Before the

U.S. COPYRIGHT OFFICE

LIBRARY OF CONGRESS

In the matter of Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies under 17 U.S.C. § 1201 Docket No. 2014-7

JOINT COMMENTS OF THE DVD COPY CONTROL ASSOCIATION ("DVD CCA") AND THE ADVANCED ACCESS CONTENT SYSTEM LICENSING ADMINISTRATOR LLC ("AACS LA") ON PROPOSED CLASS 8

[ ] Check here if multimedia evidence is being provided in connection with this comment

1. Commenter Information

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The DVD Copy Control Association ("DVD CCA") is a not-for-profit corporation with its principal office in Morgan Hill, California. DVD CCA licenses copyright scrambling systems ("CSS") for use to protect against unauthorized access to or use of prerecorded video content contained on DVD discs. Its licensees include the owners of such content and the related authoring and disc replicating companies; producers of

encryption engines, hardware and software decrypters; and manufacturers of DVD players and DVD-ROM drives.

The Advanced Access Content System, Licensing Administrator, LLC ("AACS LA"), is a cross-industry limited liability company that developed and licenses the Advanced Access Content System technology ("AACS" or "AACS Technology") for the protection of high definition audiovisual content on optical media, in particular Blu-ray Discs ("BDs"). The Founders of AACS LA are Warner Bros, Disney, Microsoft, Intel, Toshiba, Panasonic, Sony, and IBM.

2. Proposed Class Addressed

These comments address proposed Class 8 Audiovisual Works—Space-Shifting and Format-Shifting.

> This proposed class would allow circumvention of access controls on lawfully made and acquired audiovisual works for the purpose of noncommercial space-shifting or format-shifting. This exemption has been requested for audiovisual material made available on DVDs protected by CSS, Blu-ray discs protected by AACS, and TPM-protected online distribution services.

See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 79 Fed. Reg. 73856, 73860 (2014).

3. Overview

DVD CCA and AACS LA object to an exemption that the Copyright Office has repeatedly rejected. Proponents have mistakenly alleged that one recent case has changed decades of precedent and have dredged up some inapplicable legislative statements in an attempt to paint a new picture of the same old request that has been repeatedly rejected. None of that should change the outcome in this proceeding. In contrast to the lack of any real legal development, the market for motion pictures, particularly the online platform, has continued to explode and is now matured in offering

consumers a myriad of choices for viewing motion picture content. As DVD CCA and AACS LA previously explained, the array of offerings would provide consumers with the ability to enjoy high quality content anywhere, any time and on multiple devices from desktops to smartphones. Consequently, these offerings in the market place negate any substantial adverse effect that the continued prohibition on circumvention of CSS or AACS would have by denying the proposed exemption.

4. Technological Protections Measure(s) and Method(s) of Circumvention

These comments specifically address the proposed circumvention of the Content Scrambling System ("CSS") as licensed by DVD CCA and the Advanced Access Content System ("AACS") as licensed by AACS LA. CSS has long been recognized as a TPM by the courts and the earliest of the Triennial Rulemakings.[1] These comments also specifically address the proposed circumvention of the Advanced Access Content System Technology ("AACS" or "AACS Technology"), which has also been recognized as a TPM by the courts and in previous Triennial Rulemakings.[2]

Proponents have avoided explaining how circumvention of CSS or AACS would be accomplished stating that such information is "only relevant in cases where the method might itself lead to infringing uses not within the intended scope of the proposal."

[1] *See* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 Fed. Reg. 64556, 64568 (2000).

[2] *See* Section 1201 Rulemaking: Fifth Triennial Proceeding Recommendation of the Register of Copyrights at 126 (Oct. 2012) ("2012 Recommendation").

5. **Asserted Noninfringing Use**

I. The Register and Librarian Should Take the Same Approach in this Proceeding as in Prior Section 1201 Rulemakings

The precedent of this proceeding is that the Register has been unable to affirmatively conclude that the proposed noninfringing activity identified in proposed class 8 is indeed noninfringing. *See* 2012 Record at 166. In so concluding, the Register recognized that this rulemaking was not the venue to wade into a disputed issue of copyright law. The purpose of this rulemaking is to decide whether the possible harm to a non-infringing use of a copyrighted work that could result from the prohibition on circumvention merits the creation of an exemption. Because whatever possible harm asserted by proponents is mitigated entirely by the wide array of offerings of motion pictures in the marketplace, the Office need not evaluate the merits of the contentious debate between copyright owners, users of copyrighted works and so-called "fair use advocates." Ultimately, the question of how to balance the equities of the various stakeholders is for Congress, and no decision by either the Register of Copyrights or the Librarian of Congress will be dispositive on the merits of this fundamental dispute over the appropriate scope of copyright protection. If the Register and the Librarian were to grant this request, however, the carefully calibrated critical protections of Section 1201 would be effectively eliminated, severely damaging the immeasurable consumer benefits advanced by the use of TPMs to stimulate content owners to bring their work to consumers in new and exciting means.

When consumers buy a DVD or Blu-ray disc, they are not purchasing the motion picture itself, rather they are purchasing access to the motion picture which affords only the right to access the work according to the format's particular specifications (i.e.,

through the use of a DVD player), or the Blu-ray Disc format specifications (i.e., through the use of a Blu-ray format player). Consumers are able to purchase the copy at its retail price because it is distributed on a specific medium that will play back on only a licensed player. In prior exemption proceedings, the Register and Librarian have recognized that there is no unqualified right to access a work on a particular device. *See* 2012 Report at 161.

II. None of the Proponents' "New" Arguments Warrant Disturbing the Prior Approach

A. Legislative History of 1971 Sound Recording Act Inapplicable

The legislative history for sound recordings supplied by the proponents has no application to the determination of whether use of a motion picture is noninfringing. While legislative history may only be useful in interpreting the specific statute the legislative history relates to, the legislative history cited by proponents concerns the creation of the sound recording right. It has no application to the use of a motion picture or even the four factor statutory analysis that was later set out in section 107 of the Copyright Act. If anything, this legislative history suggests that making a copy of a sound recording for personal, noncommercial use is not intended to be prohibited by that specific 1971 law.

B. The 1961 Register's Report on Motion Pictures Has No Weight

The 1961 Register's Report is even less compelling than the legislative history of the 1971 Sound Recording Act. Indisputably, the 1971 legislative history has some authority for understanding the sound recording right – since it actually culminated in the law being approved by Congress. The 1961 Register's Report does not constitute legislative history for any law that Congress ultimately approved. Indeed, viewed purely

from a legislative history standpoint, it is reasonable to believe that Congress actually rejected the report, because it chose not to pursue any of its findings or recommendations.

C. *Dish* Case Not a Basis for Changing Policy in This Proceeding

The portions of the *Dish* case as cited by proponents[3] contain no meaningful analysis of the issues presented here and are non-binding. The context for that case is also vastly different from the requested exemption, and the single sentence quoted by the proponents should not be the basis for changing the approach in this rulemaking.

First, the copying at issue in *Dish* that purportedly involved space-shifting – Hopper Transfers – was provided only to authenticated, paying subscribers and incorporated numerous technical restrictions and digital rights management protocols to ensure that any users were current subscribers to that pay-television service, that programming could be viewed only on a limited number of devices, that copies of certain programming may not be copied again, that certain channels may not be viewed remotely, that copies would not be available for viewing indefinitely, and that certain other restrictions would be observed. In sum, these restrictions imposed by a content licensee help to avoid a situation where unauthorized copies are misused through unauthorized copying or redistribution and even to avoid a situation where the copy remains in a "library" created by the user for longer than an established period of time.

In this proceeding, the proponents request that content protected using a TPM, including those offered by DVD CCA and AACS LA, should be entirely freed, forever,

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[3] "Hopper Transfers is a technology that permits non-commercial time- and place-shifting of recordings already validly possessed by subscribers, which is paradigmatic fair use under existing law." Proponents PK at 5 (citing *Fox Broad. Co. v. Dish Network LLC*, Civil No. 12-4529 (C.D. Cal. Jun. 12, 2015) (internal citation omitted).

from any restraints on consumer use, including further copying or redistribution to millions of other consumers, none of whom will have paid for the original work.

Second, the *Dish* case is also far from concluded, and so its use for any precedential purpose is highly suspect at this stage. Indeed, final judgment has not yet been entered, the summary judgment ruling is still subject to appeal and neither the Court of Appeals for the Ninth Circuit nor the Supreme Court has affirmed the court's ruling or reasoning. In short, it would be inappropriate to rely on the case for any precedential purpose in these proceedings.

Third, the *Dish* summary judgment decision does not meaningfully address the issues in this proceeding. In connection with the reproduction right claims, the District Court addressed whether the particular *time shifting* features of the Dish services (i.e., PrimeTime Anytime) qualify as "fair use" under the Supreme Court's *Sony Betamax* decision. In *Sony*, the Supreme Court analyzed a full record *after* a bench trial and found that the particular time shifting function of the Betamax product was fair use in part because there was no demonstrated market harm to the movie studios. In the non-precedential *Dish* opinion, the District Court addressed fair use as a matter of law and conducted only a cursory market harm analysis, ignoring all of the testimony and opinions proffered by the economic experts.

The District Court spent even less time analyzing whether the Hopper Transfers were infringing or fair use, summarily concluding as a matter of law that space shifting functions were fair use.[4] The court did no fair use or market harm analysis of the Hopper

[4] It is important to note that, immediately following the very short section of the decision that proponents quote in their proposal, finding in favor of Dish on fair use grounds, the judge then granted partial summary judgment in Fox's favor on contractual grounds,

Transfers space shifting function and relied solely on the Rio case as support for its summary proposition. The Rio case, however, did not evaluate whether the copying of music by the Rio device was fair use, since that case related *only* whether that product was covered by the Audio Home Recording Act ("AHRA"). The quote cited in the *Dish* District Court decision is actually a combination of parts of two sentences in the Rio decision, neither of which addressed fair use. Rather, the Rio court concluded that the kind of copying that the Rio device accomplished was non-commercial in the context of the AHRA use of that concept. While that finding was not particularly important to the holding of the Rio decision – that the Rio product was not covered by the AHRA – the point certainly does not support proponent's assertion that the copying of entire copyrighted works for "space shifting" purposes is fair use. As noted above, the Hopper Transfer functionality is also substantially more limited than what proponent seeks to do under its proposed exemption, including restrictions on the type of programming that can be copied, and limiting the time period that each copy may be viewed by a consumer.

Based on the above and all of the other available case law and information, the *Dish* case is not a reasonable basis for the Copyright Office and Librarian to change policy in relation to this particular request.

6. <u>Asserted Adverse Effects</u>

I. Multiple and Varied Offerings of Motion Pictures Mitigate Any Asserted Adverse Effects

The wide array of offerings of motion pictures in both standard and high definition, across multiple platforms and accessible through even more devices now than

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essentially holding that the contractual arrangement between the parties superseded the fair use finding, thus negating any practical effect of the fair use conclusions.

ever imagined before, completely mitigates the limits that are inherent in the DVD and Blu-ray disc formats.

One example of a contemporary content distribution system that delivers content to consumers when and where they want it is UltraViolet. Ultraviolet currently has over 19 million US subscribers, almost 20% of US households. And UltraViolet has a library of over 10,000 titles - movies and TV shows. For many Blu-ray discs, the content companies provide UltraViolet rights for that title included in the price. Statistics indicate that consumers are making use of this technology, with over 125 Million movies and TV shows added to UV libraries. Users add to their UV libraries in several ways, including directly purchasing films from online retailers, purchasing physical discs that come with UV codes included, or paying a fee to verify a previously purchased DVD and gain access to the film in the UV library. UV primarily functions as a rights locker, verifying a user's purchases and permitting them to download or stream the content from varied services, such as Flixster, Vudu, and M-Go. These apps operate on a range of devices: smartphones, tablets, set top boxes like Roku, smart TVs, and more. Some of these services even allow multiple users per account, allowing entire families access to the content at once from different locations, again using various devices that might be available to each family member.

Officially licensed download-to-own services such as the Google Play, iTunes, and Amazon stores provide an even wider range of officially licensed content to users for a reasonable price. iTunes alone offers over 80,000 movies and 300,000 TV shows for users to purchase, with many titles available in full 1080p high definition for between ten and twenty dollars per movie. With services like these you do not even need to be

connected to the Internet to view the content, you only need to be connected for as long as it takes to download the content. With one of these services, your media library is fully accessible without Internet access across a range of devices including smartphones, tablets, smart TVs, set top devices such as Roku or AppleTV, and the traditional portable notebook computer. The only limit is the capacity of your hard drive.

Internet streaming services such as Hulu, Amazon, and Netflix also provide a large library of content for consumers who are connected to the Internet at a reasonable price. For example, Hulu Plus offers access to thousands of TV shows and movies for $7.99 per month. Hulu users are able to access the service across a range of devices, including video game consoles, smart TVs, smartphones, tablets, computers, and set top streaming devices. Some streaming services, Netflix in particular, allow users to set up multiple profiles on one account, allowing family members to share a subscription even when they are far away from one another.

Traditional content providers have updated their business models in order to keep up with the modern competitive media market. Cable TV providers are expanding online offerings to entice users not to cut the cord. Comcast Xfinity, the largest cable TV provider in the country, provides their users with significant offerings in their online Video on Demand (VoD) service. The offerings online largely approximate what is offered on a home set top cable box, with some content included for free as a part of a traditional cable television package, and premium content available for rent for a fee of between five and fifteen dollars for HD films.

8. **Statutory Factors**

I. Factor (iv) - Any Exemption Broader than Past Narrowly Tailored Exemptions to Circumvent CSS Technology or AACS Technology Would Harm the Market for Audiovisual Works Distributed on DVD and Blu-Ray Disc

Past exemptions recommended by the Register have been narrowly tailored to strike a balance between the noninfringing activity and the DVD format, which to date remains a successful digital distribution channel for motion pictures. Creating a new exemption for circumvention of both CSS and AACS to enable unrestrained uses by any user is precisely the opposite of the narrowly tailored exemptions that Congress intended to facilitate through this proceeding.[5]

Any DVD or Blu-ray disc that has been circumvented results in a perfect copy of the work being "in the clear" (i.e., free of any technical restrictions limiting copying or redistribution of the work). As that perfect copy of the work is now in the clear it can be freely copied and redistributed. The more copies of that work are available for free from unknown third party sources or even from family and friends, the less attraction there is for consumers to actually purchase a copy of the work in any other format or part of any offering of an online service.

The DVD and Blu-ray disc formats have developed and retained their popularity notwithstanding the advent of multiple competitive means for consumers to obtain content. Whether these packaged media formats remain available to consumers, particularly those slow to adopt to the online streaming alternatives, will depend upon copyright owners' confidence in the packaged media formats. A broad exemption could

[5] 2012 Recommendation at 9 (quoting Commerce Comm. Report at 38)(observing that the classes of works designated by the rulemaking procedure are intended to be "narrow and focused").

hasten business decisions to abandon the DVD and Blu-ray disc markets sooner rather than later, to the detriment of the vast majority of consumers who are happy to purchase or rent the packaged media and use it for its intended purpose.

The uses identified in proposed class 8 are already being served by the commercial market for audiovisual works distributed on DVD and Blu-ray disc, and the granting of such a broad exemption would substantially harm that market, and ultimately reduce the number of copyrighted works distributed through market channels, ultimately harming consumers. Consequently, creating such an exemption would unnecessarily undermine the very considerable investments made by companies making the licensed playback products, copyright owners distributing content in the formats, and consumers purchasing (and renting) the products that provide them with the ability to watch motion picture content.

II. Factor (v) – Other Relevant Factors

The fundamental purpose of Section 1201 was to enable the development of a market for a wide variety of distribution systems for copyrighted digital content. CSS and AACS were each developed by a cooperative effort of three industry groups in the manner that Congress intended to promote through the protections afforded by Section 1201.[6] These proceedings have recognized the necessity to take care in the exemption process so that particularly identified fair uses may be enabled without overwhelming the very protection systems that the broader provision was intended to benefit.[7] Yet, the

[6] WIPO Copyright Treaties Implementation and Online Copyright Infringement Liability Limitation 18, House Rept. 105-551 Part 1 (May 22, 1998) ([Section 1201] is drafted carefully to target ''black boxes,'' and to ensure that legitimate multipurpose devices can continue to be made and sold).

[7] *See* Exemption to Prohibition on Circumvention of Copyright Protection Systems for

proposals to craft an exemption that would allow *all* users to circumvent CSS and AACS for any form of noncommercial space shifting or to make back-up copies is precisely the kind of exemption that would overwhelm CSS and AACS. And despite their "age" in digital terms – close to 18 years based on the launch of DVD products into the U.S. marketplace and close to 9 years based on the launch of Blu-ray disc products into the U.S. marketplace – CSS and AACS remain viable technological protection mechanisms that the marketplace continues to rely on, and courts continue to protect, both under the DMCA and under their own licensing terms.

Granting the proposed exemption would undermine the license regimes for both CSS and AACS, each of which has been critical to the development of the market for copyrighted works distributed on DVDs and Blu-ray discs, respectively. As explained below, courts have affirmed the uniform license system and DVD CCA's need to uniformly enforce its terms including terms such as the provisions of the CSS Specification that do not permit CSS licensees to manufacture and market home entertainment systems that would store the DVD content on a server.[8] This analysis has been described in most detail in the DVD CCA/CSS context, but the analysis applies equally to AACS LA and AACS Technology.

On March 8, 2012, the trial court issued its final ruling in favor of DVD CCA, finding that Kaleidescape had indeed violated the requirements of the License.[9] The trial

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Access Control Technologies, Final Rule, 75 Fed. Reg. 43,825, 43,826 (July 27, 2010) (stating that the rulemaking process require the Register and the Librarian to carefully balance the availability of works for use, the effect of the prohibition on particular uses, and the effect of circumvention on copyrighted works).

[8] *See generally RealNetworks, Inc. v. DVD CCA, Inc.*, 641 F. Supp.2d 913 (N.D. Cal. 2009); *DVD CCA, Inc. v. Kaleidescape Inc.*, 176 Cal .App. 4th 697 (2009).

[9] *DVD CCA, Inc. v. Kaleidescape, Inc.*, No. 1-04-CV-031829, Statement of Decision at 3

court noted that the Court of Appeals had already recognized that CSS combined with the License Agreement was the result of efforts made by the consumer electronics and the computer technologies industries to work with the entertainment industry to find an "answer to the concern" for preventing unauthorized copies. Recognizing that the three industries are disparate, the court credited that the basis that the three industries coalesced was "the trust in the integrity of the License Agreement." According to the court,

> This trust would erode if a CSS licensee that broke the rules preventing unauthorized copying of DVDS nevertheless was permitted to keep breaking them, i.e., if the breach were unaddressed . In that event the intended uniformity of the rules [as applied to all the licensees] would become effectively moot, because other licensees then would have little compunction about following the footsteps of the initial rule-breaker and breaking the rules too and uniform, [the] level playing field of the License Agreement established would be upset.[10]

Although the trust is between the three industries, the harm would be specific to DVD CCA as "the undermining of those industries" trust and confidence in the License Agreement, and thus in DVD CCA, if a breach by a licensee were to go unaddressed."[11]

The Court also found the harm to the integrity of the license would be compounded by additional breaches by licenses.

> An unaddressed breach of the License Agreement would likely beget follow-on breaches . . . . An unaddressed breach will establish a rule-breaking precedent, thus compromising DVD CCA's authority to enforce the rules going forward. Other CSS licensees, concluding that they can get away with DVD copiers will make them, frustrating the ability of

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(Sup. Ct. Santa Clara County, March 8, 2012) [hereinafter *Superior Court Decision*]. Although initially appealed by Kaleidescape, a slightly amended form of the injunction issued in conjunction with the Superior Court Decision became final on November 30, 2014 based on a settlement between the parties. The case is now over, with the Superior Court Decision being the final ruling in the matter. .

[10] *Superior Court Decision* at 46–47 (citations to the record omitted).

[11] *Id.* at 47.

DVD CCA to carry outs goal of ensuring the uniformity of the CSS licensing system.[12]

The noninfringing use for which the proponents request an exemption is the same consumer activities that the CSS licensees, Kaleidescape and Real Networks, wanted to facilitate with their respective products. As the courts found, those companies' products breached the CSS license. Granting the requested exemption would have no less adverse effect on the integrity of the CSS licensing regime as the courts found that the two companies' breaches would have had on the integrity of the licensing regime.

These court decisions illustrate the fact that licensed, compliant DVD playback products continue to dominate the marketplace, notwithstanding the availability of "hack" programs through rogue websites. CSS continues to protect movie content released on DVDs according to the requirements that were put in place nearly 15 years ago. It remains a viable technological protection measure supported by a license regime that is actively enforced by DVD CCA, its licensing body.

AACS Technology has also been held to merit court-ordered protection. About a year ago, AACS LA sued DVDFab and related parties seeking an injunction against their circumventing products. A preliminary injunction was issued on March 4, 2014. After receiving competing motions and hearing oral argument on the motions – offered by Feng Tao (one of the defendants and the apparent owner of the DVDFab technology) to set aside default judgment and restrict the preliminary injunction (although NOT to set aside the preliminary injunction as applicable to products and conduct wholly within the United States) and by AACS LA to expand the injunction to cover products and services that were offered to evade the original injunction – Judge Broderick last week issued his

[12] *Id.* at 47 (citations to the record omitted).

written decision, denying Feng Tao's motions and granting (with two minor exceptions) AACS LA's motions.[13] The effect is that Judge Broderick found AACS Technology to merit injunctive relief against circumventing technology that would, among other things, enable consumer copying for space-shifting purposes.

Most relevant to this proceeding, and to the harm that AACS LA would suffer from a broad grant to allow circumvention for space-shifting purposes, Judge Broderick found:

> There is no doubt that AACS is a technological measure designed to control access to copyright protected materials. (*Id.* at 10.) Nor is there any doubt that Defendants' primary, if not sole, business purpose is to decrypt these technological measures. (*Id.* at 10-11) Furthermore, Plaintiff made a clear showing that traditional legal remedies would be inadequate to compensate Plaintiff. (*Id.* at 13.) In this case, Plaintiff "lacks an adequate remedy at law, because its business model rests upon its being able to prevent the copying of copyrighted works. If it is unable to prevent the circumvention of its technology, its business goodwill will likely be eroded, and the damages flowing therefrom extremely difficult to quantify." *Macrovision v. Sima Products Corp.*, No. 05-CV-5587, 2006 WL 1063284, at *3 (S.D.N.Y. Apr. 20, 2006)

AACS LA v. Shen, 14-CV-1112, Memorandum & Order at 15 (S.D.N.Y March 16, 2015).

CONCLUSION

The request for an exemption for the proposed class should be denied. Notwithstanding the legal reasons discussed above, the basic fact is that consumers have not suffered any harm as a result of any TPMs. In fact, the DMCA and the TPMs authorized under it have delivered to the public exactly what Congress had envisioned – copyrighted works, specifically motion pictures, are ubiquitous. While reasonable people

[13] *Advanced Access Content System Licensing Administrator, LLC v. Lanny Shen d/b/a DVDFab, Feng Tao Software, Inc. et al*, 14-CV-1112 (VSB), Memorandum and Order (Southern District, NY), filed March 16, 2015.

can disagree on the state of the law, this fact is beyond dispute. Consequently, an exemption for the proposed class must be denied.