

Before the
Library of Congress
Copyright Office
Washington, D.C.

In the Matter of :
: Docket No. RM 2005-11
Exemption to Prohibition on Circumvention :
of Copyright Protection for Access Control :
Technologies :
_____ :

REPLY COMMENTS OF THE
DVD COPY CONTROL ASSOCIATION, INC.

Pursuant to the Notice of Inquiry (“Notice”) that the United States Copyright Office (“Office”) published in the Federal Register on October 3, 2005, the DVD Copy Control Association, Inc. (“DVD CCA”), by and through its attorneys, submits the following reply comments with respect to certain initial comments that proposed exemptions for certain “classes of works” – access to which is protected by the Content Scramble System (“CSS”) – from the “anti-circumvention” prohibitions found in the Digital Millennium Copyright Act of 1998 (“DMCA”). Below the DVD CCA specifically responds to certain initial comments requesting exemptions for (1) the creation of clip compilations from DVD for educational use when they are generally protected by CSS or when they also include navigation controls or region coding; and (2) derivate and collective works containing public domain works that are protected by CSS, which prevents their educational use, and then DVD CCA treats the final set of initial comments that relate to consumers’ use of DVDs as three broad exemptions as each

individual submission in its respective group shares at least the one common theme identified in the group's name. Those groups are (1) making backup copies of DVDs, (2) playing DVDs on Linux operating systems, and (3) copying all copyright protected work.¹

As an overall matter, DVD CCA notes that a large number of the requests appear to request circumvention for purposes that are not "fair use" (*e.g.*, making "backup" copies of prerecorded DVD discs) or otherwise would seriously undermine the rights of copyright holders, effectively requesting an impermissible administrative abrogation of copyright law. As it has in prior proceedings, the Copyright Office should take great care in analyzing the requests to ensure that those that are clearly not aimed at fair uses are denied on that basis alone. As discussed in detail below, the requests related to CSS as a technological protection measure, and the DVD video content protected using CSS, should be denied for other reasons as well.

I. The DVD CCA

DVD CCA is a not-for-profit corporation with its principal office in Morgan Hill, California. DVD CCA licenses CSS for use to protect against unauthorized access to or use of prerecorded video content contained on DVD discs. Its licensees include the owners of such content and the related authoring and disc replicating

¹ By December 1, 2005, the Office received some seventy-four (74) submissions in the course of the initial comment period, and as the Office has already noted, the majority of the initial comments filed by private citizens do not meet the Office's submission requirements. For example, a number of comments failed to propose a "*class of works*" that should be exempted and instead proposed broad exemptions without providing: (1) a definition for a "*class of work*" to be exempted, (2) evidence of noninfringing use of a particular work, or (3) identification of an access control that is restricting circumvention. Accordingly, the DVD CCA believes that the Office should reject these proposals.

companies; producers of encryption engines, hardware and software decrypters; and manufacturers of DVD players and DVD-ROM drives. The availability of CSS was critical to enabling DVD products to become the fastest growing consumer electronics product in history, allowing consumers to enjoy movies and other video content in exciting new ways. This was possible because CSS allowed content owners to protect their copyright-based rights in the audiovisual content encoded onto DVD discs. The technology does so by allowing the content owner to encrypt the content in a manner that requires the use of a licensed decryption product to view the content. In order for a product to be licensed to decrypt the content, the manufacturer of the product is required by the CSS license to equip the product in a manner that adheres to certain rules that are specifically designed to protect copyright interests of the content owner.

At the outset, it is important to note that CSS is "an effective technological protection measure" covered by the anti-circumvention provisions of the DMCA, in particular the "access control" anticircumvention provisions of Section 1201(a). *See Universal City Studio v. Corley*, 273 F. 3d 429, 441-42 (2nd Cir. 2001) (noting that the trial court had found that the posting of DeCSS, a program designed to defeat CSS, was a violation of Section 1201(a)(2)(A) because CSS was a technological measure that "effectively controls access to a work"); *see also* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 68 Fed. Reg. 62011, 62015-17 (Oct. 31, 2003) (rejecting several proposed classes seeking exemptions to circumvent CSS, an access control technology).

II. THE COPYRIGHT OFFICE SHOULD REJECT THE PROPOSALS TO EXEMPT CLASSES OF WORKS RELATED TO CSS

Proposed Class: Creating Clip Compilations from DVDs for Educational Uses

Initial Round Submissions:

2
5
28
37

Summary of Argument:

In Comment No. 2, the Library Copyright Alliance and the Music Library Association (collectively, the “Libraries”)² have requested an exemption that would permit the circumvention of access controls for “audiovisual works and sound recordings distributed in digital format when all commercially available editions contain access controls that prevent the creation of clip compilations and other education uses.” According to the Libraries, CSS technology is interfering with teachers’ ability to assemble compilations of film clips for educational purposes. The Libraries maintain that because teachers can no longer make compilations of clips, teachers end up wasting

² See also Comments Nos. 5, 28, and 37. Comment No. 28 requests an exemption for “motion pictures and other audiovisual works” used for educational purposes. According to the commentator, certain films cannot be effectively used for educational purposes due to the limitations of “conventional playback devices,” such as “DVD players without ‘markers’ or that have markers which expire in too short of intervals.” Additional drawbacks of “conventional playback devices” referenced include “latency in playback (vs. PC speed), miscued segments, and the inclusion of words, phrases, or scenes that are inappropriate for the viewing audience and must be circumvented for public use.” The commentator also states that he has a license to use video clips for educational purposes. While it is unclear what specifically the Commentator is complaining about, it would seem that the commentator should pursue what he desires from this rulemaking proceeding in the course of taking the licenses, and in the alternative, he too should take advantage of legitimate devices in the marketplace that facilitate the making of clip compilations.

valuable class time advancing the film manually to the part of the film they want the class to view.

Facts and Argument:

First, the marketplace has already provided a non-circumventing alternative to address the concerns raised by the Libraries. Second, further technological developments are occurring that will provide additional non-circumventing alternatives for these concerns. Third, permitting circumvention of CSS technology for these purposes would undermine the technological and legal underpinning of the content protection system that is the basis for the DVD video business.

The Libraries fail to note that the marketplace has already responded to the concern. While DVD CCA does not collect information from its licensees concerning the products they make using CSS, DVD CCA is aware of products from at least one CSS licensee that enable exactly the kind of playback experience that the Libraries allege is not possible without circumventing CSS.³

³ It is also worth noting that manufacturers of DVD players have built in features that facilitate the use of showing clips from DVDs in the classroom. For example, bookmarks are a popular feature and manufacturers have developed a wide array of bookmark features for their players. They include:

- Samsung DVDHD850 Features (The bookmark function lets you mark and store up to three scenes at a time for easy recall.) <http://www.vanns.com/shop/servlet/item/features/480150491>;
- Samsung DVD-HD950 HD Conversion DVD Player (The bookmark function lets you mark and store up to three scenes at a time for easy recall.) <http://www.enotalone.com/electronics/B0009WNA0Q.html>;
- Toshiba SD2805 5-Disc Carousel DVD and CD Player (The bookmark feature allows 5 digital 'bookmarks' to save favorite locations/scenes on discs loaded inside the player. The bookmark feature provides quick access to those scenes the user wants to view again, or demonstrate to friends.) <http://www.amazon.com/gp/product/B00006IS65/102-8879828-4788117?v=glance&n=172282>;

Pioneer offers two players, specifically developed for and marketed to the education community, that offer the functionality sought by the Libraries. The Pioneer DVD-V5000 player⁴ offers a command stack feature, that allows the user to select the beginning and end frames of specific clips of video and store them in the player's flash memory for later playback. The playback can either be in the form of sequential video clips (up to 300) that the teacher has pre-selected, or in real time where the teacher plays any clip by reading and transmitting information from printed barcodes using a wired/infrared barcode reader.

Since 1999, Pioneer also has had another player in the marketplace, offering the command stack feature - the DVD-V7400. That player has been widely recognized as serving the educational needs of teachers and universities. An article in *Campus Technology*, formerly known as *Syllabus*, notes that the "teacher-friendly DVD-V7400 is Pioneer's rugged workhorse for classrooms and lecture hall presentations. Compact and lightweight, it offers a variety of features that make it appropriate for campus use." *Pioneer's DVD: Built for Classroom Use*, *Syllabus* (11/1/2001) (available

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- Apple DVD drive (DVD Player lets you bookmark favorite moments so you can return to them later.) <http://www.apple.com/macosx/features/dvdplayer/>;
 - NeuNeo HVD2085 (The remote also has a feature called "bookmark" that allows you to mark a sequence. It remembers the time that you initiated the bookmark and will return to that time signature whenever you invoke the bookmark feature. The player memory holds up to six bookmarks at any given time and they can be erased and re-programmed at will.) http://www.projectorcentral.com/neodigit_hvd2085.htm;
 - Sony DVP-NS400D DVD Player (An enhanced Bookmark feature makes it easy to set placeholders for up to 50 DVDs.) <http://www.amazon.com/gp/product/B00005KG4J/102-8879828-4788117?v=glance&n=172282>

⁴ More information about Pioneer's DVD-V5000 player is available at http://www.pioneerelectronics.com/pna/product/detail/0,,2076_17573250_114963594,00.html.

at <http://www.campus-technology.com/print.asp?ID=5674>). The article further notes that the “barcode stack/command stack feature allows users to save video play lists for automatic recall and display. Using this feature, an instructor teaching several sections of the same course can store into memory each day’s presentation, saving class preparation time.” In light of the above evidence, showing that there are marketplace solutions already in place, DVD CCA believes that the concerns raised by the Libraries in support for the proposed class are misplaced.

DVD CCA also notes that a variety of new digital rights management-based technologies are being brought to market that may provide alternative approaches to serve the needs cited by the Libraries. These technologies could be deployed to permit creation of clip compilations or to permit other forms of critical analyses of content without exposing the content to uses beyond the clip or analytical uses that have been proposed here. In each of the prior proceedings convened by the Copyright Office, DVD CCA has expressed its willingness to work with interested parties to find ways to meet legitimate needs for content use and analysis. Although no party has ever come to DVD CCA to discuss ways of meeting their needs without causing the adverse effects that legally authorized circumvention of CSS would cause, DVD CCA reiterates its willingness to discuss these points and possible means of accommodating legitimate uses.

Finally on this point, DVD CCA notes that permitting circumvention of CSS to enable the creation of clip compilations would expose the CSS technical and legal protection regime to possible undermining for purposes far beyond those proposed in the exemption request. Once the technology is legally circumvented, the ability to limit the scope of the use of the circumvention may well be impossible, thereby undermining the

whole system. Given that there are existing and potential marketplace alternatives to provide for the uses cited in the requests to enable easy playback of “clip” portions of CSS protected audiovisual content, there is no basis to grant the requests, and DVD CCA requests that they be denied.

Proposed Class: Works Containing Navigation Controls that Prevent Skipping of Commercial or Other Introductory Material

Initial Round Submission Controls:

2

Summary of Argument:

The Libraries request an exemption to permit circumvention of navigation controls that they allege do not permit the viewer to skip advertisements or copyright warnings in prerecorded DVDs.

Facts and Argument:

Permitting an exemption for the purpose of allowing the users of DVDs to skip advertisement or copyright infringement warnings is not a new issue to the 1201 rulemaking proceeding. In the last triennial proceeding, there were requests for exemptions for “audiovisual works released on DVD that contain access control measures that interfere with the ability to defeat technology that prevents users from skipping promotional materials.”

After conducting a full inquiry on this very issue, the Copyright Office denied the request and concluded:

The technology which deactivates the fast-forward function of DVD players (UOP blocking)⁵ does not appear to be an access control. Nor does the record show that the CSS, an access control used on motion pictures on DVDs, prevents the deactivation of UOP blocking. Therefore, an exemption does not appear warranted since it does not appear that access controls are preventing users from fast-forwarding on DVDs. Moreover, although the objections to DVDs which have the fast forwarding feature disabled with respect to advertising are understandable, the problem appears to be no more than *de minimis* and a mere inconvenience experienced with an unknown—but apparently small—quantity of available DVD titles.⁶

DVD CCA had at the time advised the Office that there was no requirement associated with CSS (or its license and specifications) that prevents consumers from fast-forwarding through advertisements placed before the feature film on a DVD. As CSS plays no part in such advertising, DVD CCA had urged the Office not to authorize circumvention of CSS as a means of enabling the skipping of advertisements placed on DVD video discs. The facts that the Office considered then in the last rulemaking remain the same today, and in that regard, DVD CCA reiterates the points made in the 2003 proceeding that there is nothing about CSS or its associated license-based requirements that relates to the navigation control functioning or alleged prevention of modifications to their functioning. It is therefore DVD CCA's position that there is no basis to disturb the conclusions drawn by the Office in the last proceeding.

In the current proceeding, the Libraries have not provided any additional or new evidence that would warrant the Office drawing any conclusions contrary to its

⁵ “User operation prohibition” (UOP) is a form of digital rights management employed on DVD video, which prohibits users from performing certain actions, such as forwarding through movie previews or the FBI warning on DVDs.

⁶ See 68 Fed. Reg. 62015-6 (Oct. 31, 2003).

original conclusions, *i.e.*, the Libraries have not shown that the problems are caused by CSS or, in any event, are anything other than *de minimis*. To the extent that is any problem at all, DVD CCA reiterates that there are products in the market that enable teachers to play back clips from CSS protected discs starting at predetermined locations on the discs, without including any objectionable advertising along with the compilation.

Proposed Class: DVD Discs Coded for Playback in a Region Other Than the United States

Initial Round Submissions:

2

Summary of Argument:

The Libraries add that there should be an exemption to permit circumventing region coding because it may prevent teachers from showing parts of a foreign film.

Facts and Argument:

Again, region coding is not a new issue for the Office either as in the last proceeding, as well as in the very first triennial proceeding in 2000, numerous submissions have complained about region coding. There is no more basis now than previously to grant this request.

In the last rulemaking, the Office concluded:

Many motion pictures distributed on DVDs are ‘region coded.’ A region coded DVD may only be played on a DVD player that is set to play DVDs bearing the code for a particular region of the world. Proponents of an exemption included individuals who had acquired DVDs from a region outside the U.S. and then encountered difficulty in playing those DVDs on devices purchased in the U.S. Because such consumers have a number of options that will permit them to view such region coded DVDs, the need for an exemption

that would permit circumvention of region coding has not been demonstrated.”⁷

DVD CCA believes the same reasoning is applicable to the instant class proposed by the Libraries and therefore region coding cannot be the basis to grant the requested exemption. First, the available options identified in the last rulemaking proceeding are even more abundant now. Thus, region coding is less of a “problem” now than it was before. Second, as previously discussed, the marketplace is already addressing the underlying concern articulated by the libraries. Consumer electronic manufacturers are marketing devices that facilitate the ability of teachers to play back clips of discs, and digital right management technologies offer new means of permitting

⁷ See 68 Fed. Reg. 62016 (Oct. 31, 2003). At the time, DVD CCA noted that DVD playback equipment licensed for CSS must respond to a regional playback code that the content owner may, but is not required to, set in the content. DVD CCA further noted that the Librarian concluded in the 2000 rulemaking that regional coding serves a legitimate purpose as an access control measure. Specifically, the Librarian found that region coding allows a copyright owner to protect its exclusive right of distribution. In addition to permitting the content owner to divide its distribution right geographically (i.e., the content owner may grant different licensees the right to distribute the work in particular regions of the world), region coding also permits content owner to choose the sequence and overall timetable for the various channels in which its copyrighted content will be distributed.

DVD CCA also argued that even assuming, *arguendo*, that the Copyright Office were inclined to grant an exemption for the purpose of avoiding region code-based playback restrictions, it would be improper to grant an exemption to circumvent CSS itself. The region code playback system is implemented by individual product manufacturers; each is required to devise its own robust means (i.e., means that are difficult to “hack” in order to defeat the functionality) of playing back only those pieces of content encoded with regions that match a particular product’s region code. Thus, authorizing the circumvention of various robust methods raises complex issues, for example, some of the technologies used to provide the robust region code playback may be used in other contexts for other copyright protection related purposes. Thus granting an exemption for region coding could cause unanticipated adverse effects on the use of the robustness methods used by some manufacturers for region code playback control purposes.

the types of uses proposed without exposing the entire work to other uses that could expose the work to piracy. Again, DVD CCA urges those seeking these exemptions to propose constructive technologically based protection approaches to these issues, including entering into discussions with DVD CCA itself.

Proposed Class: Derivative and Collective Works Which Contain Works in the Public Domain

Initial Round Submissions:

5

Summary of Argument:

Professors from the University of Pennsylvania (“the Professors”) request an exemption for “derivative and collective works which contain audiovisual works that are in the public domain and that are protected by technological measures that prevent their educational use.” According to the Professors, content owners are increasingly re-releasing, on DVD, audiovisual works that have entered into the “public domain,” as part of a compilation set that includes added features such as commentary. Because these added features, along with any other original work included in the compilation, are often still protected by copyright, the content owners are permitted to employ CSS on the DVD as a whole, including the portions of the DVD containing the public domain work. Consequently, the CSS access control system employed on such DVDs restrict the ability of teachers, in this case, to form clip compilations of the “public domain” content for educational use.

Facts and Argument:

In the 2003 triennial rulemaking, the Copyright Office considered proposals requesting exemptions for “public domain works or works distributed without restriction.” After reviewing the evidence, the Office denied the exemption.⁸

DVD CCA notes that unlike the proponents in the last proceeding, who proffered a list of audiovisual works that allegedly were part of the proposed class, the proponents in the instant proceeding have merely offered one example of a work in their proposed class. DVD CCA maintains that as a threshold matter, the proponents must make an evidentiary showing of more than one work in the proposed class.

Even assuming *arguendo* that the proponents could identify other works that belonged to the putative class, the class must be rejected.

DVDs have made particular works more available rather than less. For example, Treasures from the American Film Archives, would not be available to consumers “but for” the DVD medium and its success in the marketplace. As the Professors note the underlying works contained in the collective work were pulled from 18 different archives and “but for” the release of the archived content on DVD, the eleven hours of footage would not be readily available.

More importantly, compilations and derivative works are entitled to DMCA protection as they too constitute works protected under Chapter 17. The Libraries have not articulated how the equities should be balanced for permitting an exemption to circumvent CSS for accessing a work that is in the public domain and at the same time leaving the overall compilation unprotected.

⁸ See 68 Fed. Reg. 62015 (Oct. 31, 2003).

Consumer Uses of DVDs

A number of submissions request exemption for all content distributed on prerecorded DVDs protected using CSS, for various purposes. For purposes of this response, the proposed exemptions discussed in this section are grouped together as they reflect general exemptions premised on consumers' (or other individuals') use of DVDs. They include consumers (1) making "backup" copies of DVDs; (2) playing DVDs on Linux operating systems, and (3) copying all copyright protected work.

General Objections:

1. These proposals constitute impermissible "use-base exemptions" (i.e., the proponents justify their requested exemptions on the grounds that the proponent wishes to make a specific use of the content on the DVD) and, hence, each of the requested exemptions identifies some use to be made by the consumer that justifies the request for exemption from the circumvention prohibition found at Section 1201(a). Consequently, DVD CCA believes that these requested exemption should be rejected as not identifying a proper "class of works" as required by the statute.

2. No matter how earnest or well-intended the proponents may be in their advocacy for these broad exemptions, DVD CCA finds it simply not acceptable to meet the proponents concerns permitting CSS to be "hacked" for the various uses suggested by the proponents. The reality is that once a hacker is given an exemption, even for a limited purpose, it would become impossible to control or predict future hacks of CSS or to distinguish between "permitted" hacks and those that would remain unlawful. In short, even what are characterized as "limited exemptions" will essentially render CSS ineffective as a means of protecting copyrighted content generally.

3. Given the strong public policy interest in allowing content owners to protect their works and the integral role that CSS plays in regard to content in the DVD video format, DVD CCA respectfully requests that the Copyright Office reject the requested exemptions. It is clear, as the Copyright Office found in its 2003 triennial rulemaking, that “the DVD medium has increased the availability of motion pictures . . . to the general public.” DVD CCA submits that this public benefit—which is supported by the use of CSS and its attendant legal protections against circumvention under the DMCA—far outweighs the benefit of the “use base exemptions” sought by the proponents. DVD CCA further suggests that to the extent that any of these proponents are unhappy with the anti-circumvention provisions of the DMCA, it would be more appropriate for them to properly petition Congress to change the law rather than to attempt to use a narrow regulatory proceeding to achieve their goals – particularly, when those ends are likely to jeopardize the lawful rights of content owners.

Proposed Class: Making Backup Copies of DVDs for Personal Use.

Initial Round Submissions:

9	10	11
15	16	20
22	27	33
35	38	44
50	51	65
70	73	

Summary of Argument:

Chief among these proposed exemptions was a general exemption for making “backup” copies of audiovisual works and sound recordings for personal use.⁹ According to these proponents, such an exemption is warranted because (1) DVDs are prone to damage and “wear and tear” and (2) copies of DVDs are necessary in order to play a DVD in several places and platforms at once (i.e., at home, in car DVD players, laptops, personal media devices).

Facts and Argument:

DVD CCA incorporates and renews general objections 1 through 3 identified above, and it further states the following:

Not surprisingly, the Office in the 2003 triennial rulemaking, considered proposals requesting exemptions for “audiovisual works embodied in media that are or may become inaccessible by possessors of lawfully-made copies due to malfunction, damage, or obsolescence.” The Office noted

“In the case of audiovisual works on DVDs, the proponents desire to make backup copies of their DVDs for a variety of purposes: They claim that DVDs are inherently fragile and subject to damage; they are concerned about loss or theft of the original during travel; they wish to duplicate collections to avoid the burdens and risks of transporting DVDs; they assert that some titles are out of print and cannot be replaced in case of damage; and they claim that the duration of a DVD's lifespan is limited. The Register concludes that the proponents have not made the case

⁹ See comments # 9, 10, 11, 15, 16, 20, 22, 27, 33, 35, 38, 44, 50, 51, 65, 70, and 73. The majority of the comments are non-substantive and do not explain how the proposed exemption constitutes a non-infringing use.

with respect to fragility of DVDs, nor have they shown that the making of backup copies of DVDs is a noninfringing use.”¹⁰

DVD CCA believes that conclusions that the Office drew from the evidence in the last proceeding are still applicable to the instant proposed exemption, as no proponent has put forth any evidence that addresses these concerns.

Proposed Class: Playing DVDs on the Linux Operating System.

Initial Round Submissions:

12
13
14
19
24
32
39
41

Summary of Argument:

These submissions have requested exemptions for technology that allows DVDs to be played on Linux operating systems.¹¹ According to these proponents, legally purchased DVDs do not play on Linux operating systems because manufacturers of Linux do not include software that makes it possible to view encrypted DVD movies.

Facts and Argument:

DVD CCA incorporates and renews its general objections 1 through 3 identified above, and it further states the following:

In the 2003 triennial rulemaking, the Copyright Office considered proposals requesting exemptions for “audiovisual works, including motion pictures, the

¹⁰ See Federal Register: October 31, 2003 (Volume 68, Number 241) at 62015.

¹¹ See Comments # 12, 13, 14, 19, 24, 32, 39, and 41.

DVD copies of which are tethered to operating systems that prevent rendering on alternative operating systems.” The Copyright Office denied the request finding that:

Because there are a variety of devices that will play DVDs, the inability to play a DVD on a particular device or with a particular operating system is simply a matter of preference and inconvenience. Persons wishing to play CSS-protected DVDs on computers with the Linux operating system have the same options that other consumers have. As a general proposition, the DVD medium has increased the availability of motion pictures for sale and rental by the general public, and the motion picture studios’ willingness to distribute their works in this medium is due in part to the faith they have in the protection offered by CSS. The balancing of the incremental benefit of allowing circumvention for the purposes of watching a movie on a Linux-based computer is outweighed by the threat of increased piracy that underlies Congress’ motivation for enacting section 1201.¹²

During that rulemaking, DVD CCA advised the Copyright Office that because CSS is licensed royalty-free on reasonable and non-discriminatory terms to a variety of manufacturers, there is nothing to prevent Linux manufacturers from obtaining a CSS licenses so as to satisfy the supposed demand from Linux users for such product. Moreover, DVD CCA understood that there are Linux implementations of CSS available. In this proceeding, DVD CCA points to at least two Linux operating system based playback products whose producers are licensed by DVD CCA – a company called Video Without Borders offers the MediaREADY 5000 Media Center¹³ and "Express Media" and “Qosmio Media Player” included in Toshiba’s *Satellite* and *Qosmio* PCs, respectively. Both Express Media and Qosmio Media Player allow the PC to act as a

¹² See Federal Register: October 31, 2003 (Volume 68, Number 241) at 62017.

¹³ More information about the product and its Linux operating system can be found at <http://www.vwbinc.com/pdf/MR5000%20Brochure%205-10%20web.pdf>.

DVD player when it is otherwise powered down and closed. These devices employ a Linux operating system and a Linux player. Hence, these products not only demonstrate that manufacturers and providers of Linux players can obtain CSS licenses and produce compliant players, but also there are currently available Linux-based players from CSS licensees.

Finally, DVD CCA maintained that even if there were no such implementations available, the Copyright Office should not grant an exemption to hack CSS simply because some consumers may desire a product that, for a variety of reasons, may not be available as yet in the marketplace. This argument remains the same today, and accordingly, DVD CCA renews it.

Proposed Class: All Copyrighted Works.

Initial Round Submissions:

47
58
60
61
62
64

Summary of Argument:

These submissions made almost entirely by individual members of the public requested broad exemptions for “all” copyright protected work.¹⁴ They contend that once a consumer purchases a copyright protected work, they should have the “right” to make any use of the work.

Facts and Argument:

DVD CCA incorporates and renews general objections 1 through 3 identified above, and it further states the following:

In the 2003 triennial rulemaking, the Copyright Office considered proposals requesting broad exemptions for “all works.” In the final ruling, the Copyright Office denied the request and issued the following statement:

Many comments declined to specify a ‘class of works’ and instead designated the ‘class’ to be exempted as ‘all works.’ Because the proponents of an exemption for ‘all works’ have utterly failed to propose ‘a particular class of copyrighted works,’ but have simply asked, in effect, for a blanket exemption for all works--in effect, an administrative abrogation of section 1201(a)(1)--these proposals must be rejected.”¹⁵

DVD CCA believes that the conclusions drawn in the last proceeding are still applicable to the instant proceeding. As early as the first triennial rulemaking in 2000, DVD CCA made clear that the CSS technology was developed and is utilized to provide security for the high-value copyrighted audiovisual content that is made available

¹⁴ See Comments # 47, 58, 61, 62, and 64. The proponent in Comment No. 58 goes so far as to suggest that all copyrighted work should be exempted from the prohibitions once the has been made available for purchase for more then one year.

¹⁵ See Federal Register: October 31, 2003 (Volume 68, Number 241) at 62014.

to consumers in the DVD format. The reality is that the motion picture industry would not have released such high-value content without certain assurances that it would be protected from copying and redistribution. Likewise, it is unlikely that consumers will benefit from future releases of audiovisual works on DVD if protections do not remain in place, and unless those protections are enforced by federal law. That was the basis and reasoning behind the inclusion of Section 1201 into the DMCA and it remains relevant today.

III. Complaints About the Rulemaking Process Filed

Additionally, the Video Software Dealers Association (Comment 43) and the Computer and Communication Industry Association and Open Source and Industry Alliance (Comment 8) filed comments expressing opposition to the Notice of Inquiry's submission requirements. DVD CCA believes that these comments do not warrant any change by the Copyright Office in the standards used in this proceeding, for the reasons that the Copyright Office has given in response to similar complaints in the prior proceedings and that the Copyright Office set forth in its notice initiating this proceeding. Specifically –

- The Video Software Dealers Association argues that it is “erroneous to consider exemptions solely through the prism of whether a given work to which a person is improperly denied access is nevertheless available in some other form.” They maintain that the law is not intended to allow “copyright holders to gain control over noninfringing uses of the physical media owned by others and upon which their works are recorded, merely because they could point to the availability of other copies or phonorecords containing the same work, perhaps at a premium

price or in a less convenient format.” Accordingly, rather than requiring submission to define “classes” of works, the rulemaking should seek to identify classes of works “characterized by the use of a particular technological device by a copyright owner to impose a non-existent right of private performance.”

- Computer and Communication Industry Association and Open Source and Industry Alliance argue that the Notice of Inquiry “employs an erroneous burden of proof.” The Notice of Inquiry requires that the determination “to exempt a class of works from the prohibition on circumvention must be based on a showing that the prohibition has or is likely to have a substantial adverse effect on noninfringing uses of a particular class of works.” They argue that the Notice of Inquiry’s burden of proof standard is too high and a lower “substantial evidence” standard should be applied.
- In the 2003 final ruling, the Copyright Office addressed similar criticism against the burden of proof standard and issued the following statement:
 - “Use of the term ‘substantial’ does not impose a ‘heightened’ requirement; it imposes the requirement found throughout the legislative history, which is variously stated as ‘substantial adverse impact,’ ‘distinct, verifiable, and measurable impacts,’ and more than ‘de minimis impacts.’ As is apparent from the dictionary definition of ‘substantial,’ and the Supreme Court’s treatment of the term (e.g., in its articulation of the substantial evidence

rule), requiring that one's proof be 'substantial' simply means that it must have substance.”¹⁶

In its October 3 notice of the current rulemaking, the Copyright Office also discussed in detail its position on the burden of proof standard and other standards applicable to the rulemaking. *See* 68 Fed. Reg. at 57528-9.

DVD CCA endorses the Copyright Office's statements in the 2003 rulemaking and its reiteration of these points in the 2005 notice and urges the Office to maintain those standards in its rulemaking process.

In conclusion, for all the reasons stated above DVD CCA urges the Copyright Office to reject the proposed classes. DVD CCA would be happy to provide further detail about its views and to answer any question that may arise from this submission.

Respectfully submitted,

DVD Copy Control Association

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¹⁶ *See* Federal Register: October 31, 2003 (Volume 68, Number 241) at 62013.