



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 (“AACCS LA”), is a cross-industry limited liability company with its principal office 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, primarily 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, 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, 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 AACS2 is a successor version of the technology and has replaced AACS distributed on Blu-ray Disc. 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 1 proponents.

REPRESENTATIVES

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ITEM B. PROPOSED CLASS ADDRESSED

Proposed Class 1: Audiovisual Works— Noncommercial Videos

ITEM C. OVERVIEW

For the reasons stated below DVD CCA and AACS LA object to amending the language of the current exemption.

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 alter the language of the current

exemption for noncommercial videos. Petitioner OTW sought the same or similar modifications in prior proceedings. In the last proceeding, the Register rejected the modification, in part, on Petitioner’s multiple concessions, including that the “existing exemption is enough in the sense that it provides an exemption for what vidders do.” See 2021 Recommendation at 40-41 (quoting the hearing testimony from proponents’ witness). In addition, Proponent backed away from eliminating reference to the applicable media delivering motion pictures, (DVDs, Blu-ray Discs, and digital transmissions). 2021 Recommendation at 21. Proponent then further conceded that no “change is necessary” with respect to the “lawfully made and acquired” limitation in the exemption. *Id.*

Despite its plainly exaggerated nature, the Register nevertheless addressed Proponent’s oversized concern with screen-capture technology. The Register explained that the exemption *does not require* an exemption beneficiary to actually attempt making use of screen capture technology. 2021 Recommendation at 41. Instead, “[the exemption] requires only that users *evaluate* whether screen capture technology would produce video clips of sufficient quality; if the user reasonably believes it would not, circumventing is permissible.” *Id.* (emphasis in original). She repeated that including the provision exempting the use of screen-capture technology as a circumvention technology addresses the historic concern whether such technology involves circumvention.

The Notice of Proposed Rulemaking for this proceeding noted that the current petition is the same request to amend the exemption language made in the prior rulemaking.¹ Since this request has already been addressed, the Notice sought “comment on whether there are legal or

¹ Exemptions to Permit Circumvention of Access Controls on Copyrighted Works, 88 Fed Reg 72013, 72024 (Oct. 19, 2023) (“NPRM”).

factual circumstances that have changed and warrant altering the determination from the prior rulemaking.”² No proponent has provided any information as to new or changed legal or factual circumstances – indeed, no one has provided any comments at all. Accordingly, there is no record upon which the Register can even consider altering her prior determination.

In this proceeding, Proponents have the burden to provide more than a de minimis showing that modifying the exemption is warranted. In the 2006 Recommendation, the Register rejected a proposed exemption that would permit circumvention of DVDs to alter the region code, finding the evidence in support of the proposal – which was far more substantial than the complete lack of evidence submitted in support of the proposal at issue here – to be de minimis.³

In the last rulemaking, the Register affirmed the requirement that proponents must provide more than a de minimis showing. In that proceeding, Solabyte filed a petition for the use of audiovisual clips in text messages. While Petitioner Solabyte did not file any initial comments, Proponent Free Software Foundation filed a comment that “[c]ircumventing [digital] restrictions *for any use* should not come with the legal threat of legal sanctions.”⁴ Noting that the Notice of Proposed Rulemaking had requested specific details, the Register concluded that Proponents had failed to meet their burden of providing more than a de minimis showing. 2021 Recommendation at 62-63.

Here, there has not even been a de minimis showing that the prior determination should be altered, as no proponent has filed any initial comments in support of the exemption. The Notice

² *Id.*

³ 2006 Recommendation at 76 (explaining that in the two proceedings prior to the 2006 Recommendation (2000 and 2003), the Register denied the same proposal on more extensive records than what was provided in 2006).

⁴ Free Software Foundation, Exemptions to Permit Circumvention of Access Controls on Copyrighted Works, Docket No. 2020–11, Initial Comments at 1 in (Dec. 14, 2020).

of Proposed Rulemaking instructed any proponents to provide information regarding any factual or legal changes that warrant the Register to alter the prior determination. Nothing has been offered at all (*i.e.*, no one, including the Petitioner, has filed any initial comments in support of the exemption). That is even less than the Initial Comments proffered by Free Software Foundation in the 2021 proceeding that the Register found to be *de minimis*.

As no proponent has elected to make any showing at all – which is, by definition, less than *de minimis* – there is no basis for the Register to consider amending the exemption further. Consequently, this proposal to amend the exemption language must be rejected.

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