

UNITED STATES COPYRIGHT OFFICE

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

Docket No. RM 2011-7

JOINT COMMENTS

of

**AAP: ASSOCIATION OF AMERICAN PUBLISHERS
ASMP: AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS
BSA: BUSINESS SOFTWARE ALLIANCE
ESA: ENTERTAINMENT SOFTWARE ASSOCIATION
MPAA: MOTION PICTURE ASSOCIATION OF AMERICA
PACA: PICTURE ARCHIVE COUNCIL OF AMERICA
RIAA: RECORDING INDUSTRY ASSOCIATION OF AMERICA**

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JOINT CREATORS AND COPYRIGHT OWNERS COMMENTS

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I. INTRODUCTION AND SUMMARY

A. Descriptions of Joint Creators and Copyright Owners

The Joint Creators and Copyright Owners respectfully file the following comments in response to the Notice of Proposed Rulemaking published in the Federal Register on December 20, 2011 (76 Fed. Reg. 78,866). The Joint Creators and Copyright Owners represent authors, creators, copyright owners and most of the U.S. copyright-based industries.

The Association of American Publishers (“AAP”) 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 vibrant, evolving markets for e-books and audiobooks, while also producing journals, textbooks, computer programs, databases, and a variety of other multimedia works for use in online, CD-ROM and other digital formats.

The 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 39 chapters in this country and over 7,000 members in the United States and more than 30 other countries. Its members are the creators of the world’s most memorable images found in newspapers, advertising, magazines, books, multimedia works, and internet websites.

The Business Software Alliance (“BSA”) is the leading global advocate for the software industry. It is an association of nearly 100 world-class companies that invest billions of dollars annually to create software solutions that spark the economy and improve modern life. Through international government relations, intellectual property enforcement and educational activities, BSA expands the horizons of the digital world and builds trust and confidence in the new technologies driving it forward. BSA’s members include: Adobe, Apple, Autodesk, AVEVA, AVG, Bentley Systems, CA Technologies, CNC/Mastercam, Compuware, Corel, Intel, Intuit, McAfee, Microsoft, Minitab, Progress Software, PTC, Quest Software, Rosetta Stone, Siemens PLM, Dassault Systemes SolidWorks, Sybase, Symantec, and The MathWorks.

The Entertainment Software Association (“The ESA”) is the U.S. association dedicated to serving the business and public affairs needs of companies publishing interactive games for video game consoles, handheld devices, personal computers, and the internet. The ESA offers services to interactive entertainment software publishers including a global anti-piracy program, owning the E3 Expo, business and consumer research, federal and state government relations, and First Amendment and intellectual property protection efforts.

The Motion Picture Association of America (“MPAA”) is a trade association representing some of the world’s largest producers and distributors of motion pictures and other audiovisual entertainment material for viewing in theaters, on prerecorded media, over broadcast TV, cable and satellite services, and on the internet. MPAA members include Paramount

Pictures Corp., Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corp., Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc.

The Picture Archive Council of America (“PACA”) is a not-for-profit trade association which represents the interests of entities who license images (still and motion) to editorial and commercial users. Founded in 1951, its membership currently includes over 100 content libraries globally that are engaged in licensing millions of images, illustrations, film clips and other content on behalf of thousands of individual creators. Members include large general libraries, such as Getty Images, and smaller specialty libraries that provide the media and commercial users with access to in-depth collections of images and film footage on news, current events, nature, science, art, architecture, history, and culture, among other topics.

The Recording Industry Association of America (“RIAA”) is the trade organization that supports and promotes the creative and financial vitality of the major music companies. Its members are the music labels that comprise the most vibrant record industry in the world. RIAA members create, manufacture and/or distribute approximately 85% of all legitimate recorded music produced and sold in the United States.

B. Glossary

These Joint Comments will use the following abbreviations for official materials from the four prior rulemakings and the legislative history of the DMCA:

- 2011 NPRM – Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies; Notice of Proposed Rulemaking, 76 Fed. Reg. 78,866 (Dec. 20, 2011), *available at* <http://www.copyright.gov/fedreg/2011/76fr78866.pdf>;
- 2011 NOI – Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies; Notice of Inquiry, 76 Fed. Reg. 60,398 (Sept. 29, 2011), *available at* <http://www.copyright.gov/fedreg/2011/76fr60398.pdf>;
- 2010 Final Rule – Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies; Final Rule, 75 Fed. Reg. 43,825 (July 27, 2010), *available at* <http://www.copyright.gov/fedreg/2010/75fr43825.pdf>;
- 2010 Rec. – 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), *available at* <http://www.copyright.gov/1201/2010/initialed-registers-recommendation-june-11-2010.pdf>;
- 2009 NTIA Letter – Letter from Lawrence E. Strickling, Assistant Secretary of Commerce for Communications and Information, to Marybeth Peters, Register of Copyrights, Nov. 4, 2009, *available at* <http://www.copyright.gov/1201/2010/NTIA.pdf>;
- 2009 Joint Comments – Joint Comments filed in RM 2008-08 by a variety of associations of copyright owners and creators, *available at* <http://www.copyright.gov/1201/2008/responses/association-american-publishers-47.pdf>;

- 2006 Rec. – 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), *available at* http://www.copyright.gov/1201/docs/1201_recommendation.pdf;
- 2003 Rec. – 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), *available at* <http://www.copyright.gov/1201/docs/registers-recommendation.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), *available at* <http://www.copyright.gov/fedreg/2000/65fr64555.pdf>;
- Manager’s Rep. – 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 (Comm. Print 1998), *reprinted in* 46 J. COPYRIGHT SOC’Y U.S.A. 635 (1999);
- Commerce Rep. – Report of House Commerce Committee on H.R. 2281, the Digital Millennium Copyright Act, H.R. Rep. No. 105-551, pt. 2 (1998).

In referring to the comments received in response to the 2011 NOI, which are available at <http://www.copyright.gov/1201/2011/initial/>, these Joint Comments will refer to the groupings provided in the 2011 NPRM (*e.g.*, Comment 1 will refer to the comment filed by Open Book Alliance) or to the proponents by defined abbreviations (*e.g.*, Electronic Frontier Foundation is referred to as “EFF”).

C. Summary of Joint Comments

Besides this Introduction and Summary (Section I), these Joint Comments have three sections.

Section II discusses the general views of the Joint Creators and Copyright Owners regarding the statutory scope and purpose of this rulemaking. In sum, the Joint Creators and Copyright Owners ask the Register of Copyrights and the Librarian of Congress to hew closely to the instructions contained in the statute, including by ensuring that no exemption is granted unless a proponent thereof meets the applicable burden of persuasion in this *de novo* proceeding.

In Section III, the Joint Creators and Copyright Owners provide examples of how technologies that control access to copyrighted works facilitate a broad and expanding range of consumer uses of those materials. Creative works are available in larger numbers, through more distribution channels, to more people, in more formats, and with more flexible terms of use than ever before. Access control technologies play a critical role in making this possible. As Congress directed, the Register of Copyrights, in her recommendation, and the Librarian of Congress, in his decision, should take these facts into account when considering how the prohibition on circumventing access controls affects “the availability for use of copyrighted works.” 17 U.S.C. § 1201(a)(1)(C)(i).

Section IV consists of the Joint Creators and Copyright Owners' responses to the proposals put forward for comment in the 2011 NPRM. The Joint Creators and Copyright Owners thank the Register and the Librarian for this opportunity to comment on the proposals. We look forward to participating in further phases of this rulemaking proceeding.

II. GENERAL VIEWS

As this is our first filing in this proceeding, the Joint Creators and Copyright Owners think it will be useful to provide our general views on what this rulemaking should address based on the limited statutory mandate that Congress has provided for this proceeding. We urge the Copyright Office to use the principles below as a yardstick by which to evaluate the proposed exemptions and the comments it will receive on them.

A. Use of Access Controls

First, it should go without saying that this proceeding is not about the right or ability of copyright owners to use technological measures to control or manage access to their works. Copyright owners have used these measures for many years, long predating the enactment of the Digital Millennium Copyright Act ("DMCA"), and will continue to do so whenever conditions warrant. Thus, the question in this proceeding is not whether the implementation of technological protection measures is a good or bad development, but whether the prohibition contained in 17 U.S.C. § 1201(a)(1)(A) has substantially harmed the ability of members of the public to make noninfringing uses of copyrighted materials.

B. Anti-Trafficking Provisions

Furthermore, nothing in this proceeding should be allowed to undermine Congress's decision to prohibit the manufacture, distribution, or other trafficking in products, or the offering of services, that enable or facilitate the circumvention of access control or copy control measures, as spelled out in 17 U.S.C. §§ 1201(a)(2) and (b)(1). *See* 2011 NOI at 60,400 ("The Librarian of Congress has no authority to limit either of the anti-trafficking provisions contained in subsections 1201(a)(2) or 1201(b)."). Indeed, no determination made in this proceeding may even be used as a defense in a case in which a violation of § 1201(a)(2) or 1201(b)(1) is claimed *See* 17 U.S.C. § 1201(a)(1)(E). In ensuring that this proceeding leaves the anti-trafficking provisions unimpaired, the Office must take care, in evaluating proposed exemptions and in fashioning any exemptions, to craft any such exemptions narrowly so as not to inadvertently encourage, nor indeed indicate any toleration for, the development of a market for anti-circumvention devices or services.¹

¹ A misperception that this proceeding permits the development of such a market is already taking hold among some segments of the public. *See, e.g.,* Paul Morris, *Jailbreaking May Soon Become Illegal Again, Act Now To Help Keep It Legal*, REDMOND PIE, Jan. 25, 2012, <http://www.redmondpie.com/jailbreaking-soon-to-become-illegal-again-act-now-to-help-keep-it-legal/> (discussing the new "Absinthe Jailbreak Tool" which apparently unlocks iPhone 4s and

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C. De Novo Proceeding

In establishing a triennial review process, with any recognized exemption expiring automatically on the third anniversary of its issuance and no provision for renewing or extending any exemptions, Congress underscored that each rulemaking proceeding must be approached *de novo*. See 2011 NOI at 60,401. Of course this means that the case for any proposed exemption must rely upon the facts of what has occurred since the last proceeding. It also means that in each proceeding, the Copyright Office is not bound to follow the procedures it followed in the last cycle, nor may it rely upon conclusions reached in the previous proceedings, unless it finds that they are supported by facts and argument presented to it in the current proceeding. Indeed, the Office must revisit any conclusions reached in the previous proceedings, to the extent needed to ensure that it carries out the current proceeding in strict compliance with its legislative mandate. Any presumption to the contrary would be inconsistent with the clear Congressional directive that each rulemaking cycle proceeds *de novo*.

D. Burden of Persuasion

The burden of coming forward with evidence in support of a proposed exemption, as well as the burden of persuasion that the exemption should be recognized on the narrow grounds authorized by the statute, must always remain with the proponent of an exemption. See 2011 NOI at 60,400. This burden applies to both factual and legal issues. It also applies without regard to how closely (or not) a proposed exemption resembles one granted in the previous rulemaking cycle.

E. Legal Determinations

In this proceeding, neither the Copyright Office in its recommendations, nor the Librarian in his ultimate decision, has been given any authority by Congress to make law, to declare authoritatively the meaning of any statute, or to apply it to any set of hypothetical facts. Thus, there is no need for the Register to use this rulemaking to announce legal rules that neither Congress nor the courts have previously articulated. This principle applies, for example, to assertions by proponents of exemptions that certain uses they wish to make of copyrighted works, which they claim to be impeded by the prohibition on circumventing access controls, are “noninfringing uses.” Not only must proponents bear the burden of proof in this regard; the 2011 NOI clearly and properly stated that a proponent of an exemption must establish, *inter alia*, that a particular adversely affected use is “in fact, a noninfringing use under current law.” 2011 NOI at 60,403. This burden cannot generally be met where no clear statute or precedent exists on which the Office can rest its determination.

Thus, for example, arguments that certain uses might, may, should, or could constitute fair use, must carry very little weight in the absence of a clearly controlling legal precedent. The inherently fact-intensive nature of fair use determinations weighs especially heavily against the

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iPads and has been downloaded over one million times). Of course, distribution of the Absinthe tool violates § 1201(a)(2).

Office granting an exemption in the absence of a specific factual record that a particular use is a fair use under existing legal precedents. But this principle is not confined to questions of fair use, nor even of noninfringing use generally. It also applies, for example, to the issue of the scope of exceptions to § 1201(a)(1)(A) enacted by Congress, such as the § 1201(f) exception for certain acts of circumvention necessary to achieve interoperability of computer programs. Absent authoritative judicial interpretation of the statutory exceptions, or clear language in the statute or its legislative history pointing persuasively to a particular conclusion about their scope, the Office should be extremely cautious about making any pronouncements on the legal issues presented.²

F. DMCA Factor (i): The Availability of Copyrighted Works

Several of our observations concern the application of specific factors identified by Congress for consideration in this proceeding. *See* 17 U.S.C. § 1201(a)(1)(C). First, 17 U.S.C. § 1201(a)(1)(C)(i) instructs the Register to consider “the availability for use of copyrighted works.” The legislative history is clear that this rulemaking was not intended to ensure that every new service enables copying, manipulation, and other uses of every existing work in every new format. To the contrary, the legislative history instructs the Register to take into account increases in the availability of works that are due to access controls, and to grant exemptions only where the existence of access controls and the prohibitions of § 1201(a)(1)(A) have “diminished” the availability of works for lawful uses. *See* Commerce Rep. at 36.

Application of this factor requires careful consideration of the broader marketplace for copyrighted works and the extent to which access controls have increased the availability thereof. After all, Congress directed this rulemaking to focus on whether “real marketplace developments” have “diminish[ed] otherwise lawful access to works.” *Id.* Congress passed Title I of the DMCA because the existence of technological protection measures encourages copyright owners to make works of authorship available through new and innovative methods of dissemination. *See* Manager’s Rep. at 8 (predicting DMCA would result in “the availability of copyrighted materials for lawful uses being enhanced, not diminished”). “In assessing the impact of the implementation of technological protection measures, and of the law against circumvention, the[se] rulemaking proceedings should consider the positive as well as the adverse effects of these technologies on the availability of copyrighted materials.” *Id.* at 6.

In Section III below, the Joint Creators and Copyright Owners describe some of the exciting methods of dissemination being offered to consumers in today’s marketplace. The bottom line: through business models that make innovative uses of access control technologies, more works of more kinds are being made available in more ways to more consumers for more

² Institutional considerations argue against the Office reaching out, in this proceeding, to render legal opinions on more or less abstract questions in the absence of authoritative guidance from the statute or the courts. Such an approach risks diminishing the Office’s credibility on issues of statutory interpretation, including issues outside the context of this proceeding. Courts require specific and detailed factual records, developed through adversarial discovery practice, to issue rulings on fair use and other applications of the statute. If the Register does so absent such context, she may unintentionally distort the development of copyright law.

authorized uses than ever before in history, and surely far more in comparison to the situation in 1998 when the DMCA was enacted. Congress' policy choices have been proven correct. Clearly, we have not entered a "pay-per-use" society where each use of a copyrighted work demands payment, and where clearly noninfringing uses are impossible to make without permission.

It is critical that this bigger picture of use-facilitating access control measures be kept in mind throughout this proceeding. Some proponents of exemptions seem to see every popular new service or device as a glass half-empty. Ignoring the enhanced access to copyrighted works at various price points that innovative business models have delivered to the American public, they call on the Office to undermine these models in pursuit of ever more complete free access to copyrighted works. Missing from this perspective is the fact that the constantly evolving marketplace for these works is full of new products and offerings that mainstream consumers are enthusiastically enjoying and that bring them more content with a greater variety of consumption choices.

G. DMCA Factor (iv): The Market for or Value of Copyrighted Works

17 U.S.C. § 1201(a)(1)(C)(iv) instructs the Register to examine, *inter alia*, "the effect of circumvention of technological measures on the market for or value of copyrighted works." This instruction is worded broadly to apply to the overall marketplace, not only the particular access control and particular class of works at issue with respect to any specific exemption proposal. Thus it would be contrary to the Congressional directive to focus narrowly on the effect of circumvention on the value of the specific work to which circumvention would provide access, viewed in isolation from other works made available on the same platform, and from the broader ecosystem. Whatever the merit of such a narrow analytic focus in applying the fourth fair use factor, which specifically targets the impact of a particular use on the market or value for a particular work, it is clearly inapplicable to the fourth § 1201(a)(1)(C) factor, which is expressed differently in order to dictate a different approach that looks at the overall impact on copyrighted works in general. A contrary approach could needlessly risk encouraging unlawful circumvention and trafficking in prohibited devices and services, thereby stoking conduct that devalues copyrighted works. In response to specific proposals discussed in Section IV below, the Joint Creators and Copyright Owners reference examples of such problematic circumvention and trafficking that negatively impact the market for cultural products and business software.

H. DMCA Factor (v): Other Factors

17 U.S.C. § 1201(a)(1)(C)(v) allows the Register to consider "such other factors as the Librarian considers appropriate." The Joint Creators and Copyright Owners respectfully suggest that one such factor should be the ongoing viability of business models that enable copyright owners and their distributors and licensees to engage in transactions that provide some predictability with respect to how works will be accessed and how copyrighted software and technologies used to facilitate such access will be used and manipulated. As Congress recognized, "technological measures – such as encryption, scrambling and electronic envelopes – that [the DMCA] protects can be deployed, not only to prevent piracy and other economically harmful unauthorized uses of copyrighted materials, but also to support new ways of disseminating copyrighted materials to users, and to safeguard the availability of legitimate uses

of those materials by individuals. These technological measures may make more works more widely available, and the process of obtaining permissions easier.” Manager’s Rep. at 6.

As a Court of Appeals recently and resoundingly affirmed, the DMCA is not only about preventing infringement. *See MDY Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 946 (9th Cir. 2010) (access control prohibitions provide a new right, “independent of traditional copyright infringement”). It is also about encouraging business models – “new ways of disseminating copyrighted materials to users” (Manager’s Rep. at 6) – that depend upon robust access control measures in order to increase consumer options and promote the flow of copyrighted materials to the public.

It is inconsistent with Congressional intent to use the 17 U.S.C. § 1201(A)(1)(C)(v) “catch-all” factor as a tool for artificially separating “business interests” from “copyright interests,” with access control measures safeguarded only to the extent that they advance the latter. There is no indication that Congress wanted the Office to draw this distinction. To the contrary, to the extent that business models increase the public’s access to copyright materials for noninfringing uses, including uses made under license or with authorization, Congress aimed to encourage them. The main thrust of the DMCA is about recognizing the manner in which “business interests” and “copyright interests” work together so that businesses based on copyright can succeed in maximizing the public’s access to copyrighted works in the digital age. This proceeding should be carried out in a way that is consistent with this focus.

III. ACCESS CONTROLS INCREASE THE AVAILABILITY OF WORKS.

As discussed above, Congress instructed the Register to consider every three years “the availability for use of copyrighted works.” 17 U.S.C. § 1201(A)(1)(C)(i). The burden is on the proponents of exemptions to provide facts and information supporting their contention that the exemption is justified under the statute. Mere hypothesis and conjecture about what is possible are insufficient. Even if the Office determines that a case has been made which meets the statutory requirements, before recommending any exemption the Register must “consider the positive as well as the adverse effects” of access controls. Manager’s Rep. at 6. Congress intended this proceeding to provide a safeguard against the bleak prospect that the introduction of legal protections for access controls might lead to a marketplace characterized by “*less access, rather than more*, to copyrighted materials that are important to education, scholarship, and other socially vital endeavors.” Commerce Rep. at 36 (emphasis added). Congress also recognized, however, that access controls “support new ways of disseminating copyrighted materials to users, and to safeguard the availability of legitimate uses of those materials by individuals.” Manager’s Rep. at 6. If it appears that works are more widely available for use, and that consumers are able to engage in traditional lawful conduct in an undiminished manner, then the justification for granting exemptions to § 1201(a)(1)(A) is correspondingly diminished.

The Joint Creators and Copyright Owners respectfully suggest that any objective assessment of today’s marketplace for copyrighted materials must inevitably conclude that Congress was correct when it deemed it “most likely” that “the availability of copyrighted materials for lawful uses [would be] enhanced, not diminished, by the implementation of

technological measures and the establishment of carefully targeted legal prohibitions against acts of circumvention.” *Id.* at 8. Indeed, more consumers enjoy authorized access to more works in more ways, and at more affordable price points, than ever before. Moreover, the increased availability has led to increased opportunities for use, including lawful copying. Nearly all of the exemption proposals, as discussed below in Section IV, ignore the benefits of the innovative products and services currently made available in connection with copyrighted works protected by access controls. Their proponents instead complain that access is not maximized to suit their preferences. However legitimate these preferences might be in the abstract, indulging them would contravene the clear statutory directive for this rulemaking.

A. Entertainment Software

The console gaming model is particularly dependent on access controls to ensure the continued availability of new and exciting games that take full advantage of the hardware and provide a consistent, safe, and high-quality user experience. Users purchase gaming consoles like the PlayStation 3, Xbox 360 and Wii because games developed for those systems provide an immersive gaming experience with hyperrealistic graphics. Such games are enormously expensive and time-consuming to design and produce; without access controls to ensure that only authorized copies of those games can be played on a console, developers and publishers would be unwilling to invest the resources to produce the cutting-edge games that drive and sustain demand for the consoles themselves. Accordingly, without effective, consistent access controls to ensure that developers and publishers are able to recoup their investment through sales of their copyrighted games, the availability of high-quality console games would diminish substantially.

In addition to facilitating access to traditional entertainment software offerings, access controls have also underpinned the transformation of game consoles into general purpose entertainment portals. The Xbox 360, PlayStation 3, and Wii each offers users the ability to access a wide range of copyrighted works, including on demand movies, live sporting events, and internet radio. The willingness of rights holders in this wide range of works to license their works for use on game consoles is largely dependent on the console makers’ ability to provide a secure environment.

Entertainment software publishers and console manufacturers are also using access controls in a variety of ways that enhance the gaming experience. For example, through services like Microsoft’s Xbox Live, consumers can download copies of games, acquire updates, new features and new content for existing games, store games in the cloud, and access them at a location of their choosing.³ They can also share their experiences with their families.⁴

The PlayStation Network is a free service available to all PS3 users through which users enjoy free online multiplayer gaming, downloadable game content, access to thousands of HD

³ See Download Games, Xbox Live, <http://www.xbox.com/en-US/Live/Games>.

⁴ See Make Family Night More Amazing With Xbox Live, <http://www.xbox.com/en-US/Live/Family>.

movies and millions of songs, and social interaction in a variety of virtual environments.⁵ In addition, the reasonably-priced service provides consumers with access to multiple titles at no additional charge, something that would not be possible without properly implemented access controls. Similarly, Nintendo enables console owners to access online content using their Wii.⁶ Consumers can, for example, download classic game titles. Each of these services represents an enormous expansion of the availability of a broad range of copyrighted works, and none would have been possible without properly implemented access controls.

Other services, such as Valve Corp.'s Steam service, also continue to rapidly innovate in the personal computer space, for both PCs and Apple products.⁷ Steam offers consumers online access to over 1,100 titles, with instant software updates. Gamers can even enjoy pre-release titles and periods of promotional play at no cost.

B. Literary Works

During the last cycle of this rulemaking, the marketplace for ebooks and audiobooks was growing quickly due to the proliferation of devices such as Amazon's Kindle and Apple's iPod and iPhone. Now, with the release of Barnes & Noble's Nook, Apple's iPad, and a variety of other tablets, ebook and downloadable audiobook usage is at an all-time high.⁸ Although up-to-date figures are not yet included in many studies, reports demonstrate that ebooks have grown from 0.6% of the total book market in 2008 to 6.4% in 2010, which translates to a 1,274% increase in market share.⁹ The increased accessibility of books in convenient formats may even be contributing to an increase in reading among Americans.¹⁰

Publishers are also making their catalogues searchable and reviewable online using access controls. For example, Random House's Insight service enables web developers to interoperate with Random House's library of works, thereby enabling the public to browse books

⁵ See Sony Entertainment Network, <http://sonyentertainmentnetwork.com/main>.

⁶ See Enhance Your Wii, <http://www.nintendo.com/wii/enhance/>.

⁷ See Steam: The Ultimate Online Game Platform, <http://store.steampowered.com/about/>.

⁸ See Julie Bosman, *Tablet and E-Reader Sales Soar*, N.Y. TIMES, Jan. 22, 2012, available at <http://mediadecoder.blogs.nytimes.com/2012/01/22/tablet-and-e-reader-sales-soar/?ref=technology>; Harris Interactive, *One in Six Americans Now Use E-Reader with One in Six Likely to Purchase in Next Six Months*, Sept. 19, 2011, available at <http://www.harrisinteractive.com/NewsRoom/HarrisPolls/tabid/447/ctl/ReadCustom%20Default/mid/1508/ArticleId/864/Default.aspx>.

⁹ See BookStats Publishing Formats Highlights, <http://www.publishers.org/bookstats/formats/>.

¹⁰ See National Endowment for the Arts, *Reading on the Rise: A New Chapter in American Literacy*, available at <http://www.nea.gov/research/Readingonrise.pdf> ("For the first time in over a quarter-century, our survey shows that literary reading has risen among American adults.").

before buying them or search for text or audio content based on terms or subjects.¹¹ Harper Collins' Browse Inside tools enable similar functionality.¹²

Finally, publishers continue to use access controls to enable scholarly, educational, and library access to books in unprecedented ways. Starting in January of 2012, publishers and the British Library began offering a cross-border service to improve access.¹³ The framework enables publishers and libraries to cooperatively provide copyrighted journal articles to the libraries' users, such as students, faculty and researchers, for non-commercial research or private study. In addition, publishers have addressed issues related to the cost concerns of students, faculty, colleges and universities. Publishers have partnered with policymakers and educators across America to create technology-based, cost-conscious alternatives that enable students and institutions to save money while getting better results in the classroom. Cost Effective Solutions for Student Success is one example of such efforts.¹⁴

C. Motion Pictures and Television Programs

Once again, the motion picture and television sector has experienced some exciting advances. Innovative new and improved offerings include (i) methods of enjoying access to movies and television programs on multiple devices; (ii) enhanced online and on-demand access to programming offered by cable, satellite, IPTV platforms and other MSOs; (iii) free (advertising-supported) and payment-based online streaming and downloading services.

- Content accessible on multiple devices. In past cycles of this proceeding, as well as the current cycle, proponents of exemptions have asserted a need to circumvent access controls in order to back up copies of motion pictures and to access copies of motion pictures on portable devices. MPAA member companies have been working with technology companies to reduce any such need by steadily diversifying the means by which consumers may enjoy movies and television programs. With each passing three-year period improvements have been made. In the last rulemaking, the Joint Creators and Copyright Owners noted that DVDs and Blu-Ray discs had been sold to include additional digital copies to enable access to content on multiple devices, including mobile devices. Current developments, however, are arguably the most impressive and expansive.

¹¹ See Insight Web Service, <http://www.randomhouse.biz/webservices/insight/overview>.

¹² See Browse Inside: Try Before You Buy, <http://browseinside.harpercollins.com/>.

¹³ See Press Release, *Association of American Publishers, Professional and Scholarly Publishers Endorse British library Framework for Global Document Deliver Service*, Dec. 1, 2011, available at <http://www.publishers.org/press/53/>.

¹⁴ See About Us, <http://www.solutionsforstudentsuccess.org/about>.

Notably, a consortium of more than seventy companies, called the Digital Entertainment Content Ecosystem, has worked together to develop UltraViolet.¹⁵ UltraViolet is a cloud-based service designed to allow consumers to purchase, acquire and reacquire content from participating retailers and then watch it on a wide array of compatible devices. UltraViolet is designed with families in mind, and for that reason it allows accounts with multiple users. Once an account is created, any authenticated user can go to a participating retailer and obtain UltraViolet-enabled content; once in the account, multiple copies of that UltraViolet-enabled content are available (subject to certain restrictions, e.g., parental controls) to any authenticated user to view on multiple platforms and displays, including on television screens (with or without a DVD or Blu-Ray player), desktop computers, laptop computers, tablets, and smartphones.¹⁶ A further benefit is that UltraViolet enables multiple methods of content delivery: streaming, download, and physical formats (e.g., DVD or Blu-ray).¹⁷ The robustness of the UltraViolet platform also enables innovative consumer offerings, such as the ability of content distributors to offer consumers the possibility of converting titles they previously purchased on DVD and Blu-Ray into UltraViolet-enabled content. Several motion picture studios have already announced their intention to make such an offering for a nominal fee.

UltraViolet represents a giant leap forward in providing unprecedented flexibility to consumers to access and experience their purchased content at a time and place of their choosing, not to mention unparalleled consumer peace of mind. UltraViolet has been designed with a broad perspective of interests in mind, including those of retailers, consumer electronics manufacturers and content distributors, to ensure the widest possible adoption by all stakeholders, and their respective consumer bases. Furthermore, the success of legitimate distribution methods like UltraViolet and other authentication-based initiatives depends on the availability of robust protections for secure digital content access and delivery as a means of limiting the availability and appeal of illegitimate means of distribution.

- “TV Everywhere” Initiatives. MPAA member companies and other content owners, in conjunction with multichannel video programming distributors (“MVPDs”) now offer their customers unprecedented on-demand access to movies and television programs via the internet as part of their cable/satellite

¹⁵ See BUSINESS WIRE, *Digital Entertainment Content Ecosystem Unveils Ultraviolet Brand*, July 20, 2010, available at <http://www.businesswire.com/news/home/20100719006854/en/Digital-Entertainment-Content-Ecosystem-Unveils-UltraViolet%E2%84%A2-Brand>.

¹⁶ See What is UltraViolet?, <http://www.uvvu.com/what-is-uv.php>; Frequently Asked Questions, <http://www.uvvu.com/faqs.php#question-2>.

¹⁷ See Brent Lang, *UltraViolet Backers Get Ready To Make More Noise In 2012*, REUTERS, Jan. 10, 2012, available at <http://www.reuters.com/article/2012/01/11/us-uviolet-idUSTRE80A08S20120111>.

television subscriptions, which provides users with the ability to access televised content on their internet connected devices. Examples of such services include Comcast's XFINITY website and mobile apps,¹⁸ DISH Network's DISH Online,¹⁹ and Verizon's FiOS TV Online.²⁰ These services and others enable customers to watch many of the programs they can watch at home on traditional television sets via internet-connected devices, such as mobile phones, personal computers, and tablets. Some MVPDs, such as Cox Communications, allow their customers to view certain live television channels within the home via applications for mobile devices.²¹ This complements the existing access by subscribers to significant numbers of shows and movies, often in high-definition, on their television sets at a time of their choosing via video on demand.

In addition to access offered by portals managed by MVPDs as described above, a growing number of cable networks, including HBO,²² CNN, Cartoon Network, TBS, Cinemax, Showtime, ESPN, The Disney Channel and the Big Ten Network²³ provide access directly to subscribers via branded content portals. These offerings are predicated on protections underlying the ability of content providers to offer secure, authenticated access to authorized subscribers. Authenticated portals from cable networks are offered in conjunction with MVPDs, who work together to verify a user is a subscriber of the corresponding television network, and would not be possible without the access control measures which are the subject of these proceedings. In addition to cable networks, many broadcast television networks allow the general public to view popular television programming online on the networks' websites at no cost.

- Download and streaming platforms. In addition to authenticated "TV everywhere" services, most popular movie and television content is available on mobile phones and tablet computers through subscription models and one-time payments. Services include Apple's iTunes, Hulu Plus,²⁴ and AT&T U-verse Live TV.²⁵

¹⁸ See Watch XFINITY TV Online, <http://xfinitytv.comcast.net/>.

¹⁹ See DISH Online <http://www.dishonline.com/>.

²⁰ See FiOS TV Online, <http://www22.verizon.com/OnDemand/unprotected/ftvonline.aspx>.

²¹ See Cox Mobile Connect for iPad, <http://itunes.apple.com/us/app/cox-mobile-connect-for-ipad/id423688193?mt=8>.

²² See HBOGo, <http://www.hbogo.com/>.

²³ See BTN2Go, <http://www.btn2go.com>.

²⁴ See Hulu Plus, Enjoy More Popular, Current Shows, <http://www.hulu.com/plus/content>.

²⁵ See AT&T U-Verse Live TV, <http://attuverselivetv.att.com/channels/>.

In short, the means of accessing a broad array of content have grown exponentially since the last rulemaking. Content owners have worked with a vast network of distributors and providers to ensure broad accessibility to high-quality content outside of the traditional distribution channels. All of this growth in content distribution is underwritten by the legislative promise of secure and robust protection for such content.

D. Music

Since the last cycle of this rulemaking, access controls have continued to facilitate the emergence of new services that make recorded music more available than ever before. While existing and diverse subscription platforms such as Sirius XM Radio, Music Choice, Rhapsody, Mog, Rdio, Pandora, Slacker and V Cast Music continue to succeed at providing at-home and on-the-go access to music, some significant new services have also emerged.²⁶

- iTunes Match. In 2011, Apple launched the iTunes Match service, which enables consumers to access purchased music seamlessly on a variety of devices and at a variety of locations. For a low annual rate, the service even allows consumers to access, online, music purchased on CDs rather than through iTunes.²⁷ Licensed services like this will help consumers enjoy their music consistent with today's digital lifestyle while ensuring that artists and record labels continue to be compensated.
- Spotify. 2011 also saw the launching of Spotify in the United States, with great success.²⁸ Spotify offers users a vast library of recorded music, available for on-demand streaming. Spotify also enables creative methods of sharing music with friends. The service is offered in free advertising supported form, or by multiple subscription models.
- Muve Music. This service allows users to download millions of songs directly to a mobile handset from anywhere, with unlimited music downloads included in the user's rate plan.²⁹ It also allows users to create their own ringtones and ringback tones. The My DJ feature creates playlists for users and sends them directly to their phone. Muve Music can be freely shared with other Muve Music users; users can see what others are listening to, download their favorite songs, view their ringtones and more.

²⁶ A representative list of digital music services, some of which utilize access controls, is available at <http://www.pro-music.org/Content/GetMusicOnline/stores-us.php>.

²⁷ See Press Release, Apple, *Apple to Launch iCloud on October 12*, Oct. 4, 2011, available at <http://www.apple.com/pr/library/2011/10/04Apple-to-Launch-iCloud-on-October-12.html>.

²⁸ See Press Release, Spotify, *Hello America, Spotify Here*, Jul. 14, 2011, available at <http://www.spotify.com/us/about-us/press/hello-america-spotify-here/>.

²⁹ See Muve Music From Cricket, <http://www.mycricket.com/muve-music>.

E. Operating Systems and Software Distribution Platforms

The last few years have witnessed dramatic changes in the software industry to the benefit of developers and users alike. There has been an explosion of new operating systems, devices, and computing platforms. Apple's iOS, which existed on the iPhone at the time of the last rulemaking, has matured and expanded to operate the iPad. Google's Android operating system is widely popular on mobile phones, tablets, and ereaders in various versions. Microsoft introduced a new mobile operating system, Windows Phone 7, in 2010. Desktop computer users also have a wider choice in operating systems than they did just a few years ago, with the increasing popularization of Linux and the introduction of Google's Chrome OS, for example. All of these devices can also interoperate with internet-based applications running on cloud operating systems like Windows Azure and Amazon's E3 environment.

Alongside the growth in operating systems has been the growth of app stores, such as Apple's App Store, Google's Android Market, Microsoft's Windows Phone Marketplace, Amazon's Appstore, RIM's BlackBerry App World, and others, which provide the user a centralized place to locate and acquire software applications for their device. Developers – professional and amateur alike – have created over a million different apps for mobile devices in less than four years. App stores are not limited to mobile operating systems, however: Apple, Microsoft, and Google have announced or implemented app stores for their desktop operating systems, Mac OS, Windows, and Chrome.

This proliferation of operating systems, app stores, and cloud computing platforms has led to unprecedented choice for developers and users, and to enabling interoperability of computer programs in many different ways. Some platforms help make sure developers can run their software on the platform by providing a consistent, reliable computing experience, supported by technological protection measures, and enhanced by substantial resources provided to developers to help make their apps work well on the platform. Others try to enhance interoperability by placing fewer restrictions on what developers and users can run on those platforms. In addition, developers also have the choice to build cloud computing applications that can be accessed by PCs, devices and mobile phones, regardless of operating system. In all cases, the goal is to lower barriers to interoperability, so as to help and encourage developers to write software for a particular platform. As a result, developers and users have a wider array of options than ever before. It is critical that the Copyright Office understand this broader context when considering the unfounded claim that interoperability must be served by allowing circumvention of access controls.

Access control technologies also play a critical role in the ongoing task of upgrading the security of computer networks and resources and reducing their vulnerability to viruses and other attacks. Thanks to access controls, virtually all commercial software applications can be accessed, downloaded and/or updated online, whether directly from the developer or through third parties.

No innovation in the world of software and information technology is attracting more attention today than cloud computing. Even since the last rulemaking cycle concluded, cloud computing has become an increasingly important way of delivering IT functionality to consumers, businesses and governments. While cloud computing still accounts for a relatively

small portion of industry revenues, it is the fastest growing part of the industry. As software is increasingly downloaded for use or delivered as online services in the future, the importance of keys, IDs and passwords in enabling these services while protecting software copyright holders' rights increases accordingly.

IV. RESPONSES TO PROPOSED CLASSES OF WORKS

A. Public Domain Literary Works

1. Proposed Class

1 *“Literary works in the public domain that are made available in digital copies.”*

2. Summary of Response

The Joint Creators and Copyright Owners agree that § 1201(a)(1) must be construed as inapplicable to technological measures that only control access to public domain content. For that reason, however, an exemption related exclusively to public domain material would be inappropriate as beyond the scope of this proceeding.

3. Response

The Open Book Alliance (“OBA”) proposes an exemption for public domain literary works that are made available in digital form and are protected by access controls. In the alternative, the proponent asks the Register to clarify that “the anticircumvention provisions of 17 U.S.C. § 1201(a) do not apply to technological protection measures (‘TPMs’) placed on digital copies of literary works in the public domain.” OBA Comments at 1.

It is important to note that the prohibition contained in § 1201(a)(1) applies only to circumvention of technological protection measures “that effectively control access to a work protected under” title 17. The Copyright Office has clearly so interpreted the provision previously. *See, e.g.*, 2010 Rec. at 256 (“Works in the public domain are not affected by the prohibition on circumvention. ... Therefore, Section 1201 does not prohibit circumvention of a technological protection measure when it simply controls access to a public domain work; in such a case, it is lawful to circumvent the technological protection measure and there is no need for an exemption.”). The Joint Creators and Copyright Owners have no objection to this cycle resulting in a similar conclusion.

Furthermore, the Register should not paint with too broad a brush if she grants an exemption or issues a “clarification.” Many literary works that have fallen into the public domain are republished (in traditional or ebook formats) in editions containing copyrighted cover-art, photographs, introductions, epilogues, or other materials. Such editions would contain material protected under title 17, and thus circumvention of access controls used to protect those works would be prohibited. The Joint Creators and Copyright Owners do not read the proposal of the Open Book Alliance to apply to such circumstances, and in any event the comment does not establish a need for an exemption applicable to such circumstances.

B. Literary Works for Blind and Visually Impaired Persons

1. Proposed Class

2 “*Literary works, distributed electronically, that: (1) contain digital rights management and/or other access controls which either prevent the enabling of the book’s read-aloud functionality or which interfere with screen readers or other applications or assistive technologies that render the text in specialized formats; and (2) are legally obtained by blind or other persons with print disabilities (as such persons are defined in section 121 of Title 17, United States Code), or are legally obtained by authorized entities (as defined in such section) distributing such work exclusively to such persons.*”

2. Summary of Response

If the proponents submit additional evidence and arguments and thereby satisfy their burden, the Joint Creators and Copyright Owners do not oppose in principle recognition of an exemption identical to the current exemption related to circumvention for enabling access to ebooks for blind and visually impaired persons. However, this proposal seeks an unnecessarily broad expansion of the existing exemption. The proponents also fail to provide factual support demonstrating a need for the exemption, or use of the existing exemption. Finally, the proposal appears to cover trafficking in products or services for circumvention of access controls, which is outside of the scope of this rulemaking. Unless the exemption is narrowed significantly and additional evidence and legal arguments are submitted for the record, the proposal should be rejected.

3. Response

This proposal addresses a significant and real issue of access by the visually impaired to ebooks; but it lacks both the evidence and the legal argument required to justify the substantial widening of the existing exemption on this subject that it proposes. While the existing exemption applies only to circumstances in which “all existing ebook editions of the work (including digital text editions made available by authorized entities) contain access controls that prevent the enabling either of the book’s read-aloud function or of screen readers that render the text into a specialized format,” (37 C.F.R. § 201.40(b)(6))³⁰ the new proposal would apply to all literary works protected by access controls, regardless of whether available, accessible alternatives exist. There is no need for an exemption where a work is available in accessible formats. *See* Manager’s Rep. at 7. Thus, the American Council of the Blind (“ACB”) and American Foundation for the Blind (“AFB”) have failed to meet their burden to explain why such an expansion of the existing exemption is justified.

³⁰ The narrow crafting was done by the Copyright Office in its 2003 Recommendation. *See* 2003 Rec. at 64-82. In the 2008-10 cycle, the Office concluded that there was insufficient evidence upon which the exemption could be recognized again. *See* 2010 Rec. at 246-262. In rejecting the Office’s recommendation, the Librarian recognized the same exemption that the Office had crafted in the earlier cycles. *See* 2010 Final Rule at 43,838.

There is nothing in the record at this point to suggest that the exemption has been used at all. *See* 2006 Rec. at 39-40 (“One could well conclude that the fact that a class of works has enjoyed an exemption for the past three years but nobody appears to have taken advantage of that exemption is proof that the prohibition on circumvention is unlikely to have any adverse effect on the ability of users of that class of works to make noninfringing uses during the next three years.”). In fact, the proponents seem to assume that the existing exemption was denied in 2010. *See* ACB and AFB Comments at 5. Of course, this is incorrect. The Librarian did not follow the Register’s recommendation not to grant the exemption. *See* 2010 Final Rule at 43,838 (“The Librarian has considered but rejected the Register’s recommendation with respect to the proposed class of works consisting of literary works distributed in ebook format.”). Thus, the extent to which the existing exemption is being used at all is unclear, which undermines the call for an expansion thereof.

What the proponents’ comments do indicate is that large numbers of ebooks are available in accessible formats, and at least hundreds of thousands of titles are available in “fully accessible” formats through, for example, Apple’s iBookstore. *See* ACB and AFB Comments at 8-9. Given the large-scale availability of accessible editions, the Joint Creators and Copyright Owners see no reason why the existing exemption should be expanded to cover works that can be lawfully obtained in the desired formats without engaging in circumvention.

The proposal apparently would also cover circumvention by “authorized entities” for the purpose of distributing literary works. *See* ACB and AFB Comments at 12 (stating exemption should apply to “readers who are blind or visually impaired, or anyone else, who devises means to circumvent copy protection measures to allow access by people with print disabilities”); *see also* 17 U.S.C. § 121 (defining “authorized entity” as “a nonprofit organization or governmental agency that has a primary mission to provide specialized services relating to training, education, or adaptive reading or information access needs of blind or other persons with disabilities”). Such conduct is prohibited by § 1201(a)(2), not § 1201(a)(1), and is outside the scope of this proceeding. *See* 2011 NOI at 60,400 (“The Librarian of Congress has no authority to limit either of the anti-trafficking provisions contained in subsections 1201(a)(2) or 1201(b)(1).”). Nor does the Librarian have any authority in this proceeding to expand the scope of activities that may lawfully be undertaken by “authorized entities” under § 121.

In conclusion, the Joint Creators and Copyright Owners agree with the Librarian that “there are broad benefits to society in making works accessible to the visually impaired.” 2010 Final Rule at 43,838. Thus, the Joint Creators and Copyright Owners do not object in principle to the existence of the current exemption. However, the marketplace is progressively improving access for disabled persons, not lessening it. If the proponent submits more support into the record and the Office concludes that the evidence justifies it, the Joint Creators and Copyright Owners do not oppose the recognition of an exemption identical to the current exemption.

C. Platform Hacking – Smartphones and Tablets³¹

1. Proposed Class

5 “Computer programs that enable wireless telephone handsets (‘smartphones’) and tablets to execute lawfully obtained software applications, where circumvention is undertaken for the purpose of enabling interoperability of such applications with computer programs on the handset or tablet.”

2. Summary of Response

This proposal should be rejected because circumvention related to mobile phones and tablets increases piracy of applications and is detrimental to the secure and trustworthy innovative platforms that mainstream consumers demand. The marketplace for smartphone and tablet apps has matured since the last proceeding, and alternatives to circumvention now exist. Congress intended the DMCA to protect the right of a platform developer to choose how open to make the system designs. Granting the proposed exemption would harm the market for and value of copyrighted works. In addition, the Electronic Frontier Foundation (“EFF”) has failed to establish that the conduct at issue is not covered by § 1201(f). The proponent has not met its burden of persuasion in this *de novo* proceeding.

3. Response

EFF’s proposal to expand the existing exemption related to mobile phone interoperability should be denied. As discussed above in Section II, the Office must approach this new proposal *de novo*.

First, Congress already codified the contours of acceptable circumvention related to interoperability in § 1201(f). *See supra* Section II. It is EFF’s burden to prove that circumvention for the purpose proposed would not qualify for that exemption. If the § 1201(f) exception is applicable, then no § 1201(a)(1)(C) exemption is justified, since § 1201(a)(1)(A) could not interfere with the ability to access works for noninfringing purposes. EFF has not pointed to any court decision that is dispositive on this issue and thus EFF has failed to meet its burden. Furthermore, if it were established that Congress chose not to include the conduct at issue within § 1201(f), then proponents would bear the burden of explaining why the Librarian has the authority in this proceeding to set that decision at naught. *Cf.* 2010 Rec. at 13 (“[I]f Congress has enacted a statutory exemption for certain types of activities that includes requirements that proponents of a class cannot meet, that may be evidence of legislative intent not to permit circumvention when those requirements have not been met”).

Second, the fourth statutory factor set forth in § 1201(a)(1)(C) instructs the Register to consider “the effect of circumvention of technological measures on the market for or value of copyrighted works.” It does not limit its instruction to consideration of the impact of circumvention on the particular copyrighted work to which access would be obtained through

³¹ In order to address the proposals in the most logical sequence, we depart in the next three sections from the order in which the proposed exemptions are presented in the 2011 NPRM.

circumvention. Thus, the relevant consideration is not limited to just the impact on the market for or value of device firmware, as it may be under a fair use analysis.³² Instead, the Register must consider the impact on the market for or value of *all* copyrighted works utilized in connection with the firmware and the device it resides on. When the Register approaches the proposal from this standpoint, the harm at issue becomes clear. Copyright owners and their distributors and licensees select settings for tethered devices in order to recoup investments in a wide spectrum of innovative endeavors, and circumvention that undoes those selected settings undermines plans for such recoupment.³³

³² The Copyright Office’s 2010 fair use analysis with respect to the exemption granted for achieving interoperability was flawed. Among other things, the Office reached the peculiar conclusion that “[t]he fact that the person engaging in jailbreaking is doing so in order to use Apple’s firmware on the device that it was designed to operate, which the jailbreaking user owns, and to use it for precisely the purpose for which it was designed . . . favors a finding that the purpose and character of the use is innocuous at worst and beneficial at best.” 2010 Rec. at 93 (emphasis added). Although the Joint Creators and Copyright Owners agree with the Office that a use need not qualify as “transformative” to be fair in some circumstances (*id.* at 95), concluding that a use is “favored” because it constitutes the exact opposite of a transformative use is erroneous. The Office should recalibrate its approach to operating system software, as nothing in the Copyright Act indicates that such works are less deserving of protection than other works. The Office should not let the development of business models dictate its approach to the strength of exclusive rights and the scope of exceptions thereto. Simply because the marketplace has developed so that it is today “customary” for operating systems to enable interoperability (*id.* at 96) that was not always the case, and copyright law fully protected operating systems in the past against infringement. *See, e.g., MAI Sysys. Corp. v. Peak Computer, Inc.*, 991 F. 2d 511(9th Cir. 1993); *Apple Computer, Inc. v. Formula Int’l. Inc.*, 725 F. 2d 521 (9th Cir. 1984). The Office’s approach in the 2010 recommendation virtually decrees that copyright owners in these works are deemed to have dedicated their exclusive adaptation right to the public, since it concluded that the “nature” of this kind of work “decisively favors” a finding that any adaptation of it – even one that is a slavish copy of 7,999,950 of the program’s 8 million bytes – is a fair use. *See* 2010 Rec. at 96-97.

³³ Protecting the ability to implement such plans is part of what the DMCA was enacted to achieve. The U.S. Government (“USG”) argued just that in an *amicus curiae* brief filed in support of rehearing in *MGE Ups Sysys., Inc. v. GE Consumer and Industrial, Inc.*, 622 F.3d 361 (5th Cir. 2010). There, a panel of the Fifth Circuit concluded that a copyright owner’s “technological measure must protect the copyrighted material against an infringement of a right that the Copyright Act protects, not from mere use or viewing.” *MGE Ups Sysys., Inc. v. GE Consumer and Industrial, Inc.*, 612 F.3d 760, 765 (5th Cir. 2010). USG rejected this conclusion. *See* USG *Amicus Curiae* Brief at 5 (“Nothing in the text of the statute links ‘access’ with infringement of the underlying copyright.”). After all, Congress separated access control circumvention from infringement, and the consideration of “the market for or value of copyrighted works” (§ 1201(A)(1)(C)(iv)) looks to harm beyond harm to traditional copyright interests.

Thus, the Joint Creators and Copyright Owners take exception to the 2010 conclusion that a copyright owner's "interests as a manufacturer and distributor of a device" are somehow entirely separable from its interests in its copyrighted works. 2010 Rec. at 93. The entire purpose of a tethered device is to facilitate access to works in a manner that supports the most expansive lawful distribution of those works. The DMCA supports a person's ability to choose to do so as part of a strategy to enhance the digital dissemination of copyrighted works, as the Copyright Office has long acknowledged. *See* 2006 Rec. at 71-72, *quoting* 2003 Rec. at 138 ("The fact that copyright owners are able to tether works to particular platforms is likely to encourage some copyright owners to make their works available in digital format.").

Contrary to EFF's assertions, the focus should not be on the impact that circumvention for the purpose of enabling use on devices of unauthorized applications would have on "the actual market for the firmware bundled with the machines." EFF Comments at 18. The Register should, instead and as stated in the Federal Register Notice announcing the current cycle of the rulemaking, consider whether a technological measure "supports a distribution model that benefits the public generally." 2011 NOI at 60,401.

The Office should thoroughly consider how circumvention that enables access to the firmware harms the overall content ecosystem that tethered devices enable copyright owners to exploit. As the Assistant Secretary for Communications and Information of the Department of Commerce observed in his letter questioning the exemption recommended by the Office in the last cycle, hacking aimed at undoing selected settings for tethered devices can "deter innovation by not allowing the developer to recoup its development costs and to be rewarded for its innovation." 2009 NTIA Letter at 9.

In any event, the anti-circumvention provisions of § 1201(a)(1) assist copyright owners and their distributors and licensees to prevent piracy of their copyrighted applications. Without access controls that verify the legitimacy of newly installed applications, modified firmware facilitates use of infringing copies of applications. Myriad infringing applications are available to run on hacked devices.³⁴ Moreover, it does not ameliorate the problem to limit the exemption to circumvention engaged in for the purpose of executing "lawfully obtained software applications." This is hollow protection at best given that the language does not clearly prohibit use of the exemption in conjunction with infringing conduct and instead focuses on the method by which an application is "obtained." Moreover, the proponent currently attempts to remove the word "sole" from the architecture of the current exemption (EFF Comments at 1), thereby allowing circumvention that results in running pirated content as long as some installed applications are lawful.

³⁴ *See, e.g., iPhone Pirating App Attacks Rival Pirate App Store*, TORRENTFREAK, Mar. 30, 2009, <http://torrentfreak.com/iphone-pirating-app-attacks-rival-pirate-iphone-app-store-090330/>; *Top 3 Sites To Download Cracked .ipa Files for iPhone and iPod Touch*, FSM.COM, Mar. 25, 2009, <http://www.funkyspacemonkey.com/top-3-site-download-cracked-ipa-files-iphone-ipod-touch>.

Third, circumvention is not necessary for consumers to install applications on mobile phones or tablets. Mobile phones and tablets running the Android operating system are available completely unlocked. Although EFF largely ignores this fact, it seriously undermines any need for an exemption in this context. If a consumer wants a device with an operating system that can interoperate with independent applications, the consumer can purchase an unlocked Android device.³⁵ Consumers can and do switch from one phone device to another very frequently, just as they switch phone networks. While these switches may be motivated by a variety of factors, the availability of desired applications is prominent among them. As market developments and competitive pressures drive toward making these switches easier and cheaper, the financial and logistical costs of doing so sink inexorably below the level of “inconvenience” (Manager’s Rep. at 6) that undermines any further justification for maintaining this exemption. Cf. 2003 Rec. at 122 (“[T]here continue to be options available to consumers who wish to view non-region 1 DVDs. A user may still obtain DVD players for other regions from which the user wishes to watch DVDs.”). The examples EFF offers of more restricted Android systems, such as the systems used in connection with the Nook and Kindle devices (EFF Comments at 6-7), do not justify an exemption, because a consumer can obtain a more open device in the marketplace. There is no justifiable reason that Amazon, Barnes and Noble, or any other service provider should be forced to subsidize purchases of devices for unintended uses.

EFF proposes that its exemption apply not only to smartphones, but also to “tablets,” but fails to provide any definition of the latter term. Since the term provides no real limitation on the scope of the proposed exemption, the EFF proposal utterly fails to describe a “particular class of works,” as required by the statute, or else becomes nearly indistinguishable from the meritless SFLC proposal discussed below in Section IV(E) of these comments. The Register should be especially rigorous in holding the proponent to its burden of defining and proving the merits of its proposal, which threatens to impact one of the most successful “new ways of disseminating copyrighted materials to users.” Managers Rep. at 6. Millions of consumers are now using products generally referred to as “tablets” to enjoy licensed access to every variety of copyrighted work, from books to games, and from music to movies to software. Where this takes place in an environment secured by access controls, an exemption perceived as granting permission to hack the operating system of such an environment could wreak havoc on one of the most vibrant new markets for consumer access to works.

³⁵ See Tim Bray, *Nexus One Developer Phone*, Aug. 5, 2010, <http://android-developers.blogspot.com/2010/08/nexus-one-developer-phone.html>.

D. Platform Hacking – Videogame Consoles

1. Proposed Class

3 “Computer programs that enable lawfully acquired video game consoles to execute lawfully acquired software applications, where circumvention is undertaken for the purpose of enabling interoperability of such applications with computer programs on the gaming console.”³⁶

2. Summary of Response

This proposed exemption should be rejected. As a threshold matter, unless activity aimed at achieving interoperability fits within the contours of 17 U.S.C. § 1201(f), a determination reserved to the courts, Congress intended the activity to be unlawful. The Register should not thwart that intent.

Moreover, the Electronic Frontier Foundation’s (“EFF’s”) request fails to meet its burden of showing substantial adverse effects on noninfringing uses resulting from game console access controls, offering only arcane examples of limitations in convenience that are isolated either in time or to a specific brand of console, and many of which no longer exist. In so doing, EFF ignores readily available alternatives for these same uses, and thus betrays that its true objective is not to cure the specific “limitations” they have conjured to support their request, but to continue a steady march toward dismantling the DMCA.

Finally, and perhaps most critically, the DMCA’s statutory factors compel the rejection of EFF’s proposed exemption. Access controls in game consoles increase the market for and value of a wide range of copyrighted works – games, movies, television, music – by enabling the broad dissemination of that content on game consoles in a manner that protects publishers’ exclusive rights. By contrast, granting the exemption sought by EFF would, by definition, sanction a marketplace for the same “hacks” that enable play, reproduction and online

³⁶ The Joint Creators and Copyright Owners note that EFF’s request for an exemption at times limits the proposal to circumvention accomplished for the “sole purpose” of achieving interoperability (EFF Comments at 19), but at others omits the word “sole” (*id.* at 1). In the latter phrasing, the exemption could be read to apply to the initial act of hacking a console for the dual purpose of enabling play of noninfringing “homebrew” games even if the same consumer later played infringing copies of popular copyrighted games and movies. The NPRM for the current proceeding, intentionally or not, also omits the “sole purpose” limitation. This broader exemption is plainly unable to pass muster under the relevant inquiry, as it would explicitly sanction circumvention for infringing uses, a conclusion EFF seemingly understands because its stated class sometimes contains the “sole” limitation. And even if the “sole purpose” language was included, in practice, granting the exemption would certainly lead to infringement. The same acts of circumvention that enable the uses allegedly sought by EFF in reality disarm TPMs that guard against the unauthorized play, copying and distribution of pirated content through the game consoles. These latter infringing uses, contrary to EFF’s blithe assertions to the contrary, are the predominant ones made of the relevant console hacks.

distribution of infringing copies of those copyrighted works and thereby diminish the market for and value of legitimate copies of those works.

3. Response

EFF proposes a misguided exemption that would injure one of the most vibrant platforms for distribution and consumption of copyrighted expression: videogame consoles. The Joint Creators and Copyright Owners refer the Office to the concurrently submitted comments of the Entertainment Software Association (the “ESA”), which describe in greater detail how granting the proposed exemption would gut the very protections that the DMCA is intended to provide copyright owners, and reduce consumer access to copyrighted content on game consoles, in service of a niche “community’s” philosophical preference to be able to run operating systems and applications on the devices of their choice even though equivalent platforms are available. The Joint Creators and Copyright Owners submit these separate comments because of the broad adverse impact the proposed exemption would have well beyond video games, including specifically the ability to distribute securely by streaming and download copyrighted movies, television programming, music and other content on game consoles.

a) EFF Has Not Met Its Burden Regarding the Interplay of § 1201(f) With EFF’s Proposed Exemption.

Because the conduct for which EFF seeks a regulatory exemption (the need to circumvent to facilitate interoperability) is already addressed by a statutory exception, EFF faces two unique burdens. First, proponents of such exemptions must demonstrate that the statutory exception is inapplicable to the precise conduct for which a regulatory exemption is sought. Second, if that showing is made, proponents must then articulate the source of the Librarian’s authority to provide an exemption for conduct that Congress may purposefully have excluded from the statutory exemption. *See supra* Section II(E). Here, EFF fails to acknowledge, much less satisfy, either requirement.

The purpose of this rulemaking is not to rewrite the existing statutory exceptions, but rather to consider the merit of new temporary regulatory exemptions in order to achieve the Congressional objective in areas *not previously considered* by Congress. With respect to circumvention related to accessing computer programs for the purpose of facilitating interoperability, Congress has already addressed the issue. *See* 17 U.S.C. § 1201(f)(1). EFF does not address why the § 1201(f)(1) statutory exemption does not insulate console “jailbreaking.” Although EFF’s assertion of need for a regulatory exemption seemingly implies the inapplicability of § 1201(f)(1), EFF also asserts that, “[w]hen enacting the DMCA, Congress created § 1201(f) to explicitly protect reverse engineering and interoperability, and to ‘ensure that the effect of [*Sega v. Accolade*, 977 F.2d 1510 (9th Cir. 1992)] is not changed by the enactment of [the DMCA].” EFF Comments at 32 (internal citation omitted). EFF’s twin assertions that Congress enacted § 1201(f) to exempt the conduct at issue in *Sega* and that the conduct in *Sega* is analogous to console “jailbreaking,” make plain that the legality of engaging

in circumvention related to interoperability should be evaluated by the courts, not by the Copyright Office in this proceeding.³⁷

A review of EFF's anti-DMCA advocacy makes clear why it is seeking a regulatory exemption rather than litigating under § 1201(f) as Congress intended. EFF's request here is merely one facet of a broad strategy to chip away at the protections Congress afforded copyright owners who employ access controls. Indeed, the Register should consider the motivations of the proponent where its stated goal is not strictly to facilitate noninfringing uses of copyrighted works, but rather to unequivocally "disarm the DMCA"³⁸ through the series of "jailbreaking" exemptions sought here. EFF has consistently asked courts to usurp congressional authority by arguing that § 1201(a)(1) cannot be violated without a direct nexus to infringing conduct.³⁹ Recently, EFF also has wrongly argued that the trafficking prohibitions of § 1201(a)(2) impose only indirect liability.⁴⁰ Although this rulemaking is limited to acts of circumvention, EFF evidently hopes to muddy the waters for future courts by obtaining an exemption to § 1201(a)(1), and then later arguing that trafficking in devices or services that can be used to exercise that exemption does not violate § 1201(a)(2). In doing so, EFF would seek to achieve its goal of effectively rewriting the statute to allow trafficking in circumvention tools far beyond congressional intent.⁴¹ Knowing EFF's intentions, the Register should not, by recommending the proposed exemption, encourage the proponent to continue its efforts to thwart Congress' decisions and incite and excuse unlawful trafficking.

³⁷ To the extent EFF is instead claiming that § 1201(f)(1) does not apply because the conduct at issue here materially differs from that at issue in *Sega*, then their arguments that *Sega* establishes that current iterations of console firmware modification are fair use are inapposite. *See* ESA Responsive Comments at Section III. Moreover, EFF fails to demonstrate the basis for the authority of the Librarian to in effect extend an exemption beyond Congressional intent.

³⁸ *See* Email from Parker Higgins and the EFF Action Team to "Friend of Digital Freedom", Jan. 25, 2012 (on file with counsel for Joint Creators and Copyright Owners) ("Last week, we worked together to fend off the Internet blacklist legislation. This week, we need your help to disarm the Digital Millennium Copyright Act (DMCA)."); *see also* EFF, Digital Millennium Copyright Act, <https://www.eff.org/issues/dmca> (stating that "EFF has fought hard against the DMCA circumvention provisions in the courts, Congress and other forums").

³⁹ *See, e.g., Amicus Curiae* Brief of Electronic Frontier Foundation in *Storage Tech. Corp. v. Custom Hardware Engin'g & Consulting, Inc.*, 431 F.3d 1374 (Fed. Cir. 2005), *available at* https://www.eff.org/sites/default/files/filenode/StorageTek_v_Custom_Hardware/StorageTek_EFFAmicusBrief_v2.pdf.

⁴⁰ *See, e.g., Amicus Curiae* Brief of Electronic Frontier Foundation and Public Knowledge at 6 in *Datel Holdings Ltd. v. Microsoft Corp.*, No. 09-CV-05535 EDL (N.D. Cal. 2011) ("Like all indirect liability regimes, section 1201(a)(2) requires proof of direct liability. Datel's trafficking liability is therefore inextricably linked to consumers' circumvention liability."), *available at* https://www.eff.org/files/filenode/datel_v_microsoft/datelamicus61511.pdf.

⁴¹ The extent to which the § 1201(f) exception applies to § 1201(a)(2) is precisely spelled out in § 1201(f)(2). Nothing in this proceeding can have any impact on that.

b) EFF Fails to Meet Its Burden With Respect to Likely Adverse Impact on Noninfringing Uses.

To establish a *prima facie* case for its proposed exemption, EFF bears the burden of establishing that access control measures on video game consoles “have had or [are] likely to have a substantial adverse effect on noninfringing uses,” and that “alternate means of engaging in the noninfringing uses . . . are an insufficient substitute for accomplishing the noninfringing use.” 2011 NOI at 60,403. As shown below, and in more detail in the ESA filing, EFF does not, and indeed cannot, meet this burden for the simple reason that the alleged noninfringing uses on which EFF relies can be readily achieved without hacking game console TPMs.

EFF identifies two alleged noninfringing uses it claims are stymied by the game console access controls that are designed to prevent the unauthorized play, reproduction and distribution of infringing games and other multimedia content: the installation of “homebrew” applications, and alternate operating systems. The specific “adverse effects” it identifies on these uses differ greatly among the three consoles at issue, and in many cases are historical and no longer relevant.⁴² Most significantly, EFF fails to address the broad availability of equivalent alternative platforms to engage in each of these uses, and also ignores the potential for such uses to be undertaken on the game consoles themselves in a manner that does not open the floodgates to piracy.

The Joint Creators and Copyright Owners support innovative development of independently produced videogames. However, if gamers wish to design and play lawful homebrew games, they do not need to hack the operating systems of consoles in order to do so. Personal computers, which are almost always open platforms in most respects, are readily available for this purpose. Thus, alternatives to circumvention exist. Even if it were more convenient or less expensive to hack the console operating system than to play the game on one of these other readily available platforms, it is clear from the legislative history – and the Office has recognized (*see* 2003 Rec. at 138) – that such inconvenience or expense is insufficient to meet the burden of persuasion with regard to an exemption in this proceeding. *See* Manager’s Rep. at 6; *see also*, 2003 Rec. at 138 (“there is no unqualified right to [use] a copyrighted work on any device or platform”).

Moreover, the existence of processes whereby game developers can obtain permission to distribute game titles for authorized use on a console should undermine any need for an exemption. As noted in more detail in the ESA filing, video game console makers are eager to accommodate new developers into their ecosystem, while concurrently extending to those developers’ works the protections against infringement that access control measures provide. *See* ESA Responsive Comments at II(B). For example, Microsoft’s Xbox offers an “indie game” platform which has released over 2,300 independently-produced games.⁴³ Similarly, Nintendo’s WiiWare allows independent developers large and small to self-publish downloadable video

⁴² *See* ESA Responsive Comments at Section II.

⁴³ *See* Xbox Indie Games, <http://marketplace.xbox.com/en-US/Games/XboxIndieGames>.

game content through the Wii Shop Channel.⁴⁴ Likewise, Sony Computer Entertainment America (“SCEA”) provides small independent developers the option of creating “minis,” which are a separate category of smaller games made available to PS3 users through the PlayStation Store, evidencing that such developers are not stymied by TPMs in making games for the PS3. In all three instances, independent developers are able to create applications for the console without resorting to hacking the console’s access control measures.⁴⁵

Similarly, researchers who wish to install different operating systems in order to use collections of gaming consoles as “supercomputers” also have readily available alternatives to circumvention, both on the consoles themselves and on alternative platforms. EFF claims that researchers were rendered unable to continue research uses of PS3s after SCEA updated its operating system. *See* EFF Comment, Appendix C, at ¶ 4. Contrary to EFF’s assertion, researchers continue to use PS3s to support their work in ways that do not require circumvention. For example, through the Folding@Home project, Stanford University researchers use a distributed computing platform powered by thousands of networked PS3s to perform research in a wide variety of fields, demonstrating SCEA’s commitment to facilitating research.⁴⁶ EFF has not introduced evidence to suggest that SCEA is unwilling to work with researchers upon request. More broadly, even EFF’s own declarants concede that expansions in cloud computing and the availability of inexpensive PC processing power have largely rendered moot any comparative convenience benefit to using a PS3 console for these tasks.⁴⁷ The Office need not recommend an exemption where the marketplace already facilitates the noninfringing use at issue.

Finally, as the party bearing the burden for establishing a broad exemption extending to all video game consoles, EFF must offer far more than a smattering of isolated, speculative examples of harm, none of which are shared among the different consoles. EFF’s comments do not identify any common circumvention program or technique applicable to all game consoles,

⁴⁴ *See* Press Release, Nintendo, *Nintendo's WiiWare Paves The Way For Fresh Games, Cool Consumer Experiences*, June 27, 2007, available at <http://www.nintendo.com/whatsnew/detail/IJUgYjCGf4pVbYMAU2qmwF3wp7DiOK5k>.

⁴⁵ A review of EFF’s comments (at 24-25, Appendix F at ¶ 11) and the supporting declarations indicates that the main reason a subset of developers of unauthorized applications wish to engage in circumvention is that they are unwilling to meet the quality standards or shoulder part of the cost of developing innovative gaming networks and consoles by paying any sort of fee to exploit the networks developed by companies who have already risked substantial capital establishing a legitimate business model. It is not appropriate for the Office to effectively mandate unfettered access by a particular minority subset of potential users to a platform simply because such users do not agree with certain terms on which access is otherwise offered – particularly where these restrictions are designed to protect the exclusive copyrights of the full range of content creators that are making their works more readily available to consumers in the very manner Congress envisioned when it passed the DMCA.

⁴⁶ *See* Folding@Home, <http://www.scei.co.jp/folding/en/index.html>.

⁴⁷ *See* EFF Comments, Appendix C at ¶ 10.

nor does its patchwork quilt demonstrate any common “adverse effect” imposed uniformly by the various game console TPMs. Indeed, EFF concedes that Microsoft welcomes independently produced games,⁴⁸ and fails to identify a single homebrew application for the Xbox360 that required circumvention (its reference to a single application for the *original* Xbox (*i.e.*, not the Xbox360) merely reinforces this failure). *See* EFF Comments at 28, n. 180. This failure to show *any* adverse effects flowing from the Xbox360’s TPMs compels rejection of EFF’s request as to that console. Likewise, EFF fails to identify any need to run alternate operating systems on the Wii console to harness the processing power of that system, evidencing a failure of its burden with regard to that console. And, as noted herein, EFF’s only allegations about large-scale projects involving the PS3 acknowledge both that Sony worked directly with the affected researchers to reach a solution that avoided the need to hack the console, and that advancements in technology have largely rendered moot any prior advantages offered by the researchers for the stated purpose. In short, EFF cannot plausibly demonstrate a substantial adverse effect flowing from each game console’s use of TPMs to secure their respective platforms against piracy.

c) The DMCA’s Statutory Factors Compel the Rejection of EFF’s Proposed Exemption.

As noted previously herein, in addition to the arguments proffered by the ESA’s filing as to each of the statutory factors’ bearing on the proposed game console exemption, the Joint Creators and Copyright Owners offer the following additional comments to emphasize their concerns about the critical role game consoles play in expanding the dissemination of and market for the full range of copyrighted expression now delivered by game consoles. Specifically, as explained above in Section II, the statutory factors listed in § 1201(a)(1)(C) necessitate consideration of the broader marketplace for copyrighted works and the impact of technological protection measures thereon. The DMCA does not instruct the Register to consider only the harm that could be caused to potential markets for, or the value of, the work to which access would be gained under a proposed exemption (here, the console firmware), in a manner similar to the fair use analysis of 17 U.S.C. § 107(4). EFF’s effort to limit this discussion solely to the availability and effect on the market for game console firmware is misguided, and evinces a fundamental misunderstanding of both the DMCA and the purpose of game console TPMs. Game console TPMs increase the availability of a wide range of copyrighted works by creating a secure platform for distribution. The TPMs at issue here are designed to allow the console makers to safely distribute a wide range of copyrighted works, from video games to movies, television shows, and music.

Absent these TPMs, the incentive to disseminate this copyrighted content through these platforms would be severely undermined, as the consoles could readily make use of, reproduce and distribute unauthorized copies of that content.⁴⁹ An exemption to circumvent these TPMs

⁴⁸ *See* EFF Comments at 26, n. 154 (“Microsoft has created a development program that allows developers to publish games with relative ease on the less-regulated Indie Game section of the console’s marketplace.”).

⁴⁹ *See* ESA Responsive Comments at Section IV (detailing the inextricable link between game console hacking and piracy).

yields the same result. Although EFF fails to define a specific “jailbreaking” method, all known methods for circumventing game console TPMs *necessarily* eliminate the measures’ ability to preclude the play, reproduction and distribution of infringing content. Accordingly, if console users were free to circumvent those controls, the widespread ability to play or make unauthorized copies of not only games, but streaming or downloaded movies, television programming, music and other content, would cut deeply into the market for that content, and businesses would be reluctant to invest the substantial amounts of time and money necessary to develop and produce new content for the platform. Console makers would likewise be adversely affected, and access to all copyrighted works available through game consoles would suffer accordingly.

In sum, granting the proposed exemption would jeopardize the viability of the game console as a secure platform for making copyrighted works available for the sake of accommodating the “frustrations” of a disproportionately small segment of hobbyists who prefer to use games consoles in lieu of equivalent alternatives. The DMCA was designed to facilitate the growth and vitality of new platforms – like video game consoles – that utilize TPMs to make copyrighted content more widely available. The Register should not undermine them.⁵⁰

E. Platform Hacking – Personal Computing Devices

1. Proposed Class

4 “Computer programs that enable the installation and execution of lawfully obtained software on a personal computing device, where circumvention is performed by or at the request of the device's owner.”

2. Summary of Response

This proposal should be rejected because it goes well beyond any exemptions approved in the past, and would greatly undermine the access to copyrighted works that the use of access controls makes possible. The proposal targets every device and every platform, and creates an open-ended standard for circumvention, notwithstanding that the primary effects of such

⁵⁰ EFF seeks to ignore the inevitable impact of its request on copyrighted works by characterizing the TPMs as mere protection of a “business model.” But EFF’s assertion that the DMCA was not intended to be used to support the particular business models chosen by copyright owners (EFF Comments at 20-25) is inaccurate and misleading to the extent it implies that the business models that would be impacted by this exemption are not supportive of the clearly expressed objectives of the DMCA. *See* Manager’s Rep. at 6 (“The technological measures . . . that this bill protects can be deployed, not only to prevent piracy and other economically harmful unauthorized uses of copyrighted materials, but also to support new ways of disseminating copyrighted materials to users . . .”). Nor is the prohibition on circumvention of access controls intended only to safeguard an entity’s “copyright interests,” narrowly defined as directly preventing piracy of the work in question. *See MDY*, 629 F.3d at 952 (“Congress created a distinct anti-circumvention right under § 1201(a) without an infringement nexus requirement.”).

circumvention would be to enable distribution of pirated applications, and to remove technical limitations that would otherwise protect trial versions of applications. Although the proponent claims to base its request on speculation over a consumer's ability to access applications, it admits that alternatives to circumvention are readily available, negating any basis for this broad exemption. Finally, the proponent seeks an exemption for the provision of circumvention services, which the statute prohibits.

3. Response

The proposal of the Software Freedom Law Center (“SFLC”) should be rejected because granting the proposal would undermine the market for and value of copyrighted works. *See* 17 U.S.C. § 1201(a)(1)(C)(iv). The exemption, if granted, would strip any copyright owner, distributor, or licensee from exercising any choices with respect to how to construct a distribution system related to personal computing, and would thus expose copyright owners and their business partners to unnecessary risk, piracy, and unpredictability. The Register should also deny the proposed exemption because it too closely relates to the subject matter of 17 U.S.C. § 1201(f). *See supra* Section II.

Today, an increasing number of applications for personal computing devices are distributed via platforms (such as Apple's App Store) that utilize technical protection measures (such as code signing) to enable applications to be offered for immediate download. The exemption, if granted, would remove protections relied upon by copyright owners to help protect their applications from piracy. For example, code signing enables copyright owners to make available trial versions of software for evaluation and prevents pirated or modified applications from executing. Far from limiting the availability of software applications, these platforms and their protection mechanisms have contributed to an unprecedented number of applications being made available to users.⁵¹

Circumvention of these technical protection measures is done primarily to unlock trial versions of software, or enable access to pirated copies or unauthorized modified versions. The theoretical noninfringing use claimed by proponents that justifies the exemption is independent applications, but the reality is far different. Authors of hacks readily acknowledge that “a considerable portion – perhaps a majority – of our users are pirates,” yet defend the practice as somehow serving the promotional interests of copyright owners.⁵² The data, however, demonstrates that few users of circumvention software actually convert to legitimate copies.⁵³

⁵¹ *See* Dan Rowinski, *Mobile App Inflection Point: 25 Billion Apps Downloaded in 2011*, READWRITE MOBILE, Nov. 11, 2011, available at <http://www.readriteweb.com/mobile/2011/11/mobile-app-inflection-point-25.php>.

⁵² *See e.g.*, Enigmax, *Hackulous: iPhone Pirates Don't Hurt Jailbreaking's Image*, TORRENT FREAK, Aug. 1, 2010, http://torrentfreak.com/hackulous-iphone-pirates-dont-hurt-jailbreakings-image-100801/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+Torrentfreak+%28Torrentfreak%29 (quoting “Dissident”: “Understandably, the developers who paved the

(...continued)

Worse, malicious developers often insert malware within such pirated applications, distributing these “bootleg apps” on various torrent sites or alternative marketplaces in the hopes that unsuspecting users will install them.⁵⁴ Once installed, these applications can enable unscrupulous developers to obtain a user’s personal information or launch fraudulent activity. Copyright owners thus incur a double whammy as consumers grow to mistrust their applications, not always understanding that the copyright owner is also a victim, not the perpetrator.

Against these very real harms to copyright owners,⁵⁵ the SFLC predicates its argument regarding the need for the proposal on “speculation,” not facts. *See* 2011 NOI at 60,400. For example, the proponent claims (SFLC Comments at 8-9) that upcoming developments in how software and personal computers are designed “could” result in consumers being unable to install software of their choosing on their personal computers, but the comment fails to make a case that this is “more likely than not to occur.” 2011 NOI at 60,400. SFLC presents its theories about how new standards adopted by the Unified Extensible Firmware Interface (“UEFI”) association may lead to certain personal computers being limited to certain operating systems, but fails to identify a single computer system that currently does so. SFLC Comments at 9. At any rate, it is unclear whether the UEFI standards will even implicate anti-circumvention concerns: the UEFI specification described by SFLC “does not prevent manufacturers from allowing users to disable the lock or add non-Microsoft keys.” *Id.*

Notwithstanding their speculation, the proponent concedes that neither Apple nor Microsoft currently limits installation of applications for personal computers to those purchased through application stores affiliated with the companies, even while it argues that consumers should be able to break those non-existent limits. *See id.* at 4. Moreover, the past three years have seen an increase in computing platforms and devices that offer developers and users a wide variety of choice regarding installation of apps and ability to customize their devices. Therefore, SFLC’s proposal is, at best, premature. It has failed to meet the substantial burden required to justify exemptions based on likely future circumstances. *See* Manager’s Rep. at 6 (an exemption

(...continued)

way for jailbreaking are not too eager to join our community... citing that a considerable portion – perhaps a majority – of our users are pirates.”).

⁵³ *See Over 1.5 Million Devices Using Pirated iPhone Apps*, IPODNN, Oct. 14, 2009, <http://www.ipodnn.com/articles/09/10/14/most.pirates.located.outside.of.us> (“... illegal apps generate a conversion of just 0.43 percent.”).

⁵⁴ *See* Wilson Rothman, *Smartphone Malware: The Six Worst Offenders*, MSNBC, Feb. 16, 2010, http://technolog.msnbc.msn.com/_news/2011/02/16/6063185-smart-phone-malware-the-six-worst-offenders (“Apple and Google are pretty good about monitoring what goes into their app stores. You should worry most if you’re seeking ways to try to download premium apps without paying, trying to score bootleg apps available for ‘jailbroken’ iPhones, or visiting any shady alternative Android app markets.”).

⁵⁵ *See* Ben Sillis, *This Week’s Most Pirated Apps: Is Your Favourite Being Ripped Off*, ELECTRICPIG, Jan. 18, 2012, <http://www.electricpig.co.uk/2012/01/18/this-weeks-most-pirated-apps-is-your-favourite-being-ripped-off/>.

based on “likely” future adverse impacts may only be granted “in extraordinary circumstances in which the evidence of likelihood is highly specific, strong and persuasive”).

Finally, SFLC seeks an exemption covering circumvention “performed by or at the request of the device’s owner.” Performing such services for another is clearly a trafficking violation, unless it fits within the scope of § 1201(f). *See* 17 U.S.C. § 1201(a)(2) (prohibiting offering any service to the public that “is primarily designed or produced,” “has only limited commercially significant purpose or use other than,” or “is marketed . . . for use in” circumventing access controls). Either way, the statute does not allow the Register to recommend such an exemption. *See* 17 U.S.C. § 1201(a)(1)(E) (rulemaking exemptions “may [not] be used as a defense in any action to enforce any provision of this title other than this paragraph”); 2010 Rec. at 85 (enabling others to circumvent devices for the purposes of enabling interoperability is “outside the scope of this rulemaking”); 2011 NOI at 60,400 (“The Librarian of Congress has no authority to limit either of the anti-trafficking provisions contained in subsections 1201(a)(2) or 1201(b).”).

F. Connecting to Wireless Communications Networks

1. Proposed Classes

6A *“Computer programs, in the form of firmware or software, including data used by those programs, that enable mobile devices to connect to a wireless communications network, when circumvention is initiated by the owner of the device to remove a restriction that limits the device’s operability to a limited number of networks, or circumvention is initiated to connect to a wireless communications network.”*

6B *“Computer programs, in the form of firmware or software, including data used by those programs, that enable wireless devices to connect to a wireless communications network, when circumvention is initiated by the owner of the copy of the computer program principally in order to connect to a wireless communications network and access to such communications network is authorized by the operator of such communications network.”*

6C *“Computer programs, in the form of firmware or software, including data used by those programs, that enable wireless devices to connect to a wireless communications network, when circumvention is initiated by the owner of the copy of the computer program solely in order to connect to a wireless communications network and access to such communications network is authorized by the operator of such communications network.”*

2. Summary of Response

The Joint Creators and Copyright Owners take no position on these proposals. However, the Register should proceed cautiously and only recommend a narrowly tailored exemption, if the proponents meet their burden.

3. Response

The Joint Creators and Copyright Owners do not take a position at this time on any of the exemption proposals embodied in proposed classes 6A, 6B or 6C. However, we urge the Office

to ensure that it does not make any favorable recommendation in this area which is not supported by persuasive evidence that the proposed exemption meets the statutory standard. This applies both to proposals that track the language of the exemption currently in force, and especially to any proposals to adopt a broader exemption for the next three-year period. Among other proposed expansions advocated in one or more of the proposals listed, the Office must be satisfied that proponents have met their burden of proof on two key issues.

First, there is insufficient evidence to allow circumvention of access controls on firmware or software on each category of “mobile device,” a term that embraces (according to one or more of the proposals) tablets, netbooks, laptop aircards (MetroPCS Comments at 5), wireless modem cards, touchscreen devices, mobile WiFi hotspots, telematics systems, and ereaders (RCA Comments at 9). The proponents must meet their burden as to each such category, or else narrow their proposed class of works.

Second, the proposed exemptions would allow circumvention of access controls not only on computer programs, but also on “data used by those programs.” *See, e.g.,* MetroPCS Comments at 2. We assume this can only refer to data that has been compiled, selected, coordinated or arranged to constitute a work of authorship (since otherwise the data would not constitute a “work protected by this title,” and § 1201(a)(1)(A) could not possibly be impeding the “noninfringing use” of the data). Today, a very wide range of works of authorship, including text works, music, sound recordings, motion pictures, entertainment and business software applications, all of which consist of “data” in some sense, may be accessed through software installed on a very wide range of mobile devices. Accordingly, the Office should not recommend any exemption with regard to data unless the proponents meet their burden of clearly defining which works do and do not fall within the scope of the “class of works” requested, as well as their burden of demonstrating harm caused by § 1201(a)(1)(A) to noninfringing uses of those works. In this regard, we note that none of the proposals seems to limit its scope to data used by a computer program solely for the purpose of connecting to a telecommunications network.

G. Audiovisual Works for Users of Portions Thereof

1. Proposed Classes

7A “Motion pictures on DVDs that are lawfully made and acquired and that are protected by the Content Scrambling System when circumvention is accomplished solely in order to accomplish the incorporation of short portions of motion pictures into new works for the purpose of criticism or comment, and where the person engaging in circumvention believes and has reasonable grounds for believing that circumvention is necessary to fulfill the purpose of the use in the following instances: (i) Educational uses by college and university professors and by college and university film and media studies students; (ii) Documentary filmmaking; (iii) Noncommercial videos.”

7B “Audiovisual works on DVDs that are lawfully made and acquired and that are protected by the Content Scrambling System, where circumvention is undertaken for the purpose of extracting clips for inclusion in primarily noncommercial videos that do not infringe copyright, and the person engaging in

the circumvention believes and has reasonable grounds for believing that circumvention is necessary to fulfill the purpose of the use.”

7C “Audiovisual works that are lawfully made and acquired via online distribution services, where circumvention is undertaken for the purpose of extracting clips for inclusion in primarily noncommercial videos that do not infringe copyright, and the person engaging in the circumvention believes and has reasonable grounds for believing that circumvention is necessary to fulfill the purpose of the use, and the works in question are not readily available on DVD.”

7D “Motion pictures that are lawfully made and acquired from DVDs protected by the Content Scrambling System and Blu-Ray discs protected by Advanced Access Content System, or, if the motion picture is not reasonably available on DVD or Blu-Ray or not reasonably available in sufficient audiovisual quality on DVD or Blu-Ray, then from digitally transmitted video protected by an authentication protocol or by encryption, when circumvention is accomplished solely in order to incorporate short portions of motion pictures into new works for the purpose of fair use, and when the person engaging in circumvention reasonably believes that circumvention is necessary to obtain the motion picture in the following instances: (1) documentary filmmaking; OR (2) fictional filmmaking.”

7E “Motion pictures that are lawfully made and acquired from DVDs protected by the Content Scrambling System or, if the motion picture is not reasonably available on or not reasonably available in sufficient audiovisual quality on DVD, then from digitally transmitted video protected by an authentication protocol or by encryption, when circumvention is accomplished” solely in order to incorporate short portions of motion pictures into new works for the purpose of fair use, and when the person engaging in circumvention reasonably believes that circumvention is necessary to obtain the motion picture for multimedia e-book authorship.”

7F “Motion pictures on DVDs that are lawfully made and acquired and that are protected by the Content Scrambling System when circumvention is accomplished solely in order to accomplish the incorporation of short portions of motion pictures into new works for the purpose of criticism or comment, and where the person engaging in circumvention believes and has reasonable grounds for believing that circumvention is necessary to fulfill the purpose of educational uses by college and university professors and by college and university film and media studies students.”

7G “Audiovisual works (optical discs, streaming media, and downloads) that are lawfully made and acquired when circumvention is accomplished by college and university students or faculty (including teaching and research assistants) solely in order to incorporate short portions of video into new works for the purpose of criticism or comment.”

2. Summary of Response

The existing exemption covering circumvention of CSS for a variety of uses involving copying short portions of motion pictures lacks clarity and should be revisited, refined, and limited to the only conduct that is clearly noninfringing and simultaneously requires high quality – pedagogical and educational uses of clips of motion pictures on DVD by college and university faculty and students in disciplines that involve detailed analysis of visual images or sounds. All requested expansions of the exemption should be rejected. In addition, the Copyright Office should reject the proposals related to noncommercial videos, filmmakers, and ebook authors because those broad categories of activity are not necessarily “in fact, noninfringing.” Finally, nearly all of the uses at issue could be adequately accomplished through means other than

circumvention. Marketplace access to motion pictures has dramatically increased, not diminished, since passage of the DMCA.

3. Response

In 2010, the Copyright Office elected to recommend to the Librarian a collection of overlapping exemptions wrapped into one. *See* 2010 Rec. at 21-77. Thus, the 2006 exemption related to pedagogical uses of short portions of motion pictures expanded to cover documentary filmmakers and all noncommercial video creators. In fact, the inclusion of noncommercial videos within the exemption could be read entirely to swallow the more limited existing category of “educational uses by college and university professors and by college and university film and media studies students” such that every teacher and student at every grade level who wishes to include short portions of motion pictures in new works or compilations is entitled to engage in circumvention. *See* 37 C.F.R. § 201.40(b)(1). In this cycle, the Joint Creators and Copyright Owners implore the Register to ensure that any recommended exemption(s) in this area are more narrowly drafted. *See* 2010 Rec. at 57 (stating that “it may very well be true that an [sic] class that was not carefully tailored . . . would risk confusion”).

In addition, the Register should precisely analyze the allegedly noninfringing uses at issue to determine whether such uses are “in fact, noninfringing.” 2011 NOI at 60,400. The Recommendation that resulted from the 2010 proceeding did not abide by that standard. When it came to uses of motion pictures protected by CSS, the Office recommended exemptions related to conduct the Office admittedly could not conclude to be “in fact, noninfringing.” To the contrary, the Recommendation stated that the proponents of exemptions for documentary filmmaking and noncommercial video creation only established that “some” or “many” or “more than a trivial portion” of the underlying uses “may” be fair uses. *See id.* at 49, 52. The Recommendation also refused even to specify a few examples of documentary films or noncommercial videos that the Copyright Office concluded were clear fair uses based on applicable precedents. Even examples of noncommercial videos relied on in the Recommendation for support were not determined to constitute legal uses of copyrighted motion pictures. *See id.* at 68.

There is no need to strain to grant exemptions applicable to conduct that *might* be lawful – and in fact, this proceeding lacks authority to do so. This proceeding was created as a “fail safe mechanism” to protect established, noninfringing uses, not activities proponents wish were noninfringing but which have never been determined to be so by Congress or the courts. *See* Commerce Rep. at 36. The Office’s approach in the prior proceeding unsurprisingly led to confusion in the marketplace, as is evidenced by some of the conduct referenced in the comments of proponents, as discussed further below.

This issue is especially important because circumvention of access controls related to motion pictures on DVDs potentially subjects works to widespread infringing distribution. In 2010, the Office made a one-hundred-and-eighty-degree turn on this point, concluding that “the fact that in this case the effect of the access control is not to prevent unauthorized access, but rather to restrict uses of motion pictures, is an additional factor weighing in favor of designating a class.” 2010 Rec. at 71. This is entirely inconsistent with prior reasoning articulated by the Copyright Office, indicating that preventing copying and redistribution of works is an important

goal of the DMCA and a factor to consider when weighing proposed exemptions. *See, e.g.*, 2006 Rec. at 71 (“[T]ethering and DRM policies serve a legitimate purpose for limiting access to certain devices in order to protect the copyright owners from digital redistribution of works. Tethering works to particular platforms . . . provides copyright owners with some assurance that these works will not be easily placed on peer-to-peer networks.”). It is also inconsistent with statements from the 2010 Recommendation itself, including this statement made within the analysis of the exact same exemption: “The use of technology to prevent piracy is consistent with the purpose of the DMCA and a class of works designated under Section 1201(a)(1)(C) must be tailored to balance the respective interests of affected parties.” 2010 Rec. at 74.

Whatever the merit of the Copyright Office’s prior reasoning regarding how the prevalence of DeCSS and other methods of hacking DVD encryption should impact the Register’s position on proposed exemptions (*see* 2010 Rec. at 57), hacks of newer formats are not as widely available, if at all, and the security associated with such formats is facilitating a proliferation of exciting new services that benefit consumers. *See* Section III, *supra*. The Register should not interfere with these developments by granting a broadly applicable exemption. Moreover, as a licensed access and copy control technology, CSS continues to function as originally conceived in the hundreds of millions of CSS licensed DVD players – both old and new – that continue to operate in accordance with the requirements of the CSS license to protect against the unauthorized access, copying and redistribution of content on DVDs encrypted with CSS.

a) Uses by Educators and Students

Three comments propose exemptions similar in form to the existing exemption applicable to circumvention of CSS on DVDs by college and university professors and college and university film and media studies students. The Library Copyright Alliance (“LCA”) proposes an exemption that largely duplicates the existing exemption, but separates pedagogical and educational uses from documentary filmmaking and noncommercial video creation; the University of Michigan Library requests renewal of the existing exemption verbatim in its proposal, but also seeks expansion of the exemption to cover college and university students of all disciplines and all types of works, regardless of media; and Peter Decherney, Katherine Sender, Michael Delli Caprini, the International Communication Association, the Society for Cinema and Media Studies, and the American Association of University Professors (collectively referred to herein as “AAUP”) propose expanding the existing exemption to cover all audiovisual works, regardless of format, and all college and university faculty and students.

Although the Joint Creators and Copyright Owners do not oppose in principle the existence of an exemption related to pedagogical and educational uses of motion pictures by college and university professors and college and university media studies and film students, if proponents thereof satisfy their burden, the Register should craft a narrowly tailored exemption. Such an exemption should, *inter alia*, be separated from any exemption granted for creating noncommercial videos, in order to clearly demarcate where one exemption ends and the other begins. Moreover, such an exemption should remain limited to circumvention of CSS on DVDs, and should prohibit circumvention unless it is necessary. These measures are required to preserve the bounds of this proceeding and ensure that the exemption does not encourage hackers to target new platforms. In other words, in any newly recognized exemption, the existing

exemption should be scaled back and/or clarified and the requested expansions thereof should be rejected.⁵⁶

17 U.S.C. § 1201(a)(1)(C)(i) instructs the Register to consider “the availability for use of copyrighted works” broadly and in historical context. Whether the proposed purpose at issue is currently enabled in the precise manner desired by a proponent is not the only relevant question. Prior to passage of the DMCA, fair use did not entitle a user to access a work in the format of the user’s choosing, and the passage of the DMCA did not alter that fact. As the Second Circuit has stated:

A film critic making fair use of a movie by quoting selected lines of dialogue has no constitutionally valid claim that the review (in print or on television) would be technologically superior if the reviewer had not been prevented from using a movie camera in the theater, nor has an art student a valid constitutional claim to fair use of a painting by photographing it in a museum. Fair use has never been held to be a guarantee of access to copyrighted material in order to copy it by the fair user’s preferred technique or in the format of the original.

Universal City Studios, Inc. v. Corley, 273 F. 3d 429, 459 (2d Cir. 2001).

The use of access controls has facilitated wider availability of copyrighted motion pictures than ever existed prior to the DMCA; analog methods of copying motion pictures remain available; digital copying methods that do not involve circumvention are far more prevalent, far more robust, and far more affordable than when the DMCA was enacted. Thus, the argument that access for pedagogical and educational uses has been diminished by the prohibition on circumvention of access controls is weak at best. And certainly, so long as *Corley* remains good law, “a [professor] making fair use of a movie by [displaying selected clips in her classroom] has no constitutionally valid claim that the [teaching experience] . . . would be technologically superior if the [professor] had not been prevented from [hacking access controls on a Blu-Ray disc].”

In addition, even assuming that copying motion pictures in high-quality formats is a legitimate concern in this rulemaking, AAUP has failed to demonstrate that circumvention of formats other than DVDs is necessary for pedagogical purposes. As the comment admits, “DVD, unlike VHS, is far from extinct.” AAUP Comment at 16. AAUP’s speculation that “DVD may become an increasingly obsolete format” is insufficient to justify an exemption. *See* 2011 NOI at 60,400 (“Claims based on ‘likely’ adverse effects cannot be supported by speculation alone.”). Moreover, the desire to make use of limited examples of bonus materials available on some Blu-Ray discs (AAUP Comments at 16) does not outweigh the threat posed by

⁵⁶ In 2009, the Joint Creators and Copyright Owners offered language for an exemption they would not oppose. *See* 2009 Joint Comments at 30. Currently, if the Office determines that the proponents have met their burden, we would not oppose the proposal of LCA.

allowing circumvention of the associated ACCS protection system. In the few instances where material is not available on DVD, other methods of obtaining clips should suffice.⁵⁷

Similarly, there is no need to circumvent in order to make use of streaming or downloaded media. First, AAUP fails to establish what access controls need to be circumvented in order to reproduce portions of streaming videos. *See* AAUP Comments at 17 (stating only that “many of these streaming sources are encrypted”). Second, many sources of streaming and downloading video, including those discussed above in Section III, make classroom use more manageable and facilitate faster and simpler classroom presentations without any need for circumvention because they enable faculty to “cue up” multiple clips through internet browser software and downloaded copies.⁵⁸ The Register should consider the benefits provided by these services (*see* Manager’s Rep. at 6) rather than focusing on the half-empty glass described by AAUP. *See* AAUP Comments at 17.

Exempting circumvention aimed at Blu-Ray discs and streaming media services would be especially misguided given that many of the examples provided by proponents demonstrate that the existing exemption is already being misused. In 2010, the Copyright Office limited application of the exemption to circumstances “where the person engaging in circumvention believes and has reasonable grounds for believing that circumvention is necessary to fulfill the purpose of the use.” 37 C.F.R. § 201.40(b). The Recommendation clarified that this limitation was intended to keep the prohibition on circumvention in force where “it would have been sufficient for purposes of the noninfringing criticism or comment to use screen capture software rather than to circumvent in order to obtain a higher quality digital film clip.”⁵⁹ 2010 Rec. at 75.

Nevertheless, the LCA submitted a list of alleged uses of the exemption, many of which involved uses that demonstrated no special need for advanced quality. For example, circumvention is likely unnecessary to “analyze images of women in popular culture,” as an instructor from Georgia State University apparently did. *See id.* at 13. Similarly, using clips from interviews of “experts in the field” (*see id.* at 16) of music does not necessitate high-quality video. The existing exemption has created confusion that mitigates against expansions.

⁵⁷ Based on a sampling of information from one major film studio, requests for permission to use clips for educational purposes are a small fraction of overall requests (averaging about 1% of requests). For example, out of approximately 3,139 requests in 2010, there were 45 education-related requests, and only 35 education-related requests out of 3,420 total requests in 2011, none of which were denied by the studio.

⁵⁸ *See, e.g.*, Welcome to AnyClip: Search. Discover. Share, <http://www.anyclip.com/>; MovieClips, <http://movieclips.com/>; *see also* Will Richmond, VIDEO NUZE, *AnyClip Licenses Warner Bros. Movies for Clip Library*, Nov. 9, 2011, <http://www.videonuze.com/article/anyclip-licenses-warner-bros-movies-for-clip-library>.

⁵⁹ The Joint Creators and Copyright Owners take no position generally on whether any specific screen capture technologies, or any particular uses of those technologies, are lawful; however we note that some screen capture technologies work by avoiding decryption and locating and recording media in unencrypted form.

Finally, the University of Michigan Library's suggestion (Michigan Comments at 3) that the exemption be expanded, apparently to cover all types of works in all types of media, is indicative of the slippery slope the Office has placed itself on in these proceedings. All requests for such naked use/user based exemptions should be rejected.

b) Uses by Creators of Primarily Noncommercial Videos

This category of users is extremely problematic in that a very large number of the users at issue engage in infringement.⁶⁰ The Electronic Frontier Foundation ("EFF") falls far short of meeting its burden to show that some of the remixers they cite are making noninfringing uses. One example is Gianduja Kiss.⁶¹ To pick a specific video, *James Bond/Der Kommissar* is nothing more than four minutes of clips from *James Bond* films, with a soundtrack provided by popular recording artists *After The Fire*. The video is just entertaining because it contains clips from recognizable, entertaining movies and the assistance of a popular song. There is no voice-over commentary or critique, and similar so-called "promotional" videos have been found to infringe in the past. *See Video Pipeline v. Buena Vista Home Entertainment*, 342 F. 3d 191, 200 (3d Cir. 2003) ("It is useful to compare the clip previews with a movie review, which might also display two-minute segments copied from a film. The movie reviewer does not simply display a scene from the movie under review but as well provides his or her own commentary and criticism."). Several other Gianduja Kiss videos are similarly suspect as examples of noninfringing use. EFF has not demonstrated these are noninfringing uses.

EFF's attempt to broaden the exemption to cover "*primarily* noncommercial videos" (EFF Comments at 1-2) will only increase the likelihood of infringement. In fact, EFF's definition of what qualifies as primarily noncommercial seems to include all videos that are not themselves advertisements. *See id.* at 48 ("Proposed Class #3 should include any video that does more than propose a commercial transaction."). In effect, proposals 7B and 7C are blanket exemptions to allow circumvention of DVD and online access controls for use of clips in virtually any audio-visual production, including infomercials, brand awareness efforts, and mainstream film releases.

It is not enough, as EFF suggests, to limit the exemption "to those who may be accused of circumventing for purposes that qualify as fair use" (*id.* at 48) because the subsequent guessing games engaged in by persons hoping to rely on the exemption will unnecessarily lead to illegality. The risk associated with encouraging people to circumvent and test the limits of fair use is too high considering that alternatives to circumvention exist. The DMCA has not diminished access to works whatsoever; it has increased it. And remix video creators dealt with degraded quality copies "before the web and digital video." *Id.*, Appendix I, at 33. Thus, the alleged problems confronted by "vidders" are not newly created by the use of access control measures, nor by the prohibition on circumventing such measures, and any impairment of the

⁶⁰ Despite the large number of infringing videos uploaded to the Internet, copyright owners very rarely take action against creators of remix videos that use short excerpts of copyrighted content.

⁶¹ *See* Monsters From the Vids, <http://www.giandujakiss.com/index.php?set=videos>; *see also* EFF Comments, Appendix J, at 37.

ability to make noninfringing uses is not caused by § 1201(a)(1)(A), but rather by “other sources, including . . . other technological developments [that] are outside the scope of this proceeding.” Manager’s Rep. at 6. In effect, the proponent’s claim is that vidders cannot achieve copying at the highest level of quality possible, something that vidders clearly want to do but not something Congress ever authorized this proceeding to deal with.

Some examples relied on by EFF demonstrate that the position of the proponent is that *all* creators of noncommercial videos *need* the highest quality clips possible. This fact is especially obvious in the section of EFF’s comments focused on “political remix videos.” See EFF Comments at 44-45. There is no need for exceptionally high video quality when a person wants to draw attention to a former candidate for the governorship of New York, Jimmy McMillan, or juxtapose scenes from *It’s a Wonderful Life* with television footage from congressional hearings about bank bailouts. Thus, EFF’s position conflicts with the conclusions reached by the Copyright Office in 2010 regarding the adequacy of methods that it determined do not involve circumvention for performing many acts of copying, and indicates that confusion regarding the scope of the existing exemption is likely widespread. See 2010 Rec. at 75. Limiting the exemption to circumstances in which a person believes and has reasonable grounds for believing that circumvention is necessary has no meaningful impact, when the people the exemption is targeting believe that circumvention is *always* necessary, and there are no guidelines to follow for determining when such a belief is unreasonable.

In addition, creating an exemption applicable to Blu-Ray discs would be misguided since proponents have not met their burden to establish that high-definition content is necessary. Apparently, most “vidders” do not have computer capacity for editing footage from such discs (EFF Comments, Appendix I, at 35) and thus could not take advantage of an exemption that would likely spawn more infringing redistribution of HD copyrighted works than it would facilitate lawful conduct. Moreover, EFF’s proposal to allow circumvention of access controls used in connection with streaming and download services such as Hulu and Amazon Unbox should be viewed with extreme skepticism because the market for, and value of, copyrighted works is negatively impacted by threats to the viability of new, sensitive business models that require the promise of security and predictability in order to entice widespread licensing. As discussed above, where the use of access controls has not diminished the availability of works for copying, there is rarely any need for an exemption.

c) Uses by Filmmakers and eBook Authors

The International Documentary Association (“IDA”), Kartemquin Educational Films, Inc., National Alliance for Media Arts and Culture, and Independent Filmmaker Project (collectively, “IDA”) seek an exemption related to circumvention of access controls used on DVDs, Blu-Ray discs and digitally transmitted video services for the purpose of creating documentary or fictional films. Separately, Mark Berger, Bobette Buster, Barnet Kellman, and Gene Rosow seek an exemption related to circumvention of access controls used on DVDs or for digitally transmitted video services for the purpose of creating ebooks.

Like the proposal related to primarily noncommercial videos, these proposals involve such a broad scope of activity that it cannot be said to qualify as “in fact, noninfringing.” 2011 NOI at 60,400. Although many of the uses of motion picture footage described in the comments

likely qualify as fair, not all uses of portions of motion pictures in documentary films so qualify.⁶² See, e.g., *Elvis Presley Enters., Inc. v. Passport Video*, 357 F.3d 896 (9th Cir. 2004), cert. denied, 542 U.S. 921 (2004). In addition, incorporating real-world imagery into a fictional film can constitute infringement. See *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70 (2d Cir. 1997). And, many of the “incidental” uses of motion pictures in fictional films pointed to by the proponents – the genre of “cinema verite” for example (IDA Comments at 7) – would not require circumvention because they involve capturing background images with a camera, not through copying from a disc or online stream.⁶³

The proposals also fail to appreciate this rulemaking was not created to ensure that every newly released service enables copying of works in preferred, high-quality formats. As discussed above, under 17 U.S.C. § 1201(a)(1)(C)(i), if access controls have not *diminished* the availability of a class of works for lawful uses, it is unlikely an exemption is justified. See Commerce Rep. at 36. Therefore, much of the copying the proponents wish to engage in, while it *may* be fair, is not being inhibited by the existence of access controls or the prohibitions of § 1201(a)(1). As the proponents admit, many of the motion pictures they wish to copy were never made available in archived, on-demand form – or any other form other than live broadcast or theatrical release for that matter – prior to the passage of the DMCA. See IDA Comments at 25. To complain that the available methods of copying such materials are inadequate because they do not provide the highest possible quality copies misses the point: the materials are now available when, without access controls, they likely would not be. In other words, the DMCA is doing its job and the Register should not interfere with the use-facilitating services, such as streaming, downloading and pay-per-view television services, that are proliferating in the marketplace.⁶⁴

In addition, the Register should not sanction circumvention of ACCS on Blu-Ray discs for filmmaking. As the proponents concede, even programming distributors who demand high definition footage make exceptions for up-conversion in at least some circumstances. See IDA Comments, Appendix D, at 45. Moreover, this proceeding was not designed to generate exemptions based on evidence of “[a]dverse impacts that flow from ... marketplace trends, other

⁶² Experience suggests that licenses for use of clips in documentary films are broadly available. That said, it is the experience of at least one major film studio that requests for use of clips in documentary films constitute less than 10% of overall requests; specifically: 312 requests in 2009, 319 in 2010 and 331 in 2011. The studio offers to license such clips in almost every instance, although many requestors either do not respond to the studio’s offer of a license, or decline to take one. In certain instances, which are the exception, a request may be denied, such as where the studio does not have the rights being requested for a particular territory.

⁶³ This is, of course, true where cameras capture images in the background for documentary films as well.

⁶⁴ Although the proponents claim to offer an exemption narrowly applicable to specific formats (IDA Comments at 25; Berger Comments at 14), they in fact propose to encompass nearly every format available on the market today. Basically the proponents seek an exemption for motion pictures for filmmakers and ebook authors, which is a use-based or user-based exemption.

technological developments, or changes in the roles of . . . distributors or other intermediaries” Manager’s Rep. at 6.⁶⁵

Finally, the Joint Creators and Copyright Owners reiterate their suggestion, made during the last cycle (2009 Joint Comments at 8, 70), that licensing should be considered by many, if not all, of the filmmakers and authors at issue. Although the proponents make much of provisions in some agreements that restrict critical uses of footage (*see, e.g.*, IDA Comments, at 32, Appendix F, G), many filmmakers and authors do not engage in such critical uses and thus such provisions do not prevent them from licensing materials. By refusing to make any mention of licensing in the text of the previously recommended exemption, the Copyright Office missed an opportunity to endorse the most straight-forward method of avoiding legal disputes; asking permission. The licensing process has developed such that requests may be made easily online.⁶⁶ Given the existence of readily available licenses, the proponents’ case boils down to a matter of inconvenience.

H. Audiovisual Works for Educational Uses

1. Proposed Class

8 “*Lawfully accessed audiovisual works used for educational purposes by kindergarten through twelfth grade educators.*”

2. Summary of Response

This proposed exemption constitutes an impermissible use-based exemption. In addition, the proponent fails to establish that educators at the K through twelfth grade level require higher quality copies than can be obtained through available methods.

3. Response

The proponent seeks an exemption for a class of works that begins with a 17 U.S.C. § 102 category of works but is only further tailored by reference to a type of use. The Register cannot, consistent with her statutory authority, recommend such an exemption. *See* 2010 Rec. at 15-16 (“Tailoring a class solely by reference to the use and/or user would be beyond the scope of what ‘particular class of work’ is intended to be.”).

⁶⁵ There is no evidence that ebook authors face issues of gatekeeper standard setting similar to those filmmakers claim to confront and thus it is unclear why ebook authors require the highest quality footage.

⁶⁶ *See, e.g.*, MGM Media Licensing.com, <https://www.mgmmedialicensing.com/#>; Sony Pictures Film Clips, <http://www.sonypicturesfilmclips.com/Faq.html#Faql3>; Universal Clips Business to Business Broadcast Film Clip and Still Licensing, <https://www.universalcips.com/login.aspx?ReturnUrl=%2fRestrictedPages%2fMyCart.aspx>.

The proponent also provides multiple examples of instances in which K through twelfth grade educators would have preferred circumvention over some other method of accessing audiovisual works to create clip compilations, but none of the examples demonstrate a need for quality beyond what the Office previously concluded was sufficient. *See* 2010 Rec. at 75. For example, a teacher does not need perfect copies of high-definition video footage to shed light on “the representation of smoking in the media and the complex role of product placement after watching a clip featuring Julia Roberts in *My Best Friend’s Wedding*.” Hobbs Comments at 3. A teacher who wants to “show only a few minutes of an interview from *The Daily Show with Jon Stewart*” (*id.* at 4) also lacks any need for the quality that the Office previously concluded college-level faculty often require.

I. Audiovisual Works to Improve Perceptibility

1. Proposed Classes

9A *“Motion pictures and other audiovisual works delivered via Internet protocol (IP) protected by technological measures that control access to such works when circumvention is accomplished to facilitate the creation, improvement, or rendering of visual representations or descriptions of audible portions of such works for the purpose of improving the ability of individuals who may lawfully access such works to perceive such works.”*

9B *“Motion pictures and other audiovisual works delivered via Internet protocol (IP) protected by technological measures that control access to such works when circumvention is accomplished to facilitate the creation, improvement, or rendering of audible representations or descriptions of visual portions of such works for the purpose of improving the ability of individuals who may lawfully access such works to perceive such works.”*

9C *“Motion pictures and other audiovisual works on fixed disc-based media protected by technological measures that control access to such works when circumvention is accomplished to facilitate the creation, improvement, or rendering of visual representations or descriptions of audible portions of such works for the purpose of improving the ability of individuals who may lawfully access such works to perceive such works.”*

9D *“Motion pictures and other audiovisual works on fixed disc-based media protected by technological measures that control access to such works when circumvention is accomplished to facilitate the creation, improvement, or rendering of audible representations or descriptions of visual portions of such works for the purpose of improving the ability of individuals who may lawfully access such works to perceive such works.”*

2. Summary of Response

Audiovisual works are already available in a variety of accessible formats, including captioning on nearly 100% of DVDs, and copyright owners and technology companies are working to increase that availability through voluntary efforts as well as regulatory compliance. The proposals to allow circumvention for the purpose of improving perception of works should be rejected because the proponents have not yet met their burden. Circumvention is unnecessary to create captions or audible descriptions of works, and creating captions and audible

descriptions will not always qualify as noninfringing. The proposals are also drafted to allow for uses unrelated to improving accessibility for disabled persons. Moreover, it appears the proponents seek to traffic in prohibited circumvention devices. If the Register concludes that an exemption should be recommended, it should be narrowed to exclude material that is already accessible.

3. Response

The Joint Creators and Copyright Owners agree with Telecommunications for the Deaf and Hard of Hearing, Inc., Gallaudet University, and the Participatory Culture Foundation (collectively “TDI”) that increasing accessibility to copyrighted works for blind, deaf, and visually or aurally impaired persons is a laudable goal. Many products distributed in the marketplace provide accessible features, such as captioning. And this trend is increasing rapidly in the online context, including in conjunction with regulations adopted on January 12, 2012 by the Federal Communications Commission.⁶⁷ Thus, as discussed below, the Joint Creators and Copyright Owners oppose the proposed exemptions for several reasons.

The proponents suggest that three activities require circumvention to accomplish.

We enumerate below three specific examples of noninfringing uses implicated by the proposed classes of works that are prevented by access control measures: (1) overlaying a visible transcription of the audible portion of an audiovisual work on the visible portion of the work or an audible description of the visible portion of the work on the audible portion; (2) extracting the captioning or video description data from an audiovisual work for the purpose of making corrections to the content of the caption or video description file; and (3) extracting the captioning or video description data for the purpose of improving the rendering of that data in its audible form. (TDI Comments at 16)

First, the proponents fail to establish that circumvention is necessary to accomplish any of the three uses. Second, the broad scope of proposed uses calls into question whether all of the uses qualify as noninfringing. Third, it is unclear whether the proponents wish to engage in trafficking of circumvention devices, which of course would violate 17 U.S.C. § 1201(a)(2) and fall outside of the scope of this proceeding. Finally, the catch-all proposal put forward (TDI Comments at 3), which would apply to all works for the purpose of increasing accessibility, fails to propose a particular class of works.

⁶⁷ See Closed Captioning of Internet Protocol-Delivered Video Programming, <http://www.fcc.gov/document/closed-captioning-internet-protocol-delivered-video-programming-0>.

a) Circumvention is Unnecessary.

Today, television programming and motion pictures are almost all available with captions either on DVD or on television. Moreover, on January 12, 2012, the FCC adopted new regulations, which require all video programming (including motion pictures) that appears on television with captions to be made available online with captions. Given the wide availability of captioned programming, the proponents have failed to establish that an exemption is truly necessary.

Furthermore, the quality of captions is steadily improving and is particularly high for prerecorded programming. Contrary to assertions made by the proponents, scattered examples of errors in captions (*see id.* at 20) do not justify circumvention. Such errors are at most a “mere inconvenience.” Manager’s Rep. at 6. Thus, any exemption granted should be limited to instances in which works lack captions, and then only on the basis of a more persuasive record about why circumvention is required to achieve this and why alternatives are (and for the next three years are likely to be) unavailable.

At this point, the proponents have not met their burden of proving that improving accessibility for persons with disabilities requires circumvention. Strictly as a practical matter, and without reference to the legal issues involved, which are discussed below, it appears the “legions of volunteers” who sign up to participate in captioning by “crowdsourcing” (TDI Comments at 6, 17) may be able to achieve their basic goals without circumventing access controls. To create a caption or audio-description simply requires watching or listening to a work and transcribing what is said or vocalizing what is shown. While these tasks may be complex, they can be performed without circumventing access controls.

b) Some Proposed Uses May Infringe the Adaptation or Reproduction Right.

Given that the proponents claim they do not propose to allow unauthorized access to any works (*see, e.g.*, TDI Comments at 18), the Joint Creators and Copyright Owners assume the proponents do not plan to copy works after engaging in circumvention and then make copies available to crowdsourcing volunteers for the purpose of creating captions or audible descriptions, or to consumers after inserting overlaid captions or audible descriptions. If the proponents do wish to engage in such copying and distribution, it is questionable whether a colorable argument exists that such conduct is noninfringing.

To the extent that the proponents otherwise compare their proposals to the conduct involved in the existing exemption for circumvention to enable the read aloud function for ebooks, the analogy is unavailing because the ebooks exemption does not involve any conduct that implicates an exclusive right. *See* 37 C.F.R. § 201.40(b)(6). Instead, enabling the read aloud function results in a private performance of a literary work. In contrast, creating captions for, or audio-descriptions of, audiovisual works involves creating adaptations of such works. This is especially true with respect to audio-descriptions of content because any description created by a third party involves a degree of interpretation that cannot replicate the visual image precisely. In addition, modifying existing captions or audio-descriptions may sometimes involve adapting such works or reproducing such works.

Moreover, the proposals contain no restraints on the use of works other than stating that such use “must improve the ability of individuals who may lawfully access such works to perceive such works.” Many things arguably improve the ability of individuals to perceive works, and it is far from clear that all such things would qualify as noninfringing. In addition, the risk of infringement is not slight given the methods proposed for the creation of captions and audible descriptions; namely, crowdsourcing.

A further troubling aspect of the proposal is that the exemptions, as crafted, are not limited to adapting works to increase accessibility for blind, deaf, and hearing or visually impaired persons. In fact, it appears the exemptions were drafted to facilitate their applicability to conduct, such as translating works, that is not mentioned in the proponents’ comments but is part of the work of Universal Subtitles, a group operated by one of the proponents and mentioned prominently in their submission.⁶⁸ Creating unauthorized translations of audiovisual and literary works for distribution is very likely infringing. *See* 2 M.B. Nimmer & D. Nimmer, *Nimmer On Copyright* § 8.09 (2011) (“[A] translation may not lawfully come into being without the consent of the copyright owner of the work to be translated.”); *Radji v. Khakbaz*, 607 F. Supp. 1296, 1300 (D.D.C. 1985) (“A translation, by definition, uses different language than that in the original. That, however, does not exempt translations from the provisions of the Copyright Act. To the contrary, the Act gives the copyright holder the exclusive right to prepare derivative works, which includes the right to make translations.”).

c) The Proponents Should Clarify They Are Not Seeking an Exemption for Providing Circumvention Services.

Setting aside for the moment whether all of these activities are noninfringing, it is unclear how the proponents intend to enable the activities without trafficking in circumvention devices that would violate 17 U.S.C. § 1201(a)(2).

With respect to the first identified use, overlaying existing audiovisual material with captions or audio-descriptions, the proponents do not describe how they will enable consumers to view the newly created captions or hear the newly created audio-depictions. If the proponents seek to create such accessibility features, incorporate them into a player (whether an application or a physical device) that can accomplish the overlay, and distribute the player, such conduct is likely outside the scope of this proceeding. A similar problem exists with respect to the second and third uses, both of which involve extraction of video description data for the purpose of correcting or improving the efficacy of the data. If the proponents plan to distribute a player that is capable of rendering the improved data when consumers encounter works in disc or online formats, such conduct likely constitutes trafficking.

⁶⁸ *See* What Can Universal Subtitles Do?, <http://www.universalsubtitles.org/en/services/>.

d) The Fifth Exemption Proposed Does Not Suggest a Particular Class of Works.

In addition to the four proposals limited to audiovisual works in various formats,⁶⁹ TDI proposes a fifth exemption that would swallow the other four and would apply to basically all works in all formats and subject to all access controls for the purpose of “improving the ability of individuals who may lawfully access such works to perceive such works.” *See* TDI Comments at 3. The proposal fails to articulate a particular class of works and instead proposes a sweeping use based exemption. It should be denied. *See* 2010 Rec. at 15 (“Tailoring a class solely by reference to the use and/or user would be beyond the scope of what ‘particular class of works’ is intended to be.”).

J. Works for Personal Use

1. Proposed Classes

10A *“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.”*

10B *“Legally acquired digital media (motion pictures, sound recordings, and e-books) for personal use and for the purposes of making back-up copies, format shifting, access, and transfer.”*

2. Summary of Response

The proponents suggest exemptions that the Office repeatedly has considered and rejected in prior rulemaking cycles. There is still no legal precedent or statutory provision clearly addressing the legality of the conduct at issue, and the marketplace continues to offer consumers myriad ways to acquire works for use on the devices of their choosing. Nothing in the comments establishes the need for an exemption related to copying for personal use of any type. The only demonstrated issues are matters of mere inconvenience that do not support an exemption. Finally, several of the proposals suggest use-based exemptions that are not limited to any particular class or classes or works. Such proposals must be rejected.

3. Response

Grouped together in proposed classes 10A and 10B are several proposals that seek exemptions for “space shifting,” “back-up copying,” and “format shifting.” Previously, the Copyright Office and the Librarian have rightly rejected such proposals. *See, e.g.*, 2006 Rec. at 69-74, 80-83. They fail to satisfy the criteria for granting an exemption for at least four reasons.

⁶⁹ The Joint Creators and Copyright Owners note that the proponents have not specifically asked for an exemption related to videogames, so the proposal should not be read to cover all audiovisual works despite the imprecise proposed drafting.

First, the proponents cannot establish that the uses they seek to engage in are noninfringing. *Id.* Second, even if the uses were noninfringing, the inability to access a work on the device of one's choosing is a mere inconvenience that does not justify an exemption. *See* Manager's Rep. at 6. Third, the proponents fail to demonstrate that any category of works is not available in any particular format. Fourth, to the extent the comments propose exemptions for all works "for non-copyright infringing use" (Kossowsky), or "any and all non-copyright-infringing purposes" (Fuhs), or "any and all personal use (Tamboloni), or "format shifting and backing up [] files" (Heistand), they propose use-based exemptions that fail to identify any particular class of works and thus fail to justify an exemption. *See* Commerce Rep. at 38 ("The Committee intends that the 'particular class of copyrighted works' be a narrow[er] and focused subset of the broad categories of works of authorship than is identified in Section 102 of the Copyright Act (17 U.S.C. § 102).").

Proponent Public Knowledge (10A, "PK") provides more facts and legal argument than the proposals labeled collectively as 10B, but still misses the mark. PK seeks to enable circumvention of the Content Scrambling System ("CSS"), used to protect motion pictures on DVDs, for the purpose of space shifting. However, PK cannot establish that space shifting is noninfringing.

Although PK cites *RIAA v. Diamond Multimedia Syst., Inc.*, 180 F.3d 1072, 1079 (9th Cir. 1999) for support, the Copyright Office has rejected the application of that case in prior rulemaking cycles. *See, e.g.*, 2003 Rec. at 131, n. 234 (*RIAA v. Diamond Multimedia* "did not hold that 'space-shifting' is fair use. It did state, in dicta, the view that 'space-shifting' of digital and analog musical recordings is noncommercial personal use consistent with the Audio Home Recording Act."). Similarly, PK's citation of the Ninth Circuit's decision in *Perfect 10 Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007) is unavailing. That case involved creating thumbnail-size images in order to provide the "social benefit" of enabling internet searches for images. The Ninth Circuit concluded this constituted "an entirely new use" because it increased "access to information on the Internet." Whatever the merit of the court's fair use analysis, when an individual "incorporat[es] a copy of a motion picture into an individual's media management software" (PK Comment at 4) such that the individual can "launch the video of their choosing at the touch of a button" (*id.*) the person reproduces the work for the exact same purpose for which the existing copy was purchased; viewing the work. That is not analogous to creating a publicly available search engine.

Although the Joint Creators and Copyright Owners support and rely on the fair use doctrine, personal copying is not synonymous with fair use. And Public Knowledge cannot point to any case that has held otherwise.⁷⁰ In fact, courts have held to the contrary in cases involving

⁷⁰ PK relies on *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). However, as the Copyright Office has previously concluded, *Sony* does not stand for the proposition that all personal copying is fair. *See* 2003 Rec. at 106 ("[T]he Register is aware of only one court decision that has held that reproducing a copyrighted motion picture is a fair use: where an over-the-air broadcast was taped for purposes of time-shifting the user's viewing of the work. In the time-shifting case, the Court explicitly did not address the issue of librarying such a

(...continued)

related conduct. *See, e.g., UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000) (“[A]lthough defendant recites that My.MP3.com provides a transformative ‘space shift’ by which subscribers can enjoy the sound recordings contained on their CDs without lugging around the physical discs themselves, this is simply another way of saying that the unauthorized copies are being retransmitted in another medium – an insufficient basis for any legitimate claim of transformation.”); *see also Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994) (“[T]he mere fact that a use is . . . not for profit does not insulate it from a finding of infringement.”). As discussed above (*see supra* Section II), the Register should not begin using this proceeding to “break[] new ground on the scope of fair use.” 2003 Rec. at 106.

Moreover, PK’s comments are full of examples of innovative digital offerings that render the exemption unnecessary. As PK admits, copyright owners include with many DVD and Blu-Ray disc purchases digital copies of motion pictures that may be reproduced to mobile devices and computers pursuant to licenses.⁷¹ Blu-Ray disc purchasers can also take advantage of “Managed Copy” services that are scheduled to launch in the U.S. later this year. Movie distributors and technology companies are also making available services such as UltraViolet, which enables consumers to access motion pictures on a variety of devices through streaming and downloading.⁷² Many movies and television shows are also available online through services such as Comcast Xfinity,⁷³ Hulu⁷⁴ and Netflix,⁷⁵ or websites operated by broadcasters or cable channels, which consumers can enjoy from any U.S. location with internet access. With all of these marketplace solutions to the alleged problem PK points to, it is unlikely that the presence of CSS on DVDs is going to have a substantial adverse impact on the ability of consumers to space shift in the coming three years. As the Copyright Office stated in 2010:

[M]ere consumer inconvenience is not sufficient to support an exemption. The statute does not provide the Register with the responsibility of enabling the most convenient method of consuming video content. . . . Although the choices in ways to view video content may not be offered in all consumers’ preferred manner, consumers have a variety of options at their disposal.

(...continued)

work, and this rulemaking is not the forum in which to break new ground on the scope of fair use.”).

⁷¹ *See* What is Digital Copy? , <http://www.amazon.com/Digital-Copy-DVD/b?ie=UTF8&node=721726011> (“It’s a product (DVD or Blu-ray disc) that includes either a disc with an additional digital file of the film or TV show or a code to download the file online. You can transfer the file onto your computer or portable media player.”).

⁷² *See* What Is Ultraviolet?, <http://www.uvvu.com/what-is-uv.php>; *see also* Section III, *supra*.

⁷³ *See* XFINITY TV App, <http://xfinitytv.comcast.net/app>.

⁷⁴ *See* Current Hit TV Shows Are Now Available On More Devices, <http://www.hulu.com/plus/devices?src=topnav>.

⁷⁵ *See* Unlimited TV Episodes and Movies Instantly Over the Internet, <http://www.netflix.com/HowItWorks>.

2010 Rec. at 225.

PK is also incorrect when it asserts that the only option for consumers who purchased movies in DVD format and now wish to access them on a iPad, for example, is to “re-purchase a motion picture they already own simply to watch it on a device they own.” PK Comments at 10. In fact, many services provide access to numerous titles for low, subscription prices. For covered titles, there is no need to “purchase” a copy of a movie at all. In addition, some studios allow consumers to “trade in” copies of DVDs for Blu-Ray discs in exchange for a nominal fee, which often come with digital copies.⁷⁶ The availability of such services and products demonstrates the power of “use-facilitating” access controls (Manager’s Rep. at 7) and undermines PK’s position.⁷⁷ Regardless, “it is not the purpose of this rulemaking to provide consumers with the most cost-effective manner to obtain commercial video content. If the consumer wants to obtain content, there are many reasonably-priced alternatives that may fulfill the consumers’ wants and needs.” 2010 Rec. at 224.

In fact, granting PK’s proposed exemption would be directly counter to the purpose of this rulemaking. It would undermine emerging business models that increase access to creative works in precisely the manner Congress intended the DMCA to promote. *See* Manager’s Rep. at 6 (“In assessing the implementation of technological measures, and of the law against their circumvention, the rulemaking proceedings should consider the positive as well as the adverse effects of these technologies on the availability of copyrighted materials.”); 2003 Rec. at 138 (“tethering and DRM policies serve a legitimate purpose for limiting access to certain devices in order to protect the copyright owners from digital redistribution of works”). As discussed *supra*, (*see* Section II) the Register should consider Congress’ policy choices, as reflected in the DMCA, and the broader environment within which any proposed exemption would operate before recommending decreased protection for copyright owners. The question should not be whether “an exemption for certain noninfringing uses will cause the end of the digital distribution of motion pictures” (2010 Rec. at 57), but whether circumvention may interfere with marketplace trends that, overall, benefit consumers rather than injuring them. *See* 17 U.S.C. § 1201(a)(1)(C); 2011 NOI at 60,401 (“Another consideration relating to the availability for use of copyrighted works is whether the measure supports a distribution model that benefits the public generally.”). It is clear that access controls have increased consumers’ options with respect to motion pictures in digital formats. The Register should not interfere with that progress. Instead, she should endorse it.

⁷⁶ *See, e.g.*, the DVD2Blu program offered by Warner Bros., <http://www.dvd2blu.com/>.

⁷⁷ To the extent PK identifies devices that are incapable of receiving content from certain services or playing DVDs (PK Comments at 10-11), this is not grounds for an exemption. *Cf.* 2010 Rec. at 224 (“With respect to the Linux proposal, the fact that a consumer may not be able to play a particular work on the Linux platform of the consumer’s choice is not sufficient to justify an exemption when there are other platforms and alternatives available to view purchased material.”).

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