

UNITED STATES COPYRIGHT OFFICE



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

Please submit a separate comment for each proposed class.

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 in protecting against unauthorized access to or use of prerecorded video content distributed 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

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

As ultra-high definition products are entering the marketplace, AACCS LA has developed a separate technology for the distribution of audiovisual content in ultra-high definition digital

format. This technology is identified as AACCS2, and not AACCS 2.0. This distinction in nomenclature is significant, as the latter would suggest that it replaced AACCS distributed on Blu-ray. It has not. AACCS2 is a distinct technology that protects audiovisual content distributed on Ultra HD (UHD) Blu-ray discs, a distinct optical disc format which will not play on legacy (HD) Blu-ray players. To the extent a proposal mentions CSS and/or AACCS, but does not explicitly include AACCS2, such mention should not be inferred to include AACCS2. Indeed, AACCS2 is not subject to the proposed exemptions put forward by any Class 13 proponents.

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ITEM B. PROPOSED CLASS ADDRESSED

Proposed Class 13: Computer Programs—Security Research

ITEM C. OVERVIEW

DVD CCA and AACCS LA object to the proposed class to the extent that proponents' once again attempt to relax the purpose and security limitations.

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

The TPMs of concern to DVD CCA and AACS LA are the Content Scramble System (“CSS”) used to protect copyright motion picture content on DVDs and the Advanced Access Content System (“AACS”) used to protect copyrighted motion picture content on Blu-ray Discs.

ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGING USES

DVD CCA and AACS LA object to the proponents’ recycled proposal to eliminate the current “use limitations”, or, as proponents have described them, the “purpose” and “security” limitations. The NPRM rightfully indicated that the Register has previously addressed these issues.¹ Nevertheless, although proponents promised to develop the record in favor of their proposal, they have merely presented the same arguments as they did before, and provided an implausible reading of preliminary motions in the *Green*² case. None of this warrants the Register revisiting this issue yet again.

Elimination of the use limitations for both purpose and security would run the risk of the security research exemption becoming a back door to the creation of circumvention techniques and exposure of the inner workings of the CSS and AACS technologies that would not otherwise legitimately be available. Thus, an unqualified exemption would unnecessarily counteract the efforts, resources, and time that DVD CCA and AACS LA have expended over many years to maintain as closely as possible the confidentiality of the cryptographic values used in encrypting and decrypting high-value motion pictures and keep them from being widely and unnecessarily

¹ Exemptions to Permit Circumvention of Access Controls on Copyrighted Works 85 Fed. Reg. 65293, 65307 (Oct. 15, 2020) (quotation omitted) (Notice of Proposed Rulemaking “NPRM”).

² *Green v. U.S. Department of Justice*, 392 F. Supp.3d 68 (D.D.C. 2019).

disseminated. The scope of the exemption as it currently exists appropriately respects this confidentiality without foreclosing the proponent's ability to discuss, debate, and expand the frontiers of knowledge regarding encryption technologies.

Notwithstanding proponents' protestations to the contrary, reasonable researchers are capable of understanding what is meant by both limitations - "primarily for the purpose of good faith research" and "the derived information . . . is used primarily to promote the security or safety of the class of devices" ³ In the 2018 Recommendation, the Acting Register articulated what a reasonable researcher would understand the limitation to mean:

First, it is not plausible to conclude that the term "primarily" could be interpreted to mean "only." Those two terms clearly are not synonymous, and nothing in the record suggests that any copyright holder has advanced such a reading. Likewise, proponents' concern that the exemption might not extend to situations in which a researcher advises against the use of a device seems farfetched. It would be absurd to construe the exemption to mean that research is protected only if it results in users being able to use the class of devices whose security or safety is being examined. ⁴

Thus, to the extent any researcher may be unclear, this practical guidance provides a path forward.

Furthermore, the *Green* Court's decision on preliminary motions is not dispositive on any of the remaining claims, and the viability of First Amendment challenges to the DMCA has been well-understood since the Second Circuit affirmed the district court's decision in *Corley*. ⁵ Thus, until the Court makes some factual findings on a more developed record, all that can be said is that nothing has changed. ⁶

³ 37 C.F.R. § 201.40(b)(11).

⁴ 2018 Recommendation at 309.

⁵ *Universal Studios, Inc. v. Corley*, 273 F.3d 429 (2nd Cir. 2001).

⁶ The Court did give a fairly broad blessing that this rulemaking is on constitutionally firm ground.

Since this proceeding is intended to balance the needs of those seeking an exemption with the benefits of a digital marketplace as Congress envisioned, the conditions noted above are essential to enabling those benefits to continue to exist for the robust market for copyrighted digital audiovisual content on optical discs that the CSS and AACS TPMs support. Without these conditions, the security research exemption could very well be used for the bad-faith purpose of advancing techniques to circumvent CSS and AACS technologies in order to make inappropriate and widespread infringing use of the motion pictures which they protect. Consequently, as nothing has changed, the Register should once again deny the proposed requests.