy.ssrc.org/wp-content/uploads/2011/02/Does-Crime-Pay.pdf>.

<sup>54</sup> MPAA, *The Cost of Content Theft By the Numbers* (2011), [mpaa.org/resources/8c33fb87-1ceb-456f-9a6e-f897759b9b44.pdf](http://mpaa.org/resources/8c33fb87-1ceb-456f-9a6e-f897759b9b44.pdf).

and television titles *every day* merely by sampling 500 websites.<sup>55</sup> Regardless of the veracity of the numbers provided by the MPAA (and they have been subject to correction,<sup>56</sup> skepticism,<sup>57</sup> and government inquiry<sup>58</sup> in the past), many content owners clearly believe that piracy is pervasive. The MPAA regularly advocates for new laws to address this perceived threat and has sued individuals as part of what it considers to be a broader anti-piracy education campaign.<sup>59</sup>

This is the state of affairs in the absence of the requested exemption. Copyright owners already feel that piracy is a threat to their businesses but have come to terms with that risk and continue to move towards the digital availability of works.

Furthermore, granting this exemption would not result in any increase in the availability of unauthorized copies of works. This flows from the nature of digital technology itself. Once there is a single unauthorized copy of a work available online, there is no need for a second copy of equal quality. Adding “more copies” is irrelevant to the problem of unauthorized reproduction.

Frederick D. Huntsberry, Chief Operating Officer for Paramount Pictures, vividly illustrated this point in a presentation to the FCC in 2009.<sup>60</sup> Mr. Huntsberry’s

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<sup>55</sup> *Id.*

<sup>56</sup> Brooks Bollek, *Studios Admit Error in Piracy Study*, Reuters (Jan 23, 2008), <http://www.reuters.com/article/2008/01/24/industry-piracy-dc-idUSN2365001520080124>.

<sup>57</sup> Mike Masnick, *MPAA’s Bogus ‘Piracy’ Numbers Mean it Thinks Downloaders Would Buy 200 More DVDs Per Year*, Techdirt.com (Sep. 6, 2011) <http://www.techdirt.com/articles/20110903/00070515801/mpaas-bogus-piracy-numbers-mean-it-thinks-downloaders-would-buy-200-more-dvds-per-year.shtml>.

<sup>58</sup> Government Accounting Office, *Intellectual Property: Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods* (Apr. 2010).

<sup>59</sup> Grant Gross, *MPAA Sues First Movie Swappers*, PC World, Nov. 17, 2004, [http://www.pcworld.com/article/118628/mpaa\\_sues\\_first\\_movie\\_swappers.html](http://www.pcworld.com/article/118628/mpaa_sues_first_movie_swappers.html).

<sup>60</sup> Testimony of Frederick D. Huntsberry, Chief Operating Officer, Paramount Pictures, at the FCC Broadband Workshop *The Role of Content in the Broadband Ecosystem* (Sep. 17,

presentation, which tracked the availability of unauthorized copies of the motion picture *Star Trek* online, traced hundreds of thousands of unauthorized downloads to a handful of “original” copies of increasing quality.<sup>61</sup> Each “new” copy was added because it was of higher quality than those available, not because there was a need for more source copies at the same quality. As Mr. Huntsberry so astutely recognized, “once the film is out it will get pirated. . . . somebody will rip the DVD that day and you will have a perfect copy of the DVD image out that same day.”<sup>62</sup> Once that “perfect copy of the DVD image” exists, there is no reason to create a second one.

The individuals creating these original “perfect copies” are not waiting for a DMCA exemption from the Library of Congress. MPAA-funded studies have asserted that a great deal of copyright infringement of member studio works are connected to terrorist groups and organized crime syndicates in far-flung corners of the world like Italy, Malaysia, Brazil, and Russia.<sup>63</sup> If the report is correct, it is hard to imagine these groups having any reaction to the Register’s recommendation in this proceeding.

Ultimately, this exemption will have no impact on unauthorized reproductions of motion pictures. The Register is in the enviable position of balancing a clear benefit to the public against no cognizable harm to rightsholders because the harm they fear already exists.

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2009), available at [http://www.broadband.gov/docs/ws\\_24\\_role\\_content.pdf](http://www.broadband.gov/docs/ws_24_role_content.pdf) (Huntsberry Testimony).

<sup>61</sup> Frederick D. Huntsberry, *Presentation on Film Piracy*, FCC Broadband Workshop (Sep. 17, 2009), available at [http://www.broadband.gov/ws\\_bb\\_ecosystem.html](http://www.broadband.gov/ws_bb_ecosystem.html).

<sup>62</sup> *Huntsberry Testimony* at 92.

<sup>63</sup> See *RAND*.

In response to these facts, rightsholders will undoubtedly retreat to ominous predictions about “invisible boundaries”<sup>64</sup> being crossed and slippery slopes being created.<sup>65</sup> The Court in *Sony* dismissed these types of hypothetical, unquantifiable, and likely nonexistent harms almost thirty years ago.<sup>66</sup> The Register followed suit in 2010: “there is no credible support for the proposition that the digital distribution of motion pictures continues to depend on the integrity of the general ‘principle’ that the circumvention of CSS is always unlawful.”<sup>67</sup> The only sales “lost” as a result of this exemption would be those tied to the desire of copyright owners to charge customers a second time for a motion picture identical to the digital copy those customers already own. The Register should not protect such anti-consumer activities in this or any other proceeding.

iv. *Factor Five – Other factors.*

Although expressed while considering a more narrow exemption, other factors described by the Register in 2010 apply in this case as well. CSS is a “technological measure that controls access [that] is being used predominantly for the purpose of preventing reproduction and other rights of the copyright owner.”<sup>68</sup> “Socially-beneficial

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<sup>64</sup> *Sony*, 464 U.S. at 451.

<sup>65</sup> See, e.g. “The reality is that once a hacker is given an exemption even for a limited purpose, it would become impossible to control or predict future hacks of CSS or to distinguish between ‘permitted’ hacks and those that would remain unlawful. In short, even what are characterized as ‘limited exemptions’ will essentially render CSS ineffective as a means of protecting copyrighted content generally.” *Reply Comments of the DVD Copy Control Association, Inc.*, Exemption to Prohibition on Circumvention of Copyright Protection for Access Control Technologies, Docket No. RM 2005-11 (2006) at 14.

<sup>66</sup> See *Sony*, 464 U.S. at 451-52.

<sup>67</sup> *2010 Rec.* at 57.

<sup>68</sup> *Id.* at 71.

noninfringing uses are being adversely affected by the prohibition on circumvention in relation to certain users of portions of motion pictures on CSS-protected DVDs.”<sup>69</sup> “The effect of the access control is not to prevent unauthorized access, but rather to restrict uses of motion pictures.”<sup>70</sup> “Deployment of CSS over time has begun to adversely affect some legitimate uses of motion pictures.”<sup>71</sup>

That the noninfringing use is not directly related to the uses such as scholarship or criticism does not prevent it from being socially beneficial. Society benefits when the public can use copyrighted works they have lawfully acquired in personal, noncommercial ways. When balanced against a total absence of harm to rightsholders, the exemption requested here easily prevails.

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 72.

## **Conclusion**

For the above stated reasons, the Register should recommend that the Librarian of Congress grant the requested exemption. The exemption would remove a barrier to legitimate and beneficial uses of motion pictures owned by the public while imposing no cognizable harm on copyright owners. As such, it is precisely the type of circumstance envisioned by Congress when it granted the Library of Congress the authority to create exemptions to prohibitions contained in subsection 1201(a)(1)(A).

Respectfully submitted

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