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UNITED STATES COPYRIGHT OFFICE



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

ITEM A. COMMENTER INFORMATION

As stated in the Initial Comment, at <https://www.regulations.gov/document?D=COLC-2017-0007-0078>, OmniQ is a joint venture for the commercial development of a method for non-reproductive substitution of the material object in which a work is fixed. The method is disclosed in a patent application for *Digitally Transferring Content Across Media Without Reproduction*, Patent Application # WO 2016/168832; US 2016028135 (annexed hereto as Exhibit 1, hereafter the “OmniQ Invention”). Although necessarily a for-profit endeavor to attract the needed investment, OmniQ currently plans to incorporate as a public benefit corporation with the aim of restoring the public benefit provided from secondary markets for lawfully made copies of copyrighted works that, although still supported by the first sale doctrine and Sections 109 and 202 of the Copyright Act, is rapidly being lost on account of modern technological advances that allow copyright holders to effectively avoid business models that allow secondary markets to flourish. By use of the OmniQ Invention, OmniQ seeks to restore the public benefit that Sections 109 and 202 used to guarantee. To be clear, although the OmniQ Invention discloses the specific method OmniQ intends to use to space-shift motion pictures and other audiovisual works (as well as literary and pictorial works) from one material object to another without copying, the exemption sought need not be limited to the precise method disclosed in the OmniQ Invention. Rather, it should be permitted for any space-shifting process that does not reproduce the work into another copy. Also, although OmniQ also hopes to make the technology available to libraries, particularly public and academic libraries, as a means of regaining the freedom to “lend” copies without requiring the consent of the copyright holder, and a library use case might include non-reproductive space-shifting of literary works fixed with ink on paper, the proposed exemption is limited to Class 3, given that circumvention is unnecessary for space-shifting copies of literary works printed on paper, as they do not come with TPM.

The OmniQ invention seeks to, among other things, maintain the viability of, and the public benefit afforded by, secondary markets for the exchange of lawfully made copies of copyrighted works. As technological advances often render copies in certain formats obsolete when the technology needed to access them is going into disuse (for example, a DVD is useless without a DVD player), and as digital dissemination and storage technologies increasingly result in the fixation of lawful copies on material objects that are too cumbersome to redistribute and may share space with thousands or even millions of fixations of other works (as in “downloading”), a new method is needed to preserve important avenues through which those unable to afford new copies in the primary market may continue to obtain access to lower cost second-hand copies notwithstanding the current trend toward digital dissemination that is causing a reduction in the

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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.

availability of discrete fixations on individually transferable single-work copies.¹

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ITEM B. PROPOSED CLASS ADDRESSED

Proposed Class 3: Audiovisual Works—Space-shifting. Specifically, *non-reproductive* space-shifting, which is to say, moving the work from one material object to another without reproducing the work into a copy. The very substantial difference between space-shifting as proposed by OmniQ and as proposed by others is explained in OminQ’s [Initial Comments](#).

ITEM C. OVERVIEW

The MPAA Opposition² ([Joint Creators II Opposition](#)) to OmniQ’s request for an exemption for non-reproductive space-shifting opens with the factually unsupportable assertion that OmniQ’s request should be denied because the Register has “repeatedly declined to recommend a space-shifting exemption” because she “has consistently found insufficient legal authority to support the claim that these activities are likely to constitute fair uses under current law.”³ The DVD-CCA and ACCS LA Opposition, at 6, also plucks the Register’s words concerning the “space-shifting” under consideration in the 2015 Triennial and seeks to drape them over anything that might fall under the “space-shifting” moniker even if fundamentally different. There is a radical difference between the “*reproductive* space-shifting” under consideration in 2015 (and the De Petris petition here), which rely on making reproductions that arguably constitute fair use, and the OmniQ Petition concerning “*non-reproductive* space-shifting,” in which the copyright holder’s Section 106(1) right is not touched. It is akin to asking that functioning parachutes be rejected because, in a prior proceeding concerning only non-functioning parachutes, “parachutes were rejected.”

¹ Lawfully made copies fixed in hard drives, servers and mobile phones are, of course, redistributable under Section 109. The problem is that to distribute the fixation of one work requires the distribution of the entire library of works fixed on the hard drive, server or mobile phone.

² Several “Joint Creators and Copyright Owners” oppositions have been filed in this proceeding. In Class 3, the Entertainment Software Association, the Recording Industry Association of America, and the Association of American Publishers join the Motion Picture Association of America. But given that Class 3 concerns only audiovisual works, we refer to it as the MPAA Opposition for brevity and clarity.

³ The Overview section of the Opposition, at 3, quotes the Register’s own words in the 2015 Triennial Rulemaking).

Until now, there has never been a request for a 1201 exemption for *non-reproductive* space-shifting.⁴ While it is true that the Register was not persuaded by OmniQ’s suggestion that the 2015 Class 8 request be partially salvaged through a narrowing to non-reproductive conduct, this is the first time that any petitioner has requested an exemption solely for non-reproductive space-shifting.

It is unfortunate that two radically different “space-shifting” activities are lumped into one class, as it may make it more difficult to analyze each on its own merits. The De Petris petition concedes that the work is reproduced into a copy, thereby requiring an analysis of whether the otherwise clear infringement of the reproduction right is, nevertheless, non-infringing on account of Section 107. The OmniQ petition, in contrast, is limited to use cases where there is no reproduction of the work at all. The Section 107 fair use analysis would of course be more favorable to the use, given that the Section 106 rights of the copyright holder (as limited by Sections 107-122) are not diminished, yet if the reproduction right is not implicated to begin with, the fair use analysis is more of a theoretical exercise.

Moreover, given that the MPAA Opposition itself suggests that the focus should be on non-reproductive space-shifting (that is, the OmniQ Petition) because the De Petris declined to file comments in support of it, it is all the more reason to maintain that sharp distinction.

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

OmniQ agrees with the MPAA Opposition’s observation that the Class 3 petitions are limited to the Content Scramble System (CSS) applicable to DVDs and the Advanced Access Content System (AACS) applicable to Blu-ray discs. We see no policy or legal reason to exclude AACS2, used in conjunction with Ultra HD discs, but concede that AACS2 is not part of OmniQ’s exemption petition.

We note that the MPAA Opposition does not challenge OmniQ’s statement of OmniQ’s method, nor challenge OmniQ’s assertion, Initial Comments at 17, that OmniQ’s method is so superior to CSS and AACS as to render them of no copyright-protection value to the copyright holder after the space-shift is complete. OmniQ’s method is infinitely harder to circumvent than either CSS or AACS. But while that feature may be central to the OmniQ patent-pending method of non-reproductive space-shifting, it is not central to the Petition.

⁴ In 2015, OmniQ filed a Reply Comment on Proposed Class 8: Audiovisual works – space-shifting and format-shifting. OmniQ pointed out the problem (where reproduction was involved, leading to the multiplication of copies), and suggested that the Register could recommend an exemption for this class that was limited to use cases where no reproduction takes place. But OmniQ was not an initial commenter, nor did it participate in the second round. Rather, it simply attempted to show a way to not deny the entire space-shifting exemption and, instead, salvage space-shifting that did not involve reproduction. Moreover, the OmniQ suggestion did not rest exclusively on any fair use analysis (as the proponents’ initial comments did), because there is no reason to apply Section 107 to activity that does not implicate Section 106 rights. *See* https://www.copyright.gov/1201/2015/reply-comments-050115/class%208/ReplyComments_LongForm_OmniQ_Class08.pdf.

The reality is that CSS and AACS no longer have a plausible nexus with any Section 106 rights. The public has countless choices of readily-available tools for ignoring CSS and AACS, copying the works to a hard drive, and watching the movie without a CSS or AACS licensed device. The point here is not to argue that an early case concluded that CSS “effectively” (for purposes of the DMCA) controls access even if it does so ineffectively (for purposes of casual copying) is no longer good precedent given the dramatic increase in simple ripping tools since then, but rather, to note that what may have started out with a starry-eyed expectation of serving as a barrier against infringing reproductions is now being used for an entirely different purpose - to dictate who can perform the work privately, from where (regional coding) and using which devices. But the non-public performance of a work has never been among the exclusive rights of the author. While it may have been the case that, initially, these technologies did serve a copyright-related purpose, they certainly no longer provide any protection against either casual or commercial reproduction of the work from the disc, but they do still protect the market value of “selling access.”

The MPAA Opposition focuses on the many means of “access” the public may have (at a price). But in doing so, it makes evident that the concern is also to frustrate access to the work from the DVD that has already been sold. If someone no longer has a DVD drive, which is the trend, it increases demand for access services. That is, the studios’ opposition to non-reproductive space-shifting is an attempt to make it harder for legacy copies which, by law, may be freely circulated without their consent, to compete with the preferred “access” business model. But the Copyright Act was never intended as a shield for business models.

The DVD-CCA and AACS-LA Opposition concedes, at 5, that, “the [OmniQ] technology as mentioned above can allegedly preserve the entire disc image, which would include CSS and AACS,” but adds, “OmniQ seeks the exemption so that it can circumvent CSS and AACS.”⁵ It adds, in footnote 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 [sic] 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.

The DVD-CCA and AACS-LA Opposition concedes that OmniQ’s *non-reproductive* space-shifting may be able to shift the entire contents of the disc without “circumventing” anything. It insists, nevertheless, that one still needs their “licensed and compliant playback environment” to play back the space-shifted work. It is sort of like saying the only licensed way to eat their ice cream served in their licensed bowl is with their licensed spoon. OmniQ is able to move the ice

⁵ The Opposition also misrepresents OmniQ’s Petition by saying that the work is shifted “to the CPU.” Nothing in OmniQ’s submission supports that. While the CPU may, naturally, be used to conduct the shift, the destination is another storage medium. It would be more accurate to say “from the DVD through the CPU to a hard drive.”

cream to an unlicensed bowl from which it can be eaten using an unlicensed spoon. Their response is that, even if someone can move the ice cream to the unlicensed bowl without a 1201 exemption, those are unlicensed spoons, and therefore circumvent another part of the broader TPM. But they are not protecting the ice cream against unlawful eating. It is lawfully made ice cream, distributed by the ice cream maker, who has no exclusive right to prevent it from being eaten once distributed. They seek to control ice cream spoons. Their TPM allows only their spoons to work with their bowls, and they now struggle to explain why, once the ice cream is no longer in their bowl, anyone would still have to use their licensed spoon to eat it. In essence, it is no longer about protecting copyrights from infringement, but about protecting use controls that expand the copyright holders' power over non-infringing uses.

What is abundantly clear is that although the CSS and AACS systems may have been rolled out as an integral part of the DVD and Blu-ray ecosystems initially, the individual pieces cannot be converted into the tail wagging the dog, particularly not when the original purpose is no longer served. Section 1201 was never intended to give authors of copyrighted works the power to control the market for playback devices. The very fact that DVD CCA and AACS LA are active in this proceeding is proof enough that they are not operating as third party vendors of TPM technology, but as partners with the studios. As soon as that partnership begins to restrict lawful non-infringing uses that compete with the studios' preferred business models, serious Sherman Act concerns arise.

These TPMs (1) limit playback based on encryption, and require a player with a secret key to decrypt for playback; (2) require read protection based on the drive: access to significant disc data is only granted if the player authenticates successfully; and (3) regional restriction is based on the disc and the drive: the drive can deny access if the disc doesn't belong to the drive's region.⁶ But if the TPM has been decrypted, it becomes irrelevant, for DMCA purposes, whether the intent was that, once decrypted, a licensed player would authenticate. "Because § 1201(a)(1) is targeted at circumvention, it does not apply to the use of copyrighted works after the technological measure has been circumvented. *See Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 443 (2d Cir. 2001). ('[T]he DMCA targets the circumvention of digital walls guarding copyrighted material (and trafficking in circumvention tools), but does not concern itself with the use of those materials after circumvention has occurred.')." *MGE UPS Systems, Inc. v. GE Consumer and Indus.*, 622 F. 3d 361, 366 (5th Cir. 2010). Indeed, Senator Hatch made clear in his introductory remarks to the WIPO Copyright and Performances and Phonograms Treaty Implementation Act of 1997, that the legislation was intended to be "minimalist," and in no way alter the existing balance between copyright owners and users. Senator Hatch noted,

"This 'minimalist' bill is ... a compromise; it does not represent any group's 'wish list' ... [and] addresses only those issues required by the treaties without altering the substantive protections and exceptions provided under U.S. copyright

⁶ Continued enforcement of regional coding is legally suspect in the United States, after *Kirtsaeng*. The Supreme Court's holding is that Section 109 applies to non-infringing copies no matter where they are made – or what region they were made for. Any copyright holder who uses regional coding to frustrate the entitlement Congress vested in the owner of the non-infringing copy would be inviting a claim of copyright misuse, if not Sherman Act liability.

law or injecting extraneous issues into the treaty process. The Administration has tried to preserve the delicate balance that U.S. law already strikes between copyright owners and users, since the WIPO treaties were not intended to upset that balance.”

Remarks of Senator Hatch, 105th Congress, 1st Session, on the introduction of S. 1121, Congressional Record, July 31, 1997, at S8584. Significantly, the WIPO Treaties do not require any prohibition at all against circumvention of a measure that controls access that is permitted by law. Nothing in the WIPO Treaties suggests or implies that copyright holders should be able to use technological protection measures to frustrate uses authorized by the Copyright Act. Section 1201(c)(1) and (4) are best interpreted as Congress’ response to WIPO’s anti-circumvention requirement being limited to acts “which are not authorized by the authors concerned or permitted by law” language, WIPO Copyright Treaty Article 11 (emphasis added); *and see* WIPO Performances And Phonograms Treaty, Article 18.

Moreover, no one is obligated to design non-reproductive space-shifting in a manner compliant with CSS or AACSS. Section 1201(c)(3) provides, “Nothing in this section shall require that the design of, or design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure, so long as such part or component, or the product in which such part or component is integrated, does not otherwise fall within the prohibitions of subsection (a)(2) or (b)(1).” Non-reproductive space-shifting in the manner described in the patent application appended to the OmniQ Comment is designed to shift any work from a DVD to a hard drive without reproduction, and is agnostic to whether the work is copyrighted, or whether the bits on the disc include some form of TPM.

ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGING USES

The Oppositions Rely On Baseless Premises

The Oppositions rely on three arguments – two of which are *non-sequiturs* to the question of whether the technological emasculation of the first sale doctrine is negatively impacting the public’s centuries-old right to alienate copies without copyright holder interference, and to the detriment of millions who depend on secondary markets to supply the demand of those unwilling or unable to pay the price of “new.”

1. Failure to Rebut A Strawman

First, both Oppositions claim that OmniQ fails to rebut the Register’s view on space-shifting. They both ignore the fact that this is the first time that OmniQ’s proposed exemption has been requested, and that it makes no logical sense to apply any “fair use” conclusions reached with respect to the *reproductive* space-shifting at issue in the previous triennials to the current OmniQ petition concerning *non-reproductive* space-shifting. It is the equivalent saying that if the Register previously concluded that “the fowl can’t swim” when referring to chickens, then it

must also be true that “the fowl can’t swim” when referring to ducks – unless OmniQ can rebut the Register’s view that fowl can’t swim.⁷

2. Demand To Test Technology

Next, the DVD-CSS and AACCS-LA Opposition, at 6, argues that the exemption cannot be granted for “unobservable technology,” and asks that “technical experts from DVD CCA, AACCS LA and other parties” must first be given the ability “to evaluate actual technology and actual implementation of that technology,” and makes the testing of an operating model a prerequisite to meeting the burden of showing that the non-reproductive activity is likely non-infringing of the reproduction right. The MPAA Opposition, similarly, rails against the lack of a mature technology, arguing, “The lack of a working prototype makes it unlikely that adverse effects will be felt on any noninfringing use in the next three years.” MPAA Opposition at 13. Put another way, the MPAA Opposition is arguing that the Librarian of Congress should not grant an exemption that would facilitate a quicker solution to the declining public *de facto* value derived from *de jure* alienability of lawfully made copies because – particularly if the exemption is not granted – the MPAA believes it is unlikely that the solution will come to market within the next three years. It is the logic that would reject creating a public right of way for a new highway until there is sufficient gridlock to show that it should have been done sooner. The two Oppositions offers no legal, regulatory or precedential basis for their demand to pre-test the technology. The reality is that there are several reasons why this prototype-testing basis for opposition is specious:

First, of the seven *current* exemptions relating to motion pictures and other audiovisual works, § 201.40(b)(1), none specify a particular approved technology. The Register rightly focused on the “persons who are users of a copyrighted work” and who “are likely to be in the succeeding 3-year period, adversely affected by virtue of such prohibition in their ability to make noninfringing uses.” 17 U.S.C. § 1201(a)(1)(B). There is no statutory requirement that any particular method for carrying out the exemption be tested. The § 1201(a)(1)(C) criteria have nothing whatsoever to do with the technological method to be used.

The Rule setting forth the seven current exemptions relating to motion pictures, rule (§ 201.40(1)) uses the following phrase eight times: “Where the circumvention is undertaken using screen-capture technology that appears to be offered to the public as enabling the reproduction of motion pictures after content has been lawfully acquired and decrypted.” The Librarian of Congress was satisfied that if the user employed technology that only “appears to be offered” to meet the lawful acquisition and decryption conditions, the exemption would apply. It is simply a legal framework for authorized present *and future* technologies. No provider of screen capture technology was required to present a working demo to show that it appears to enable

⁷ We acknowledge that OmniQ did put forward its solution as a suggested way of not rejecting completely the request to exempt reproduction of back-up and convenience copies, where the fair use case suffered from the fact that copies would be reproduced – multiplied – and necessarily impact the right of the copyright owner to extract a particular “per copy” price. But OmniQ’s was not a Petitioner or even an initial Commenter, but made its suggestion in a Reply; nor did OmniQ participate in any of the hearings.

reproduction after the content has been lawfully acquired and decrypted. A search for “screen capture software” on Amazon reveals over 1,000 choices, none of which were subjected to any demonstration or testing during the Section 1201 process. In all likelihood, none of the over 1,000 computer programs for carrying out this exemption were designed to actually determine whether the “content has been lawfully acquired and decrypted” and to reject capture of content unlawfully acquired, before allowing the screen capture to function.⁸

In short, all prior exemptions describe the user’s conduct, and do not contain any requirement that the specific technological solution for carrying out the exempted conduct be vetted or tested before the exemption can apply.

Second, anyone can cheat. Assuming, *arguendo*, that OmniQ presented a fully functional non-reproductive space-shifting model, there is no guarantee that someone claiming to practice the exemption is not using an un-tested technology – or even cheating by secretly doing something else, like fixing the work into a second material object before un-fixing the work from the original.⁹ Like *all* of the exemptions granted to date, the exemption is limited to a specified legal framework – not a specific technology. None of the exemptions listed in 37 C.F.R. § 201.40(b) suggest or imply that the method must have been tested out first. Did the kindergarten teacher use “screen-capture technology that appears to be offered to the public as enabling the reproduction of motion pictures after content has been lawfully acquired and decrypted,” as required by § 201.40(b)(1)(vii)? If so, that is enough. The teacher is not limited to using pre-tested screen-capture technologies.

At no time did the Register give Opponents the opportunity to demand a prototype technology to test and make sure that, for example, the screen-capture technology wasn’t being offered to the public without regard to whether “the content has been lawfully acquired.” The Librarian of Congress was not blessing specific tested technology, but trusting users to work within the approved exemption. Quite simply, using screen-capture technology with stolen DVDs or infringing copies is not covered by the exemption, but using the identical technology with lawfully acquired (and decrypted) DVDs is.

Like all petitions before it, OmniQ’s Petition is not seeking a blessing of its own patent-pending technology, but rather, permission to facilitate the non-reproductive shift of the work from one substrate to another using any technology, now known or later developed, that would meet the non-reproduction requirement. If approved, anyone is free to come up with competing technology to accomplish non-reproductive space-shifting. Conversely, anyone jiggering OmniQ’s technology to use it in a reproductive way would not be protected by the proposed

⁸ When examining the top three after sorting by average customer review, none of the product descriptions purported to be concerned with the “lawfully acquired and decrypted” condition. Movavi Video Suite 17 Video Editing Software Personal (“Record anything from your computer screen”), NCH Software Video Essentials (“Capture and save video files from a webcam or from your screen”) and Movavi Video Suite 15 Video Editing Software Personal (“rip unprotected DVDs,” meaning that it will work with infringing copies).

⁹ This was the most serious flaw in ReDigi’s “make a copy first and then delete all copies but one” methodology, in which that reproduction first step was explained in the ReDigi patent.

exemption. And, if OmniQ or its licensees are never able to perfect the non-reproductive feature, the exemption simply would not apply to anyone attempting to practice OmniQ's invention, but might still be available to those using a technology that meets the non-reproduction requirement using a different method.

Third, given the lack of any statutory basis for testing technologies in the triennial process, the fact that OmniQ chose to disclose the technology it intends to use for non-reproductive space-shifting is no basis for increasing the proponent's burden. Congress was concerned with identifying what conduct should be exempted, and not with regulating – much less testing or pre-approving – specific technology for carrying out the exempted activity. When OmniQ appended the patent application, it was not for the purpose of seeking approval of the patent-pending invention, but to illustrate that it is possible to envision a means of space-shifting which, unlike any other space-shifting or format-shifting proposal before it, does not involve the reproduction of the work into additional copies.

The DVD-CCA and AACS-LA Opposition admits, at 2, “OmniQ may have an idea, and even an exciting idea,” but then suggests the cart is before the horse unless and until a working model can be subjected to demonstration and testing. Such a backward-looking approach hardly advances the progress of science and the useful arts. OmniQ's idea, if implemented, would benefit to millions of people sidelined by the expensive “metered access” economy envisioned by MPAA's members, and who are finding it increasingly difficult to benefit from the Section 109-enabled economy because of MPAA members shifting their business models away from the sale of DVD and Blu-ray copies that can be infinitely redistributed, without their authorization, in secondary markets.¹⁰

Fourth, the requested exemption is not dependent upon the specific technology used. Opponents chide OmniQ by saying that the exemption “apparently would serve only ‘those who practice the OmniQ invention,’” But it is irrelevant whether a particular entity might be advantaged in providing the technology to carry out the exempted conduct. Moreover, the reality is that the patent could be denied, in which case OmniQ's only advantage is as a first mover. Second, the existence of the first patented mousetrap never stopped others from trying to build a better

¹⁰ The copyright owners in the movie industry seem to be taking a page from the textbook publisher playbook. For years, textbook publishers had been artificially increasing the price of college textbooks by suppressing price competition from domestic sales of copies they had sold more cheaply abroad. In 2013, two of the defendants that fought back (unlike the dozens put out of business) took their case to the U.S. Supreme Court, which ruled that Section 109 entitled the owner of non-infringing copies to redistribute them in the U.S. regardless of whether they had made them off-shore in an attempt to escape Section 109's limitation on their Section 106(3) rights. *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519 (2013); *Liu v. Pearson Education, Inc.*, No. 11-708, 133 S.Ct. 1630 (2013); *Kumar v. Pearson Education, Inc.*, No. 11-1343, 133 S.Ct. 1630 (2013). Textbook publishers have responded, not by abandoning their price discrimination schemes, but by lacing their textbooks with licenses to “access” supplementary material that can be accessed free of charge only by the first owners of the textbook. That way, they artificially diminish the value of secondary copies lawfully obtained through secondary markets such as resale, gift or lending channels.

mousetrap. OmniQ has no power at all to prevent someone else from coming up with a different way – perhaps even a better way – to move works fixed in one material object to another one, without reproducing the work into copies.

Put another way, the requested exemption is not “to use OmniQ’s patented technology,” as the Opposition suggests, but “to engage in non-reproductive space-shifting” by any means now known or later developed that does not infringe the exclusive right of reproduction.

Fifth, OmniQ has no obligation to come up with other methods, not covered by its invention, that competitors could use without infringing its patent.

Sixth, anyone can fail. None of the exemptions that were granted in 2015 guarantee success. If the Librarian of Congress grants the exemption for non-reproductive space-shifting, and OmniQ fails to build a system that succeeds in shifting the work from one strata to another without reproduction, then OmniQ obviously cannot take advantage of the exemption.

Finally, it is ludicrous to require OmniQ to build a prototype prior to granting the exemption because the specific way in which OmniQ builds it will depend on whether the exemption is granted. If the exemption is not granted, OmniQ would have to figure out how to practice the invention without circumventing anything, perhaps with a more inefficient process that will lessen the public benefit. If the exemption is granted, OmniQ can bring the invention to market more quickly by focusing on the safeguards necessary to guarantee non-reproduction and security.

3. The “Exclusive Right to Grant Access” Dream

The DVD-CCA and AACSLA Opposition does not challenge the public’s need for the exemption nor the harm to the public that the exemption seeks to remedy. It simply dismisses the entire issue by declaring – without any support – that “Consumers enjoy unprecedented ability to enjoy content anytime, anyplace, anywhere,” Opposition at C, p.2, and concluding that therefore OmniQ cannot show harm. Its Opposition shows nothing at all, one way or another.

The MPAA Opposition invests substantially more energy in attempting to document the many means of “access” available to the public, arguing that those access points more than offset any diminution in the Section 109 privilege with respect to lawfully made copies. But it’s new line of reasoning is built on “faux copyright” – a movie studio’s dream-works; a fantasia of what it wishes were the law; a universal access under the studios’ exclusive control; a marvel of wishful reasoning; sly-as-a-fox twisting of Section 1201’s protection of access technology into a new Section 106 substantive exclusive right of the author; a paramount theft of non-exclusive rights; a veritable cartoon network of false equivalence.

This shift from ownership to access has truly only materially benefitted the large incumbents (the 1%) of the music industry, and has materially harmed virtually every other member of the music ecosystem...none more so than the music creators themselves.

So concludes [George Howard, *Canary In A Coal Mine: How Streaming Music Presages The End Of Ownership ... Of Everything*, Forbes, March 8, 2018.](#) We are now seeing an aggressive effort

on the part of computer program publishers, textbook publishers, and movie studios, to eliminate that pesky “ownership of the copy” that keeps giving the owners of copies the right to redistribute them to others without further control by the copyright owner, and that allows entrepreneurial arbitrage to undermine the effectiveness of publisher efforts to price-discriminate among purchasers or geographic regions. The “access economy” promises to eviscerate the benefit to the public of unrestricted redistribution of lawfully made copies. The poor don’t count. Heirs don’t count. Markets that don’t interest the copyright holder don’t count. The philosophy is, “Better to sell a few copies to the well off at a higher price than to sell them at a more affordable price that fails to capture what the wealthy are willing to pay.” And, if Disney wants to place *The Little Mermaid* on the “[Disney Vault](#),” it gets locked down more completely – gone are the days when the local video store would say, “What moratorium? I have enough copies to keep renting until it gets re-released seven years from now!” That’s how the Copyright Act was intended to work – the copyright holder, in exchange for exclusive rights, was to have “no control whatever” over lawfully made copies lawfully owned by others.

In response to OmniQ’s evidence that the market for redistributable copies is shrinking as it is being replaced with a permissions-based system in which the studios can effectively increase revenue from licensed public performances (streaming) and reproductions (downloads), which permissions can be altered month-to-month as needed to prevent price competition and keep revenues high, the MPAA Opposition headlines, “The Marketplace Is Overflowing With Options For Consumers Seeking Access To Digital Copies And Transmissions Of Motion Pictures.” MPAA Opposition at 6. It says nothing about consumers seeking ownership or possession of copies in lieu of “access.” It goes on to catalog the ever-increasing “access” its members sell. Each example betrays a disdain for the Copyright Act’s limitations on their rights.

In its effort to oppose the non-reproductive space-shifting exemption, the MPAA Opposition betrays what is, at bottom, simply an effort to suppress secondary markets its movie studio members do not control, lest those secondary markets generate downward price pressure on their preferred price points. The MPAA Opposition contains very little about copyrights, but a lot about prices.

In its worldview, the MPAA rattles off many different ways in which people can pay for “access” to their works – despite the fact that there is no “exclusive right of access” in the Copyright Act. There are eleven dollar signs (\$) explaining the way people can obtain access.

One access method is to try to enhance the value of the purchased copy by licensing additional copies to the purchaser. Another is to offer public performances to those who own copies but are unable to privately perform the work from those copies. There is no problem with offering such features, *per se*, but they are not substitute for the loss of the public’s access to these works due to technological advances.

People who already own a Blu-ray or Ultra HD disc can pay \$2 to “a digital copy” of the work on the disc they own, or \$5 if their disc is not high definition and they want the licensed copy to be in high definition. MPAA Opposition at 7. But they can’t exercise their Section 109 rights with respect to those new lawfully made copies without parting with their entire storage medium.

For “often” \$5.99 (or \$2.99 for older titles), customers of “online retailers” may watch a movie, either by public performance (streaming) or from their own lawfully made (downloaded) copy, MPA A Opposition at 9, except that it goes by the “temporary rental” misnomer. Once again, Section 109 rights cannot be exercised at all, so the public cannot benefit from downstream redistribution of the lawfully made downloads. There is no Section 106 right to delete a lawfully made copy, but this jerrybuilt business model takes that right anyway by jury-rigging TPMs to pull it off. The *de jure* right “to do or to authorize the reproduction of the work into copies” becomes the *de facto* right to also destroy lawfully made copies they do not own, thereby infringing upon the public’s non-exclusive right to privately perform the work as often as wished for however long is desired. Here is a rundown on their access points:

(a) Discs sold in “bonus packs” with a “redeem code” to obtain a licensed reproduction of the work via download. Opposition at 6. But although everyone who takes advantage of the redeem code becomes the owner of a lawfully made copy, and entitled to redistribute that copy without the studio’s consent, there is no practical way to do so. Instead of being redistributed for the benefit of the public – particularly members of the public dependent upon secondary markets – there is one primary market: Buy the new disc, and you will be licensed the right to make a hard drive copy over which you cannot exercise your Section 109 privilege.

(b) Disc-To-Digital Through Vudu. If you own the disc, you may, for a fee, get a second lawfully made copy fixed on your hard drive; but again, you can’t enjoy your Section 109 privilege to redistribute it. Just destroy it when you need more space on your hard drive.

(c) Locker services to expand access (MPAA Opposition at 8):

(i) UltraViolet lets you “access” the work from the cloud, once the consumer has obtained a lawfully made copy via downloading from licensed online retailers. Sure enough, the consumer’s ability to redistribute that lawfully made copy in the stream of commerce exists only in legal theory – not practical reality – as the ability to do so is hampered by the impracticality of having to alienate the copy of every other work on the hard drive.

(ii) Movies Anywhere operates in similar fashion. The Opposition claims, “Movies Anywhere had allowed consumers to stream 3,000,000 hours of content since the service launched. Movies Anywhere had also been used to store close to 80 million movies in customer lockers.” But those numbers compare apples to oranges – saying that the right to alienate ownership of a copy no longer matters because theatrical attendance and streaming subscriptions are up ignores that each Section 106 right is discrete, and the limitations on each are not fungible. There is no option to fix the authorized copy in a DVD for redistribution pursuant to Section 109, because the only choice is to fix the work in a lawfully made copy in someone else’s material object, aptly referred to as a “locker” that locks out the operation of Section 109. The Opposition thinks that is a good deal, but if the scales of a balanced Copyright Act might benefit from jiggering, it is up to Congress, not the studios, to make the public interest decision.

(d) Digital rental – that’s the studio term for “you can own a lawfully made copy that we have no exclusive right to destroy, but if you want to own it, you have to give us the right and the ability to destroy it, lest you make non-infringing private performances of it for years to come.” And the

example shows why this is all about price protection; not copyright. The \$5.99 faux rental “deal” is nearly 400 percent higher than a true rental from a kiosk such as Redbox.

Moreover, the Copyright Office has previously declined to go down that faux rental rabbit hole. When the Recording Industry Association of America (RIAA) attempted to shoehorn a destructible (by the copyright owner) licensed reproduction owned by the consumer (a “limited download”) into a “rental” framework, it was rebuffed.

Rental, Lease or Lending. In its initial petition, RIAA sought clarification on the question of whether a limited download should be considered to be in the nature of a rental, lease or lending. It has also asked the Office, in the event it determines a limited download to be in the nature of a rental, to clarify the interaction of section 109(b)(1)(A) of the Copyright Act, regarding the “first sale doctrine,” with Section 115(c)(4).

The National Association of Recording Merchandisers and Video Software Dealers Association (“NARM/ VSDA”) opposed the idea that a limited download could be treated as a rental, lease or lending. They maintained that once a consumer receives a copy of a work, that work becomes the property of the consumer and the consumer cannot be made to pay for the use or possession of one’s own property. Moreover, they asserted that a limited download cannot qualify as a rental because the recipient does not return anything at the end of the “rental period.” They viewed the transaction as substantially the same as the purchase of a CD in a store, even though the limited download transaction would by its very nature limit the use of the file for a period of time or a specified number of plays. The opposition stemmed from a concern that copyright owners would ultimately choose to limit a consumer’s choice to limited downloads only, thereby covertly asserting control over private performances by limiting a consumer’s right to control one’s own purchases.

In the course of the roundtable discussion, the purpose of which was to refresh the record, the discussion turned to the question of whether a limited download may qualify as a rental, lease or lending. At that time, no participant advanced an argument that Download Services constituted a rental, lease or lending. This prompted the Register to specifically observe that “nobody today is supporting that it’s [a limited download is] a rental, lease, or lending.” Marybeth Peters, Register of Copyrights, Section 115 Roundtable Transcript, at 26. No participants at the roundtable, which included representatives from the recording industries and NARM, disputed this conclusion. Thus, the Office sees no reason to accept the invitation to consider limited downloads to be acts of rental, lease or lending under Section 115(c)(4) because, as is explained above, limited downloads easily fall into the definition of DPDs and within the scope of the compulsory license for DPDs. Therefore, the Office does not propose to issue a rule that considers limited downloads to be in the nature of a rental, lease or lending.

Copyright Office, Library of Congress Notice of Proposed Rulemaking, *Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries*, Docket No.

RM 2000-7, at 73, July 16, 2008. Here, too, the Copyright Office and Librarian of Congress should reject the studios' effort to put "rental" lipstick on a "we get to destroy your lawfully made copies" pig.

Having said that, it warrants noting that even though the Copyright Act does not give the author the right to cause lawfully-made copies owned by others to disappear, and the Sherman Act certainly does not allow the author to convert a limited exclusive right into a broader *de facto* right through use of technology, nothing prevents a third party from doing so. Just as a bookstore is free to sell books at a cheaper price on condition that they be destroyed after a month, but a copyright holder cannot impose that condition because of Section 109(a), an entity such as OmniQ would be free to cause a customer's fixation of the work to become un-fixed if there was an agreement to keep it for a shorter period of time. While it might feel like a rental, the reality is simply the non-reproductive space-shift of the work from one article to another, with the potential of a shift back at a later date, with no new copies available for use beyond the one first sold or authorized by the copyright owner.

The MPAA Opposition also mentions, under the "rental" moniker, certain "add-on subscription access" to other works. These are in reality licensed public performances. There is nothing "rental" about them, any more than a one-month subscription to MoviePass is a rental. Again, though, while we have no reason to object to creative ways of offering "access" to public performances online any more than we would object to offering access to a public performance in a theater, nor do we object to a theater offering access to the entire family if one person purchases a ticket, we do object to the public being forced to accept these "access points" as a viable substitute for the full enjoyment of the Copyright Act's right of the owners of a lawfully made copies to alienate possession of their copies. Any shift from alienability of ownership of lawfully made copies in the direction of non-alienable access to public (or private) performances comes at the expense of the secondary market ecosystem that millions depend on.

(e) Online Streaming Services And Over-The-Top Services (MPAA Opposition at 9-10).

The Opposition points to several streaming services as viable "access" alternatives to dissemination of their works to the masses. They are not. As noted in the Initial Comments, even if you add all of their offerings together, they are dwarfed by what a well-appointed Section 109-protected local video store might have offered. While it may well be true that "Consumers continue to embrace streaming services," these are all (a) limited to what the copyright owner granted permission to stream, (b) often involve "exclusives" such that several subscriptions would be needed to satisfy requests for particular movies (and if the service doesn't have the license to stream it, it can't just order a copy for you, like you local store might have), and (c) can be added or deleted – even mid-season (from the viewer's perspective) – at the whim of the copyright owner.

And it comes at a heavy price to the public! For \$7.99 per month, "basic access" to Hulu; for another \$7.99, "basic Netflix access," and for "free" – so long as one pays the \$99/year Prime membership (equivalent to \$8.25 per month) one can add Amazon Prime Video. MPAA Opposition at 9-10. In short, \$24.23 per month for "access" to whichever movies these three services were able to negotiate temporary licenses for, with the possibility of paying even more for "add-on" streaming of other works. And to get HBO, adding the low, low price of \$14.99 per

month can bring the monthly basic outlay for a limited catalog to nearly \$40 per month, *id.* at 11, and to get some Warner classic included, it's another \$7.99 per month, *id.* at 12. For those with money to spare, another \$4.99 added to an Amazon account will net more classics, and for just \$6.99 per month more, a few more of the missing classics can be included. *Id.* In short, the MPAA Opposition touts a package of over \$50 per month for “access” to watch (but not lend, sell or give away copies of) a fraction of what the local VHS/DVD video store used to offer.

That is a horrible deal.

Section 106 of the Copyright Act lists very specific exclusive rights belonging to the copyright owner. None of those include an “exclusive right to grant access” to a work. But you would not know that by reading the MPAA Opposition, which speaks of access more than about exclusive rights. It sets the stage by quoting from the U.S. Copyright Office, Section 1201 of Title 17: A Report of the Register of Copyrights 45-46 (2017) (“1201 Study”), in a way that seems intended to give the impression that the Copyright Office believes that “the offering of access” to copyrighted works “has become a preferred method of delivering copyrighted content,” and that “law should continue to foster the development of such [access] models.” MPAA Opposition at 3. But returned to its original context, the quoted text lends no support to the notion that the Register of Copyrights thinks it is preferable for copyright owners to meter out access in lieu of exercising (or licensing the exercise of) their exclusive rights. Nor does the 1201 Study indicate that the Register believes that, in addition to the exclusive right to reproduce a work into copies and distribute those copies, there should be an additional right to control access to the lawfully made copies they authorized and/or distributed but do not own, so as to effectively control private performances.

Moreover, the “right of access” that the Register was referring to was more akin to a theater owner limiting access to only those who purchased tickets – sneaking into the theater without paying is not copyright infringement. Once the copyright holder licenses a service such as Netflix or Hulu to publicly perform a movie by streaming, the licensed public performance is authorized, and viewers have no obligation to seek “access rights” from the copyright holder.¹¹ Similarly, if the copyright holder gives iTunes the right to reproduce the work into downloaded copies, that's the end of it – the copyright holder has no right, under the Copyright Act, to control private performances of the copy lawfully made by fixing the work on a smart phone or computer hard drive.

Yet, the MPAA Opposition rallies around the non-existent access right, advocating the sale of access as a good thing in itself, even as MPAA's member studios reduce the number of lawfully made copies that can be redistributed – without their permission or additional compensation – to millions of second-hand buyers, renters or gift recipients.

In short, the MPAA Opposition claims that the industry that tried to kill off unlicensed video rentals that competed with its sales-only model, that engaged in economic warfare with discount

¹¹ The quest for “access rights” comes on the heels of a 20-year campaign of referring to copyrighted works of authorship as “content,” which makes it easier to construct an extra-copyright framework free of the Copyright Act's limitations.

renters such as RedBox to suppress lawful 99-cent rentals, that attempted a self-destructing DVD (the EZ-DVD) the sole purpose of eliminating the non-exclusive right to perform the work privately after 48 hours and rendering ineffective the entitlement to sell, lend or rent the DVD without the studio's permission, is now "[Betting on Movies Anywhere](#)" and does not want non-reproductive space-shifting to be used to retain the Copyright Act's constitutionally-required balance. Who needs to respect a balanced Copyright Act when you can use technology to tilt the scales?

MPAA Argues That the Register Trumps the Second Circuit? Wow!

Relying heavily on U.S. Copyright Office, DMCA Section 104 Report (Aug. 2001) ("Section 104 Report"), the MPAA Opposition, at 13-17, asks the Librarian of Congress to base her decision on what the Register of Copyrights said with respect to what constitutes a "copy" in 2001, before the Second Circuit and other federal courts disagreed with her in 2008. The MPAA Opposition makes no secret of its disdain for the Second Circuit's holding in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 129 (2d Cir. 2008), and criticizes OmniQ (at 16) for not "addressing" the Register's Section 104 Report. So, let's address it now.

The Register declared, "Unless a reproduction manifests itself so fleetingly that it cannot be copied, perceived or communicated, the making of that copy should fall within the scope of the copyright owner's exclusive rights." Section 104 Report at 111 (emphasis added). The Second Circuit does not disagree with that premise, but insists that this was only one element – the embodiment requirement. The second element is the duration requirement: "for more than transitory duration."¹² While the Section 1201 Report addressed duration, its answer fell short of the Second Circuit's subsequent requirement. The Section 1201 Report correctly noted, at 110, "The definition of 'fixed' leaves open the possibility, however, that certain RAM reproductions that exist for only a 'period of . . . transitory duration' are not copies." But the Section 1201 Report went on to allow the first element to swallow the second. Surmising that Congress intended the exclusive right to "extend to all reproductions from which value can be derived," *id.* at 111, the Register concluded that only in cases where "a reproduction manifests itself so fleetingly that it cannot be copied, perceived or communicated" would it not be an infringing reproduction.

The first problem with this construct is that, by defining "a period of more than transitory duration" with reference to whether the embodiment is "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated" conflates the two separate elements in a manner that causes the second to be written out of the Copyright Act. In the Register's 2001 view, if the first element is met, it proved that the second element was also met. The Second Circuit disagreed, and we have seen no evidence to suggest that the current Register is challenging the Second Circuit.

¹² Section 101 of the Copyright Act states, "A work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is [1] sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated [2] for a period of more than transitory duration."

The second problem is that it attempts to draw a line between “reproductions” that fall within the exclusive rights and those that do not, *id.* at 111. The statutory language, however, defines “fixed” by determining whether the “embodiment” is a reproduction at all. It is not a question of whether the “reproduction” existed long enough to be of some economic value, but whether, in terms of the Copyright Act, the “embodiment” met the two requirements of Section 101 so as to constitute a reproduction of the work in the first place.¹³

Still, the MPAA Opposition, at 16-17, tries to take the discredited “economic value” construct one step further, to argue that (even if the embodiment cannot be perceived, reproduced, or otherwise communicated for a period of more than transitory duration) “OmniQ’s temporary copies would clearly have economic significance, as they are the generative input for its commercial enterprise.” Astounding! That “generative input” formulation is conceivably boundless – but is completely foreign to the Copyright Act.

Even assuming that the volatile memory stage is a “generative input,” whatever that means, it remains erroneous to say that the volatile memory is a copy – even if we continue to give full credit to those early cases that dubiously concluded that all RAM embodiments are fixed,” and therefore are “copies.” The reason it is wrong in the case of the OmniQ method is that, unlike an ordinary “loading into RAM” operation in which a work is privately performed from RAM while the source copy remains, the OmniQ method instantly destroys – un-fixes the work – from the original material object. Put another way, even if the OmniQ method met the fixation requirement after the original has been un-fixed, there is still only one fixation in existence, and therefore, no *reproduction* of the work into an additional copy.

Of course, OmniQ’s method is to move the work to volatile memory while the original is being erased and immediately move the work from volatile memory to the new material object while erasing the work from volatile memory. Accordingly, there is no reproduction of the work even if the process is considered a “generative input.”¹⁴

Moreover, the MPAA Opposition’s insistence on following the 2001 Section 1201 Report over the Second Circuit’s 2008 *Cartoon Network* decision is at odds with the degree of deference given to the Copyright Office.

¹³ The MPAA Opposition, at 14, claims, “Courts have held that temporary copies are reproductions.” Such a declaration may make sense in casual conversation, but in the context of the Copyright Act, and Section 101 in particular, it is the logical equivalent of saying, “temporary copies are copies.” The Copyright Act defines “copies,” however, and the definition does not lend itself to a distinction between “temporary copy” and “permanent copy.” The question is whether a particular reproduction caused an embodiment of the work to be “fixed” in a material object in the manner described in Section 101.

¹⁴ To be clear, OmniQ does not believe the “generative input” construct merits any serious consideration in any copyright context, as practically any step, process or information – even typing in the title of a movie into a retailer’s database – might be considered a “generative input” to any subsequent use, regardless of legality.

Although an opinion expressed by the Copyright Office in such a report does not receive *Chevron* deference of the sort accorded to rulemaking by authorized agencies, we do recognize the Copyright Office's intimate familiarity with the copyright statute and would certainly give appropriate deference to its reasonably persuasive interpretations of the Copyright Act. *See Skidmore v Swift & Co.*, 323 U.S. 134, 140 (1944) (explaining that the weight of such an interpretation "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those facts which give it power to persuade, if lacking power to control"). In this instance, however, for the reasons explained above, we cannot accept its interpretation of § 512(c). *See* PATRY at § 17:102 (stating that courts should defer to the Copyright Office's interpretation of the statute only to the extent they find it persuasive); *see also Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 129 (2d Cir. 2008) (assuming that a 2001 report by the Copyright Office "deserve[d] only *Skidmore* deference, deference based on its 'power to persuade,'" and rejecting the Office's interpretation as unpersuasive).

Capitol Records, LLC v. Vimeo, LLC, 826 F.3d 78, 93 (2nd Cir. 2016), *cert. denied* (2017). Clearly, the Second Circuit has concluded that there was not enough power to persuade. Accordingly, the Second Circuit's holding prevails on this issue.

Fair Use – An Analysis In Search Of A Subject

As noted in its Initial Comment, OmniQ's Petition rests on the legal premise of "non-reproductive" space-shifting. There is simplicity in that tautology: There is no such thing as non-reproductive space-shifting that infringes the exclusive right of reproduction. Conversely, if we must apply Section 107 fair use analysis to anything falling into the broadest sense of "space-shifting," it is because it is not non-reproductive. Accordingly, the Librarian of Congress may, with confidence, grant an exemption for "non-reproductive" space-shifting without having to apply a Section 107 analysis.¹⁵

In our Initial Comments, we briefly touched on the fair use question¹⁶ despite that an exemption expressly limited to non-reproductive space-shifting needn't even consider whether Section 107, to which all Section 106 rights are subject, applies – because the Section 106(1) right does not apply either. Without retreating from our contention that fair use analysis need not be undertaken where the exemption applies to non-reproductive activity, we turn now to address the MPAA Opposition's argument that fair use weighs against the activity.

¹⁵ Similarly, the Librarian of Congress may grant a non-reproductive space-shifting exemption without regard to whether OmniQ's patent-pending method is sufficiently robust to be covered by the exemption. It is either non-reproductive or it is not; if not, then the exemption does not apply.

¹⁶ We had expected that the De Petris Initial Comment would cover fair use more exhaustively, since the De Petris Petition relies completely on surviving a fair use analysis, but no such comment was filed. Even if it had been filed, the fair use analysis would be fundamentally different for reproductive space-shifting that results in a multiplication of copies.

As a matter of law, unless there is reproduction, there is no need to consider whether a non-reproduction constitutes fair use. The question in this Triennial is not whether OmniQ’s patent-pending method is non-reproductive, but whether circumvention for a specific non-reproductive use should be permitted. Even so, fair use analysis may be helpful to understand the benefit to the public from a technology that can help repair (or counteract) the technological damage being done to the Section 109(a) limitation on the Section 106(3) right, so as to help maintain the Copyright Act’s intended equilibrium.

(a) The MPAA Opposition Relies On Inapposite Authority

The MPAA Opposition declares, at 17, “The Register’s Prior Fair Use Analyses Have Now Been Confirmed By The Ninth Circuit.” But the MPAA Opposition is tilting at windmills. As noted above, it matters whether the “space-shifting” being analyzed is reproductive or non-reproductive. Concluding, “ducks can’t swim,” based on three triennial analyses and case law holdings with respect to “fowl-swimming” studies of chickens would be just as fallacious as what the MPAA Opposition is asking for here. It is imperative that the substance of the activity, and not its popular shorthand label, be studied. To say that previous proponents of an exemption to reproduce the work into copies for purposes of preservation or convenience failed to establish that such reproductions are not infringing (Opposition at 17, citing the NPRM) means nothing in the context of a proposed exemption to shift the work from one material object to another *without* reproduction. The principal point of commonality is the “space-shifting” moniker – not the substantive conduct.

The Opposition relies on *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 862 (9th Cir. 2017), for the proposition that “The reported decisions unanimously reject the view that space-shifting is fair use under § 107,” and quotes the *VidAngel* quote of the Register’s prior determination that “the law of fair use, as it stands today, does not sanction broad-based space-shifting or format-shifting.” But the OmniQ Petition does not advocate “broad-based space-shifting or format-shifting” at all. It advocates a very narrow non-reproductive space-shifting that courts have already concluded is not even a reproduction – much less a reproduction that might require Section 107 for its salvation.

Consider the *VidAngel* facts. As the Ninth Circuit explained (on the same page 862 cited in the MPAA Opposition), “VidAngel’s service is not personal and non-commercial space-shifting: it makes illegal copies of pre-selected movies and then sells streams with altered content and in a different format than that in which they were bought.” In other words, the Ninth Circuit was considering an activity called “space-shifting” that involved the Section 106(1) reproduction right (“making illegal copies”), the Section 106(4) public performance right (streaming the work), and the Section 106(2) derivative works right (streaming the work with “altered content”).¹⁷ In other words, the Ninth Circuit ruled that an activity that involved unauthorized copying of a work in order to make an unauthorized public performance of the altered work was

¹⁷ The Ninth Circuit, at 862 n.9, declined to rule on whether the preliminary injunction could also be sustained with respect to the public performance right, noting that “at least one exclusive right” under § 106 sufficed to sustain it.

not fair use. The OmniQ Petition involves none of that. The only point in common is the “space-shifting” label. There is no substantive point in common, either as a matter of fact or of law.

(b) The Opposition Places A Mischaracterization Thumb On Fair Use Factor Scale

It is disconcerting to see such a gross mischaracterization of what is to be weighed under fair use. With respect to the first factor, it is true that the non-reproductive space-shifting “is not transformative” of the work, but the remainder of the Opposition, at 18, seeks to support its first fair use factor analysis using “alternate facts”:

– “the purpose and character of the use is to *reproduce* works.” No, it is expressly to *not* reproduce the works.

– “it involves obtaining a benefit (access to multiple, digital copies) that requires paying more at the point of sale in the marketplace.” No, no, and no. (1) there is no “right of access” in Section 106; (2) there are certainly not “multiple copies” made in a non-reproductive process; and (3) the “marketplace” price is no different than it has been since the advent of Section 109(a) and Congress’ rejection of the notion that rental of lawfully made copies of movies should be excluded. The Copyright Act *intends* that anyone who owns a lawfully made copy is free to, *without* the consent of the copyright owner, (a) privately perform the work from that copy and (b) redistribute that copy to anyone, anywhere.

What the OmniQ exemption facilitates is a means of repairing the technological barrier to full enjoyment of the Section 109(a) privilege – something that benefits the owner of the lawfully made copy but, more importantly, the public, as downstream secondary markets work to broadly disseminate the work to those unwilling or unable to acquire the copy at the full price of a new one.

Similarly, the MPAA Opposition, *id.*, offers a false premise for the third fair use factor, saying “Under the third factor, fair use is disfavored because entire works would be copied.” *Id.* (emphasis added). But the Petition is expressly limited to no “copies” being made, as that term is defined in the Copyright Act. Although a single embodiment of the “entire work” is being moved from one material object to another, un-fixing it from one and fixing it in the new body, nothing is being reproduced into copies

Finally, with respect to the fourth fair use factor, the MPAA Opposition seems to become unhinged from the Copyright Act, devolving into a mash-up of incompatible claims. First, it claims “MPAA members and other copyright owners are exploiting the market for providing access to multiple digital copies,” *id.* at 19. If the MPAA Opposition is implying that the exemption would allow “multiple digital copies,” the Register should reject that notion, as nothing in the requested exemption allows for multiple copies of any kind. Second, there is no “market for providing access” that is cognizable under Section 106. As demonstrated above, no copyright owner enjoys a Section 106 “exclusive right to do or to authorize access to a work.” Third, the “unfettered personal copying” that might have occurred in the case of “unfettered” backup or convenience “personal use” copies is not present here. OmniQ’s own patent-pending method makes it less likely that there will be “unfettered copying” of a DVD, once space-shifted has taken place; in any event, an exemption for *non-reproductive* space-shifting cannot possibly entail unfettered

personal copying. Nor would the exemption impair studios that “aimed at allowing consumers to access works already owned on physical media through online channels.” Impossible, because the studios remain free to do so, and consumer demand for online “access” to a work that is fixed in a copy they own can still be satisfied through Movies Anywhere or UltraViolet. The only difference is that the physical constraints of the dwindling DVD format need no longer artificially hinder the full enjoyment of copy ownership.

In apparent desperation, the MPAA makes the outrageous claim that “OmniQ admits it wants ‘to build the world’s biggest video store’ by hacking encryption and offering digital transmissions of movies to paying members of the public.” The biggest falsehoods are typically sold with a kernel of truth. It is true that the Vrieling Declaration says OmniQ wants “to build the world’s biggest video store.” It would not be the first legitimate retailer to have the same aim. But nothing, absolutely nothing, in the Vrieling Declaration or in OmniQ’s Petition lends any support whatever for the notion that OmniQ’s aim is to “hack encryption” or offer public performances of the works to the public.

More False Equivalence

The remainder of the Opposition generally re-hashes previous arguments in an attempt to show that the public is going to be served well enough if the exemption is denied, and the studios can attempt to capture additional revenue by offering products and services intended to overcome many of the technological limitations that have developed as collateral damage, such as the inability, as a practical matter, to enjoy the benefits of the right to alienate ownership or possession of lawfully made copies, or to privately perform works from lawfully made copies without needing to pay for a “subscription,” or to privately perform works from embodiments lawfully fixed in material objects that are incompatible with the consumer’s playback technology.

In the end, the MPAA Opposition responds to an exemption to allow non-infringing activity – non-reproductive space-shifting – by saying that copyright owners are busy cobbling together a patchwork of “access” business models that capitalize on the technological limitations experienced by the public in order to maximize revenue, even at the expense of millions who will be unable to enjoy the high cost of limited access instead of the benefits of the “no control whatever” framework, as Congress intended, over who may possess, own, or privately perform a work from, a lawfully fixed embodiment for which the copyright owner has received its bargained-for price.

DOCUMENTARY EVIDENCE

None, apart from the linked/cited material.

Date: March 14, 2018