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

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, decrypters (hardware and software); and manufacturers of DVD players and DVD-ROM drives.

Advanced Access Content System Licensing Administrator

Advanced Access Content System Licensing Administrator, LLC ("AACS LA"), is a cross-industry limited liability company with its principal office in Beaverton, Oregon. The Founders of AACS LA are Warner Bros., Disney, Microsoft, Intel, Toshiba, Panasonic, Sony, and IBM. AACS LA licenses the Advanced Access Content System ("AACS") technology that it developed for the protection of high-definition audiovisual content distributed on optical media, primarily Blu-ray Discs. AACS LA's licensees include the owners of such content and the related authoring and disc replicating companies; producers of encryption engines, decrypters (hardware and software); and manufacturers of Blu-ray disc players and Blu-ray Disc drives.

As ultra-high-definition products gain popularity in the marketplace, AACS LA has developed a separate technology for the distribution of audiovisual content in ultra-high-definition digital format. This technology is identified as AACS2, and not AACS 2.0. This distinction in

nomenclature is significant, as the latter would suggest that AACS2 is a successor version of the technology which has replaced AACS as distributed on Blu-ray Discs. It has not. AACS2 is a distinct technology that protects audiovisual content distributed on Ultra HD (UHD) Blu-ray Discs, a newer, distinct optical disc format which will not play on legacy (HD) Blu-ray Disc players. To the extent a proposal mentions CSS and/or AACS, but does not explicitly include AACS2, such mention should not be inferred to include AACS2. Indeed, AACS2 is not subject to the proposed exemptions put forward by any Class 6 Proponents.

REPRESENTATIVES

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ITEM B. PROPOSED CLASS ADDRESSED

Proposed Classes 6(a): Computer Programs and 6(b): Video Games— Preservation

ITEM C. OVERVIEW

DVD CCA and AACS LA object to the proposed class as Proponents have failed to identify any changes in the law that would warrant expanding the existing exemption to apply to remote access by multiple users.

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 copyrighted 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 proposal to the extent that it requires exceeding copyright norms by permitting multiple remote users to make use of a computer program or video game (each a type of work protected by copyright). The Register imposed the current one-user limit to ensure that the exemption enables only those uses which Proponents sufficiently demonstrated were likely to be non-infringing. Indeed, in its Notice of Proposed Rulemaking for this proceeding, reminding the Proponents of this decision, the Office requested "whether there have been new factual or legal developments since the last rulemaking that would support a new recommendation for the preservation exemptions."[1] Despite this reminder, Proponents have not provided any new factual or legal developments that would warrant the Register removing the one-user limitation.

Notwithstanding Proponent's inapposite citation to the unpublished Eleventh Circuit opinion in *Apple, Inc. v. Corellium, Inc.*, which neither considered nor addressed the issue of distinguishing between one-user versus multiple-users – *i.e.*, the core feature of Proponents' requested expansion – nothing has changed since the last rulemaking.

A. Prior Rulemaking

In the prior rulemaking proceeding, the Register recommended the one-user limitation to ensure that the newly authorized remote uses of software conformed to current copyright policy:

> The recommended [ ] exemption will reflect the Proponents' request to remove the premises language, [a limitation]: . . . only one user will be able to access the preserved software at a time, and for a limited time. . . . [T]he inclusion of single user and limited time restrictions will minimize the risk of substitutional use of the software.

2021 Recommendation at 279.

[1] Exemptions to Permit Circumvention of Access Controls on Copyrighted Works, 88 Fed Reg 72013, 72026 (Oct. 19, 2023) ("NPRM").

The Register pointed to the Section 108 Discussion Document (the "Discussion Document") as, in part, establishing the need to include the one-user limitation. And while the Discussion Document relaxes many copyright policies, the Copyright Office specifically reaffirmed its position that the one-user limitation should not be abandoned.

B. The Proposed Use Is at Odds with the Section 108

Proponents' proposed use for students runs counter to Section 108. *See* Initial Comments at 9 ("it is impossible to have a class of remote students working with a collection of materials that require the same piece of TPM-circumvented software."). Section 108(g) currently prohibits related or concerted reproduction of the same material. This ensures proper respect for the traditional limitations of video game and computer software content on physical discs and other media – one copy of the work per disc, not endless copies from a single disc. Such conduct robs creators of proper remuneration for each copy of their work actually accessed and used. Circumvention of TPMs for the preservation of video games and computer programs does not alter this fundamental understanding, as recognized by the Discussion Document and acknowledged by the Register in prior rulemakings. Teachers are, therefore, limited in making copies for classroom use, and, even then, such authority does not extend to making copies of an entire work. The proposed use would make use of multiple duplicates of the entire work, and such use is therefore not authorized under Section 108. Accordingly, Proponents' use is infringing.

C. The "Retro" Market Is Already Acting to Address Supposedly Orphaned Works

Proponents appear to believe they know the minds of publishers when they claim categorically that publishers have ceased exploiting certain works commercially. According to Proponents, the "proposed uses do not have any impact on potential licensing revenues for traditional, reasonable, or likely to be developed markets because [they claim] there is literally no

market for the out-of-commerce versions of the software." Initial Comments at 15-16. Contrary to Proponents' speciously supported assertions that video games and/or computer programs are going obsolete, popular video games by Atari have been reintroduced to the market in the form of multiple video game consoles designed to play legacy games, new games, and even new games in legacy formats such as the Atari 2600.[2] Similar "retro" consoles and devices such as the Sega Genesis game console, Commodore 64 personal computer, Atari 400 personal computer, various classic arcade games cabinets (including near-full-size stand-up and working miniature versions), and others have been offered to consumers to tap the growing commercial market for nostalgia in personal computing and video gaming.[3] Clearly, the death of commercial viability of these platforms has been greatly exaggerated. Thus, Proponents are demonstrably wrong about, at the very least, the "retro" market generally, which cuts against their assertion that their use should outweigh the prerogative of copyright owners to exercise their exclusive rights.

Indeed, the DMCA Section 104 Report identified this harm to copyright owner's reproduction rights clearly, finding that the precise scheme advanced by Proponents' here "could substitute for a large number of purchases":

> Even the "lending" of a fairly small number of copies of a work by digital transmission could substitute for a large number of purchases. For example, one could devise an aggregation site on the Internet that stores (or, in a peer-to-peer model, points to) multiple copies of an electronic book. A user can "borrow" a copy of the book for as long as he is actually reading it. Once the book is "closed," it is "returned" into circulation. Unlike a typical lending library, where the book, once lent to a patron, is out of circulation for days or weeks at a time, the electronic book in this scenario is available to other readers at any moment that it is not actually being read. Since, at any given time, only a limited number of readers will

[2] *See, e.g.*, Jim Lenahan, *Decades Later, the Atari 2600 Makes a Comeback, Cartridges Included* (Dec. 14, 2023) available at https://www.aarp.org/home-family/personal-technology/info-2023/atari-console-re-release.html (last visited Feb. 20, 2024).

[3] *See, e.g.*, Mitch Wallace, *Gaming and Nostalgia: An Uneasy Pairing* (Feb. 20, 2023). Available at https://www.forbes.com/sites/mitchwallace/2023/02/20/gaming-and-nostalgia-an-uneasy-pairing/?sh=3de37e9c6f93 (last visited Feb. 20, 2024).

> actually be reading the book, a small number of copies can supply the demand of a much larger audience. The effect of this activity on the copyright owner's market for the work is far greater than the effect of the analogous activity in the non-digital world.

U.S. Copyright Office, DMCA Section 104 Report at 83 (Aug. 2001). In fact, if exemption beneficiaries follow the rule of spontaneity, which prohibits copying works for future lessons,[4] then seeking authorization could lead to better access to the software and a new opportunity to exploit the copyright within the confines of the current exemption.

D. Conclusion

While every rulemaking provides an opportunity for Proponents to advance another argument that their desired use is a noninfringing use, such arguments are required to be supported by new evidence not previously considered by the Office. In this case, Proponents have failed to submit any such new evidence. And, in fact, the rise of the "retro" market to meet the needs of those interested in legacy video games, computer programs, and equipment is new evidence that cuts against Proponents' arguments, both in terms of their proposed expansion of the exemption, and also against the merits of the original exemption, itself. Thus, DVD CCA and AACS LA urge the Office to consider that the current exemption should not be readily accepted for streamlined renewal, and, as far as this proceeding is concerned, the Register should reject the proposed expansion of the exemption.

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[4] *See, e.g.*, U.S. Copyright Office, Circular 21 at 6-7 (Reproduction of Copyrighted Works by Educators and Librarians).