



UNITED STATES COPYRIGHT OFFICE

Long Comment Regarding a Proposed Exemption Under 17 U.S.C. § 1201

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

ITEM A. COMMENTER INFORMATION

DVD Copy Control Association

The DVD Copy Control Association (“DVD CCA”), a not-for-profit corporation with its principal office in Morgan Hill, California, licenses the Content Scramble System (“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

Advanced Access Content System Licensing Administrator, LLC

The Advanced Access Content System Licensing Administrator, LLC (“AACSLA”), is a cross-industry limited liability company with its principal offices in Beaverton, Oregon. The Founders of AACSLA are Warner Bros., Disney, Microsoft, Intel, Toshiba, Panasonic, Sony, and IBM. AACSLA licenses the Advanced Access Content System (“AACSLA”) technology that it developed for the protection of high definition audiovisual content distributed on optical media. That technology is associated with Blu-ray Discs (“BDs”).

As ultra-high definition products are entering the marketplace, AACSLA has developed a separate technology for the distribution of audiovisual content. This technology is identified as AACSLA2 and not AACSLA 2.0. This distinction in nomenclature is significant as the latter would suggest that it replaced AACSLA distributed on Blu-ray. It has not. AACSLA2 serves only audiovisual content distributed on Ultra HD Blu-ray discs, which cannot be played on (HD) Blu-ray players.

Privacy Act Advisory Statement: Required by the Privacy Act of 1974 (P.L. 93-579)

The authority for requesting this information is 17 U.S.C. §§ 1201(a)(1) and 705. Furnishing the requested information is voluntary. The principal use of the requested information is publication on the Copyright Office Web site and use by Copyright Office staff for purposes of the rulemaking proceeding conducted under 17 U.S.C. § 1201(a)(1). NOTE: No other advisory statement will be given in connection with this submission. Please keep this statement and refer to it if we communicate with you regarding this submission.

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ITEM B. PROPOSED CLASS ADDRESSED

This comment addresses Proposed Class 3: Audiovisual Works—Space-shifting

ITEM C. OVERVIEW

DVD CCA and AACS LA oppose the creation of an exemption for any of the activities that would be permitted under the proposed class including but not limited to (i) “non-reproductive space-shifting” and copying for the purpose of (ii) making back-up copies or (iii) engaging in space shifting. Consumers enjoy an unprecedented ability to enjoy content anytime, anyplace and anywhere through lawful services (or services that – at least thus far – have proven not to offend copyright norms). Both requests are “solutions” in search of a problem that does not exist. While OminQ may have an idea, even an exciting idea that OmniQ may even one day bring to market in a product, the request for an exemption for an unrealized invention at this point is nothing more than proverbial “cart before the horse.” Looking at the facts surrounding this unrealized technology and the conclusions that must be drawn from them, DVD CCA and AACS LA request that the Register not recommend creation of an exemption for something so speculative.

ITEM D. PROTECTION MEASURE(S) AND METHOD(S) OF CIRCUMVENTION

CSS and AACS are encryption-based technologies, recognized as technological protection measures under the DMCA.

ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGING USES

With respect to both requests for exemption, today’s consumer marketplace demonstrates that there is no need for circumvention of CSS, AACS and other TPMs in order for consumers to be able to enjoy audio-visual content on innumerable devices using multiple delivery systems (physical, over-the-air, online, cable, satellite, etc.). The marketplace simply provides for virtually any consumer need in this area. And the vast majority of the delivery systems exist because of the ability of those systems to use TPMs to protect the delivered content from unauthorized uses. That is the basis for their ability to persuade content providers to enable the use of the systems to deliver valuable content. This is the backdrop to these requests and, by itself, provides grounds for rejecting these requests as simply unnecessary.

I. De Petris Request and FSF Comments Rehash Arguments Repeatedly Rejected by the Register and the Librarian

Although De Petris made a request for “space shifting,” he did not file evidence or, indeed, even any comments in support of his own request. The Free Software Foundation filed very general comments, ultimately stating support for this request after making very high-level policy comments advocating against TPMs. Both the request and the FSF comments supporting it simply reiterate the request and high-level arguments that were rejected in multiple previous cycles of this proceeding. Further, apart from a very generalized “policy” argument, there has been nothing submitted in this cycle to establish any record for the Register to use in her recommendations or for the Librarian to use in her decision with respect to the requested exemption.

The Register has repeatedly declined the invitation to conclude space- or format- shifting is non-infringing.¹ When confronted with petitions to be able to transfer copyrighted works to different devices,

the Register has consistently found insufficient legal authority to support the claim that these activities are likely to constitute fair uses under current law. ...

...

While . . . acknowledge[ing] that judicial interpretation of fair use could someday evolve to include certain space-shifting activities, . . . the Section 1201 rulemaking process is not the forum in which to break new ground on the scope of fair use[.]

2015 Recommendation at 109 (footnotes omitted).

¹ See Register of Copyrights, Section 1201 Rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights 109 n.656 (2015) (“2015 Recommendation”).

Based on the lack of any new precedent or evidence (and in De Petris' case, the lack of any submission at all), DVD CCA and AACS LA ask that this request for an exemption be denied.

II. OmniQ's Request Must Be Denied As Legally Unsupported and Based on Lack of Concrete Technological Evidence

OmniQ's very lengthy, dense filing requests that the allegedly noninfringing activity as "non-reproductive space shifting" be permitted to circumvent TPMs, including CSS and AACS, to allow the creation of a business that does not now exist and that may or may not be viable. Although dizzying in its length and numerous detours into matters that are ultimately irrelevant, the essential points for this proceeding are the following. In order to qualify for an exemption, OmniQ has to be (i) right about the non-reproductive space shifting being a distinct form of space shifting that the law would find to be noninfringing and (ii) right that their technology would really work to "erase" the copy that that is being non-reproductively space shifted using their technology. Neither of those is at all clear, let alone demonstrated by the submission. On that basis alone, the request should be denied.

There is no case law supporting OmniQ's claim that non-reproductive space shifting does not involve infringement. The one case they cite as the base for their claim involved very different technology from a different era. OmniQ's accuracy concerning what the technology actually would do in a real product is exactly the problem, and whether the technology offends the reproductive right will depend on the facts. The digital era case that seems closest to on-point regarding their approach is the *Redigi* case,² where the District Court judge held against the technology provider and the Second Circuit is reviewing that decision. How those cases, or any other legal precedent, would apply to all aspects of OmniQ's proposed system is, at best, not clear, in large part because there is only a hypothetical technological approach to evaluate. At this point, DVD CCA and AACS LA see no legal basis for the Register to conclude that the system envisioned by OmniQ would not involve infringement.

From the standpoint of DVD CCA and AACS LA, the lack of actual technology, even technological proof of concept, is perhaps even more damning. The question of whether the proposal would actually destroy the original recording on the disc is critical to even OmniQ's vision of the situation. The existence of CSS and AACS does not cause a problem in demonstrating the system. There are unencrypted DVDs that could be used. Apart from such commercial discs, making a test disc is not hard or, in light of the scope of the envisioned system, particularly expensive. Yet, OmniQ has simply not made a prototype for what it is proposing. Without evidence that the technology would work as proposed, and work that way on a reliable basis, there is no ground for the Register and Librarian to conclude that this system actually involves "non-reproductive space shifting" at all.

² *Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640 (S.D.N.Y. 2013).

The exemption apparently would serve only “those who practice the OmniQ Invention.” DVD CCA and AACS understand this to mean that the exemption would serve OmniQ in commercializing its technology that is the subject of its patent application appended to its filing as Exhibit 1. The technology, if reduced to practice, would allegedly be able to preserve “the entire ‘disc image’” when it shifts from the content on the plastic disc to a hard-drive, “erasing” the content from the plastic disc in the process. Comments at 15. OmniQ describes this shifting as “material substitution.” Specifically, once the disc is “ingested,” the technology will extract the data on the disc and transfer that very same data to the CPU. Comments at 16. According to OmniQ, “There is never a point in which the work is fixed in two material objects at once.” *Id.*

OmniQ later suggests that the exemption need not be specific to OmniQ’s technology but the exemption use any method now known or later developed of moving the fixation from the disc to something else, without reproduction. Comments at 19 (emphasis in original).

Although the technology as mentioned above can allegedly preserve the entire disc image, which would include CSS and AACS, OmniQ seeks the exemption so that it can circumvent CSS and AACS. Comments at 15.³ OmniQ claims “when ‘the work’ of interest is just the motion picture, having to maintain the surrounding TPM is very inefficient[.]” *Id.* OmniQ adds, “the ability to lawfully bypass the virtually useless TPM will make space-shifting much more efficient and less costly than having to respect it.” Comments at 17.

³ OmniQ misunderstands at least one aspect of both CSS and AACS. Play back is authorized for CSS and AACS only from the prescribed media, meaning the DVD or Blu-ray disc itself. That authorized is backed up by a technical authentication process that is used to ensure that the content is coming from the disc in the drive. So, making a pure disc image copy onto a hard drive (thereby retaining the CSS or AACS encryption) is possible but would not work to allow play back in the licensed and compliant play back environment.

A. OmniQ Has Cited No New Legal Authority to Rebut the Register’s View Regarding Space Shifting

As described above, the Register has repeatedly denied requests for “space shifting,” including OmniQ’s request in the 2015 proceeding. *See* 2015 Recommendation at 123. In the current NPRM, the Register requested proponents to address whether, in the past three years, there has been a change in the legal or factual landscapes regarding whether space-shifting and format-shifting are noninfringing fair uses.”⁴ OmniQ has not done so. Instead, it repeats its argument from the last proceeding, albeit with a bit more clarity. Nevertheless, its argument, and the legal support alleged, is not new.⁵ It attempts to distinguish the decision in *Capitol Records LLC v. ReDigi, Inc.*,⁶ but the distinction depends on evidence of OmniQ’s actual technology, which is submitted only in hypothetical form. Accordingly, DVD CCA and AACCS LA see no reason to disturb the Register’s prior conclusions on the allegedly noninfringing activity.

B. Unobservable Technology Does Not Warrant a Finding of “Unlikely Noninfringing”

The Register’s finding that an activity is indeed noninfringing must rest on the facts developed on the record, and accordingly, “the proponent must establish that the proposed use is likely to qualify as noninfringing under relevant law.” Register 2015 Recommendation at 15 (noting that a showing is “more than that a particular use *could* be noninfringing) (emphasis in original). OmniQ’s accuracy on what the technology does is exactly the problem, and whether the technology offends the reproductive right will depend on the facts. In the current proceeding, OmniQ has baldly asserted that there is no reproduction and offered only a pending patent application in support of its claim. As OmniQ has already argued, the Register likely does not have the capacity to determine “whether the split-second computing operations are being carried out precisely in the manner described in OmniQ Invention patent.” Comments at 19. In the absence of the ability of the Copyright Office and technical experts from DVD CCA, AACCS LA and other parties to evaluate actual technology and actual implementations of that technology, we simply do not know whether this invention would involve infringing reproduction or not. The, OmniQ has not met its burden to show that its activity is likely to qualify as noninfringing.

⁴ Notice of Proposed Rulemaking, 82 Fed Reg. 49550, 49560 (Oct. 26, 2017) (“NPRM”).

⁵ OmniQ continues to advance *C. M. Paula Co. v. Logan*, 355 F. Supp. 189 (N.D. Tex. 1973) in support of its claim of non-reproductive space-shifting. Comments at 25-27.

⁶ *ReDigi Inc.*, 934 F. Supp. at 648.

C. Conclusion

OmniQ has not presented any factual or legal argument for the Register to reverse course on the activity of space-shifting. In the absence of more information about how the OmniQ Invention accomplishes the alleged “non-reproductive space-shifting,” there is insufficient record evidence to conclude that that the activity would likely be noninfringing. Finally, as set forth in the introduction to this submission, an exemption is not warranted because OmniQ cannot show any harm. Contrary to the proposition of adverse effect, the prohibition against circumvention has in fact facilitated the creation of a robust market for high quality digital content. Consequently, DVD CCA and AACS LA request that the exemption for the proposed class be denied.

DOCUMENTARY EVIDENCE

Commenters are encouraged to submit documentary evidence to support their arguments or illustrate pertinent points concerning the proposed exemption. Any such documentary evidence should be attached to this form and uploaded as one document through [regulations.gov](https://www.regulations.gov).