

UNITED STATES COPYRIGHT OFFICE

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

Docket No. RM 2011-7

REPLY COMMENTS

of

DIRECTORS GUILD OF AMERICA, INC.

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Introduction and Summary

The Directors Guild of America (“DGA”) files the following reply to comments submitted regarding the December 20, 2011 Notice of Proposed Rulemaking.¹ The DGA represents over 14,500 directors and members of the directorial team. These artists create the film, television, commercials, documentaries, news, sports and new media content that is enjoyed and acclaimed across the globe. Our members’ audiovisual works are also among the most “pirated” products in the world, often through illegal circumvention technology and at great creative and economic cost to our members. As a result, the DGA has a vested interest in the outcome of the current DMCA rulemaking period.

General Reply

The DGA wishes to respond generally to comments submitted to the U.S Copyright Office (“USCO”) from various individuals and organizations advocating broad circumvention exemptions. Many of these proposed exemptions are described as benefiting consumers, for example, by permitting them to install software on “jailbroken” electronic devices. This characterization is misleading because it disregards the broader environment in which a proposed exemption would operate. In other words, some exemptions may benefit an isolated group of consumers even as they harm the overall digital marketplace. The DMCA’s anti-circumvention provision has fostered an emerging digital marketplace and the DGA opposes any proposed class that jeopardizes that growth.

In addition, while circumvention technology has some legitimate uses, it is also used to steal intellectual property. Among the most brazenly stolen intellectual property are the films, television programs and other audiovisual works created by DGA members. As the DGA has noted for USCO in past submissions, directors, like producers, have an economic stake in the revenue generated from their work in downstream markets. This compensation, known as “residuals,” is essential to our members: DGA members’ total compensation, health care and retirement are all dependent on residuals. When circumvention technology is used to copy and steal audiovisual works, this undercuts artists’ livelihoods and jeopardizes one of this nation’s greatest art forms.

A February 10, 2012 submission on behalf of a coalition of creators and copyright holders² addresses these issues and others (the “Joint Comments”). The Joint Comments provide a thorough review of the proposed classes and their impact on individual creators and the digital marketplace. The submission also provides a detailed analysis of the legal deficiencies of each proposed class. The DGA agrees with the key conclusions in the Joint Comments and believes the submission correctly describes the consequences that will occur if the proposed exemptions to the DMCA’s anti-circumvention provision are accepted.

¹ 76 Fed. Reg. 78,866.

² Filing made on behalf of (1) Association of American Publishers, (2) American Society of Media Photographers, (3) Business Software Alliance, (4) Entertainment Software Association, (5) Motion Picture Association of America, (6) Picture Archive Council of America, and (7) Recording Industry Association of America.

Reply Regarding Specific Proposed Classes

In addition to its general reply regarding the proposed classes, the DGA wishes to respond specifically to comments supporting two proposed classes of works:

Proposed Class 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.

Proposed Class 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.

Both of these proposed classes advocate a form of “format shifting.” Although each triennial review by the Copyright Office is *de novo*, it is worth noting that the Copyright Office previously and properly rejected proposals to permit circumvention for the “format shifting” of audiovisual works.³ The mere inconvenience of possessing a work in a single format does not justify an exemption, particularly because audiovisual works are now available in a variety of affordable formats.⁴ To the extent consumers have a legitimate need to make a back-up copy of an audiovisual disc, the entertainment industry is actively pursuing voluntary programs including the Managed Copy system, which permits users to make a limited number of electronic copies of DVDs or Blu-Ray discs for legal purposes.⁵

More importantly, and contrary to the comments supportive of the proposal of Public Knowledge,⁶ there is no legal authority holding that “format shifting” is *per se* fair use. To the contrary, courts have rejected fair use claims in analogous circumstances.⁷ Far from being employed exclusively for fair use, “format shifting” – a misleading term that often generates confusion in the marketplace – remains a common and viable tool for digital infringement.

Given their tenuous legal position, supporters of “format shifting” stress the alleged consumer benefit of circumvention technology. But here their argument is also misplaced. Over the past three years, consumers have in fact *benefited* from the DMCA’s anti-circumvention provision, not been harmed by it. Rather than hinder the growth of digital media, anti-circumvention provisions have cleared space for a digital marketplace and new technologies to develop.

The Motion Picture Association of America’s website lists nearly 50 websites where consumers can legally access television shows and films. On these websites and others, consumers can enjoy audiovisual content through download-to-rent, electronic sell-through, monthly subscription, ad-supported streaming and other innovative business models. They can view hundreds of thousands of programs, some of which were never released in any other format. The prohibition on circumventing access controls, subject to limited exemptions, has advanced, not hindered, this “marriage” of digital technology and content.

³ 2006 Rec. at 69-74, 80-83.

⁴ See, e.g., 2010 Rec. at 225; Joint Comment at 49; DVD CCA Comment at 7.

⁵ AACSLA Comments, at 3, 7.

⁶ Public Knowledge and the Free Software Foundation both submitted comments in support of Proposed Classes 10A and 10B.

⁷ *UMG Recordings, Inc. v. MP3.com*, 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000).

Hundreds of millions of consumers enjoy the digital distribution channels that were fostered by the DMCA's protections. Meanwhile, Public Knowledge and others are purportedly concerned about consumers who "bought a DVD when DVD was the only available format" or have an obsolete HD-DVD collection.⁸ While the DGA is sensitive to these concerns, the broad consumer benefits of a healthy and growing digital marketplace far outweigh disparate and anecdotal criticisms. Regardless, the purpose of this rulemaking is not to provide consumers with the most cost-effective way to obtain commercial video content. As noted above, there are already many legal and reasonably priced digital outlets for consumers to purchase audiovisual content – and more are appearing each day.

For Directors Guild of America members, digital media distribution offers another manner of re-use through which they can earn residuals, and it is a source that will become increasingly important as digital sales supplant DVD and Blu-Ray sales. But every "pirated" or "burned" film that enters cyberspace makes it less likely a consumer will access that content through legal means, such as Netflix, Hulu, Vudu, HBOGo, Ultraviolet or another digital distributor. Current DMCA protections ensure that our members and their families are compensated for the re-use of their creations regardless of the medium. By doing so, it permits our members to continue earning a living from doing what they love: creating high-quality, original content.

Conclusion

Some comments falsely characterize the debate over circumvention technology as a struggle between "corporations" and "consumers."⁹ But as USCO knows, the reality is far different. "Corporations" are not the sole beneficiaries of copyright protections. Individual creators, like the DGA's members, have just as much at stake in the ongoing copyright debate. Any decline in downstream sales, whether in retail or the evolving digital marketplace, puts creators at financial risk and makes it difficult for them to continue producing original content.

And the term "consumer" is far broader than a handful of technicians or Internet activists with "jailbroken" cell phones. "Consumer" includes hundreds of millions of Americans who increasingly enjoy digital content through legal websites facilitated by the DMCA's anti-circumvention provisions. Such content includes programs that were never previously available on DVD or any other format. If the Internet is to grow as a viable marketplace for films and television programs, it must present opportunities to both consumers and creators. The Internet will never realize its full potential if legitimate distribution channels are undermined by circumvention technology.

Dated: March 1, 2012

Respectfully submitted:



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⁸ PK Comments at 10; Meacham Comments at 2.

⁹ See, e.g., Jeffrey Comments at 1 ("To keep the exemption is a statement that the gover[n]ment by the people is still for the people and not for ... business.").