

Electronic Frontier Foundation

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Mr. David O. Carson
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Copyright Office GC/I&R
P.O. Box 70400
Southwest Station
Washington, D.C. 20024
Sent via email: 1201@loc.gov

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RE: Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies

Mr. Carson:

We are writing you today to share the thoughts of the Electronic Frontier Foundation (EFF) on the US Copyright Office's comment period on the Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies. EFF thanks you for giving us the opportunity to provide input as you try to formulate your recommendations on whether noninfringing uses of certain classes of works are, or are likely to be, adversely affected by such prohibition.

EFF (<http://www.eff.org>) is a global nonprofit organization linking technical architectures with legal frameworks to support the rights of individuals in an open society. Founded in 1990, EFF actively encourages and challenges industry and government to support free expression, privacy, and openness in the information society. Over the past decade, EFF has participated in precedent-setting cases, has worked to ensure that any legislation passed or rules promulgated protect individuals' rights, and has been on the forefront of public debate over the equitable use and growth of information technology. A member-supported organization, EFF maintains one of the most-linked-to Web sites in the world.

EFF is concerned with attempts to make digital copying of all audio and visual works illegal. Members of the entertainment industry are assuming that all digital recording is a copyright violation, despite clear legal authority to the contrary. While preserving intellectual property rights is important, it must not be done at the expense of free expression. In fact, the U.S. Supreme Court clearly stated in the Betamax case that copyright concerns cannot be used to eliminate recording equipment from the market if the equipment has any substantial non-infringing function. The storing, transmitting, or reproducing of audio/video should be treated no differently than other

forms of speech or publication. The Internet distribution of audiovisual content must not be crippled by regulation or industry standards that preclude the use of open technologies or that require personally identifiable information to access audiovisual content.

As a legal services organization, EFF represents several of the nation's very first Defendants charged with violating the access control restrictions under the DMCA and can comment on the DMCA's negative impact from a knowledgeable position. The cases under DMCA in which EFF is involved relate to DVD technology (CSS) and an attempt by the motion picture industry to use the DMCA to create substantially new rights to copyright holders that essentially grant them the right to control a user's ability to manipulate their legally purchased media, kill fair use, and prevent competition among manufacturers of DVD players. In order to achieve the balance required by copyright's principles, DVDs should be exempt from the DMCA's anticircumvention prohibition.

It is important to note that while DVDs are discussed specifically in this comment, the same analysis applies to other systems such as the RIAA's highly publicized Secure Digital Music Initiative (SDMI) that rely upon a broad interpretation of the DMCA that would have the effect of preventing competitors from making open-source devices that can compete with and interoperate with closed proprietary ones. Any such systems that are designed to prevent consumers from making fair use of their property should be ruled exempt under the DMCA's anticircumvention ban.

EFF appreciates the Copyright Office's interest in carefully considering the breadth of Section 1201 (a)(1) as it relates to classes of works that should be exempt from the prohibition against circumventing a technological measure that controls access to a copyrighted work. EFF would be happy to testify at hearings in connection with this rulemaking should the Copyright Office desire.

As to the specific questions outlined in the Federal Register's Notice of Inquiry on this matter, EFF respectfully submits the following:

A. Technological Measures (Questions 1-2)

One example of a technological measure that effectively controls access to a copyrighted work is the Content Scrambling System (CSS) applied to Digital Video Discs (DVDs) that prevents people from viewing DVDs on devices not authorized by the copyright holder. Unlike other technological measures used to protect copyrights, CSS does not prevent the unauthorized copying of DVDs. As a protection system, CSS works by controlling the devices on which the movies may be viewed by requiring the manufacturers of "authorized" devices to limit functionality to prevent copying including fair use.

The type of technological protection measure applied to DVDs is particularly harmful to peoples' ability to make noninfringing uses and tips copyright's delicate balance significantly in favor of copyright holders at the expense of free speech,

innovation, and competition. Such protection systems are able to use the DMCA to prevent fair use entirely by requiring one to descramble a DVD on an “authorized” player in order to view it; “authorized” DVD hardware is required to disallow legal (in addition to illegal) copying. Hence, any “unauthorized descrambling” or viewing of DVDs constitutes a violation under the DMCA. Bypassing the wisdom of copyright law’s First Sale Rule which terminates the author’s right to control what happens to a particular work after its first sale, systems such as CSS effectively assert control over a DVD forever. DVD hardware does not discriminate as to whether or not copyright is asserted over a work. As a result, the implementation of this type of system effectively prevents people from accessing and copying public domain materials in perpetuity, ignoring the Constitution’s requirement that copyright be granted for only a limited time.

Recently, eight major movie corporations sued Web site owners under the DMCA for posting software (DeCSS) that allows DVDs to be viewed on unauthorized players. The use of the DMCA in this case to prevent people from building and using unauthorized players to watch their legally purchased DVDs dramatically shifts the delicate balance the Constitution designed for copyright.

Consequently, in considering which classes to exempt under the anticircumvention provisions of section 1201, *the Librarian should consider whether or not the technological protection measure actually protects a right afforded by a copyright holder, (such as copying, distribution, adaptation, public display/performance), or whether the system is designed to limit a consumer’s legitimate use of media (such as viewing).*

Copy protection schemes that do not protect specific rights granted to authors under copyright infringe upon a user’s right to use and manipulate information in lawful ways and should constitute a class of works to be exempt from the DMCA’s anticircumvention provisions. DVDs are an example of such a class of works that should be exempt from the DMCA’s anticircumvention provisions because the protection measure taken (CSS) does not protect rights afforded to a copyright holder, but controls viewing of a DVD, the scope of which is intentionally outside an author’s control under copyright law. Thus, it grants new and unprecedented rights to movie studios to control others’ use of creative expression.

In addition to the problems reconciling such a broad interpretation of the DMCA with copyright’s stated objectives of promoting progress of science and useful arts, not classifying such schemes as exempt under the DMCA fosters a breeding ground for anti-competitive and monopolistic practices among “authorized” DVD player manufacturers. Copyright law could not require consumers to purchase DVD players from “authorized” dealers when they could simply download free software that would play their DVDs on their computer and antitrust law’s rules against illegal tying of hardware to software would likely not permit it either.

B. Availability of Works (Questions 3-7)

One consequence of applying technological measures such as CSS to DVDs is that many DVDs are unavailable to persons who desire to be lawful users of the works. Under the DVD industry practice of “region-coding”, movies purchased in one geographic region of the world are not released in another region and are coded to refuse to play in other region’s DVD players. Since CSS prevents DVDs from being viewed on players sold in other parts of the world, the works are effectively unavailable to large segments of the world population who would otherwise desire to make lawful use of them. Consequently, technological protection measures such as CSS and “region-coding artificially depress the availability of copyrighted works.

DVDs constitute a unique class of works available only electronically and for which there exists no substituting format to which technological measures have not been applied. At first glance, it may appear that VHS tapes of movies are the equivalent to a DVD. This superficial similarity becomes apparent when considering all the additional information a DVD contains such as extra scenes, interviews with actors and directors, additional language features, etc. The VHS experience pales in comparison to the rich multimedia experience only a DVD can provide. A DVD is a truly unique product because there is no real substitute for the information and entertainment provided by a DVD. As such the DVD format should be exempted as a class of works under the DMCA’s anticircumvention provisions.

C. Availability of Works for Nonprofit Archival, Preservation, and Educational Purposes. (Questions 8-11)

The use of technological measures such as CSS on DVDs significantly reduces the availability of movies for nonprofit, archival, preservation, and educational purposes. Because the CSS system is dependent upon a proprietary closed technology for protecting copyrights, the risk of media obsolescence increases substantially. As explained previously, under the CSS scheme, DVDs will only play on authorized DVD players. Consequently, when the DVD format becomes extinct (as all formats from shellac, 8-track, cassette, and CD eventually do) and DVD manufacturers stop making players, consumers will want the ability to “port” their DVD movies to the new media rather than have to repurchase them again in the new format. Since the DVD format creates a unique product, the obsolescence of DVD/CSS risks losing the entire body of knowledge and entertainment provided by the DVD format.

The ability to make and use nonprofit archives is effectively prevented by the DVD/CSS technological system. Because “authorized” DVD hardware prevents people from making a back-up copy of their lawfully purchased DVD, they are denied their legitimate rights under fair use to protect themselves against eventual media failure. Similarly, the CSS system reduces the availability of DVDs for nonprofit educational purposes. Because the only readily available hardware for playing DVDs are the “authorized” DVD players which prevent archiving and copying for educational purposes, the entire class of DVDs should be exempt from the anticircumvention provisions of the DMCA. It is necessary to exempt the DVD format to ensure people have the ability to exercise their lawful rights to create nonprofit archives and manipulate DVD media for educational purposes.

If the entire class of DVDs are not exempt from the DMCA's anticircumvention provisions, then at the very least, DVDs circumvented for the purpose of nonprofit archival preservation and /or educational purposes should be considered a class automatically exempt under the rulemaking provisions. To decide otherwise would grant new and additional rights to copyright holders allowing them to prevent the creation of nonprofit archives and severely stifle education. In order to achieve the objectives and principles of copyright to spread culture and knowledge, it is imperative that individuals are able to circumvent DVD technological protection measures for nonprofit archives and education purposes. Claims that such a rule would be difficult to enforce and should therefore not be enacted disregards the important interest protected by such uses.

D. Impact on Criticism, Comment, News Reporting, Teaching, Scholarship, or Research (Questions 12-17)

The use of technological measures to control access to copyrighted works has severely restricted the ability of interested persons to engage in criticism, comment, news reporting, teaching, scholarship, and research. Because consumers are prevented from copying DVDs by the hardware itself, it is impossible to engage in any copying for the purposes outlined above unless DVDs are exempted from DMCA's anticircumvention ban under the rulemaking procedure. Hence, reporters, journalists, teachers, and researchers are not able to copy portions of DVDs that they would be entitled to under copyright law's fair use privilege. This makes it impossible to use a direct reference of DVD, which is necessary for credibility since one must be able to back-up one's point with a DVD clip of what they are referring to in order to show context.

Similarly, the use of technological measures has severely restricted the ability of interested persons to engage in noninfringing uses including fair use. Since consumers are wholly prevented from copying DVDs they are not able to make lawful personal use copies. Copyright law's fair use privilege entitles consumers with a right to make personal use copies of works for the purposes of time shifting or space shifting their DVDs. Courts have been clear in holding that consumers must take their fair use rights with them into the digital realm if copyright is to maintain its delicate balance. Fair use allows copyright protection to exist without contradicting the First Amendment to the U.S. Constitution. Therefore any restriction on fair use will face conflict with freedom of expression principles. Because the impact upon fair use wrought by the use of technological measures such as CSS/DVD threatens to effectively kill fair use in the digital realm, DVDs should be exempt under the DMCA.

Teaching and education are likewise severely impacted by the use of such technological measures. Many schools cannot afford "authorized" DVD players or expensive proprietary software and must rely on open software which is free of direct charge. If DMCA can be used to require people to view DVDs on costly "authorized" players when they could in fact download a free software program from the Internet that allows them to use their PC to view their DVDs on a non-proprietary system, then this

will result in a widening of the digital divide in education in complete contradiction to the values and principles of promulgated by copyright law.

Because of the severe hindrance upon criticism, news reporting, teaching, scholarship, and research brought on the technological protection systems, the entire class of DVDs should be exempt from the DMCA's anticircumvention provisions in order to achieve balance and further copyright's stated goals. Considering the movie industry consists of a large portion of society's pre-packaged culture, preventing the lawful copying of DVDs has the effect of chilling criticism, and hampering news reporting on matters of high social importance. At the very least DVDs circumvented for the lawful purposes outlined herein or in other ways that do not result in copyright infringement should constitute a class of works exempted from the anticircumvention provisions.

E. Effect of Circumvention on the Market for or Value of Copyrighted Works (Questions 19-22)

The circumvention of technological measures that control access to copyrighted works can have the effect of increasing the value of the underlying copyrighted works. Using the example of CSS, circumventing that system and allowing DVDs to be viewed on new unauthorized players produces the net effect of enlarging the market for DVD movies. If DVDs can be viewed on previously unsupported operating systems, then the consumer base for DVDs is enlarged. Greater market value is assigned to a work that can interoperate with various formats and hardware.

In summary, DVDs should be considered a class of works to be exempt from the DMCA's anticircumvention prohibition in order to achieve balance and preserve free expression, fair use, and innovation in the digital realm.

Respectfully Submitted,

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Electronic Frontier Foundation