Before
The Copyright Office
Library of Congress

In the Matter of	)	
	)	
Exemption to Prohibition on	)	Docket No. RM 2005-11
Circumvention of Copyright Protection Systems	)	
For Access Control Technologies	)	

Comments of Bill D. Herman, Ph.D. Candidate,
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I. Supported Classes of Work for Exemption, both via Comment #5

Class One:
Audiovisual works included in the educational library of a college or university's film or media studies department and that are protected by technological measures that prevent their educational use.

Class Two:
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.

II. Summary of Argument

I am writing to provide two additional legal arguments in support of these proposed exemptions. First, I argue that the forthcoming alleged disadvantage of increased risk of infringement is simply untrue. There is no causal connection between granting an exemption for any (or even for all) motion pictures on CSS-encrypted DVDs and creating an elevated risk of infringement. Second, I argue that the Register should consider only those threats that arise from circumvention of CSS to gain unauthorized access to motion pictures on DVD. CSS, though nominally an access-control measure and therefore subject to protection under 1201(a), is primarily valued as a use-control measure, and circumventing use-control measures is legal.

Here, I urge the Register to begin using her open-ended statutory authority embodied in 17 U.S.C. § 1201(a)(1)(C)(v) to begin to solve the problem of dual-use technologies.

III. Introduction

I am writing in support of both exemptions proposed in Comment #5, submitted by Peter Decherney, Michael X. Delli Carpini, and Katherine Sender of the University of Pennsylvania.[1] I am a Ph.D. Candidate at the Annenberg School for Communication, University of Pennsylvania, but my views are my own and in no way representative of the Annenberg School, the University, or any of the above-named individuals.

I respect the Register of Copyrights, Hon. Marybeth Peters, for her expertise on issues of copyright law and for her career-long service in the Copyright Office. I nonetheless hold serious reservations about the efficacy of this rulemaking, and I believe that Ms. Peters still has every right and responsibility to improve its ability to restore balance to Title 17. Dr. Oscar H. Gandy, Jr. and I recently completed what will soon become perhaps the first published systematic study of the submissions and rulings of this triennial rulemaking.[2] The paper, "Catch 1201: A Legislative History and Content Analysis of the DMCA Exemption Proceedings," will be published in the next issue of *Cardozo Arts & Entertainment Law Journal*. In the meantime, the most recent draft is available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=844544.

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[1] Peter Decherney, Michael Delli Carpini, and Katherine Sender, 2006 Comment, at: http://www.copyright.gov/1201/2006/comments/decherney_upenn.pdf.

[2] Bill D. Herman & Oscar H. Gandy, Jr., *Catch 1201: A Legislative History and Content Analysis of the DMCA Exemption Proceedings*, 24 CARDOZO ARTS & ENT. L.J. (forthcoming 2006), *available at*: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=844544. (hereinafter, "*Catch 1201*")

In that paper, we conclude in part that the Register of Copyrights has wrongly refused to provide relief to those who are negatively affected by the continued applicability of 1201(a)(1) to DVDs encrypted by CSS. This is part of a broader conclusion, "that the Register has constructed a venue that is hostile to the interests of noninfringing users; in light of congressional rhetoric to the contrary, this constructs a catch-22 for many who earnestly wish to engage in otherwise legal activities."[3]

I am writing today to provide additional legal argumentation in support of the two proposals by Decherney, Delli Carpini, and Sender. Having studied the last two proceedings in depth, I have concluded that Peters is especially likely to reject one or both of the classes proposed in comment number five due at least in part to the supposed risk of infringement. I hope that the two legal arguments contained herein will give her pause before making such a recommendation to the Librarian of Congress.

IV. No Increased Risk of Infringement

First and foremost, I urge the Register to weigh only the infringement that will uniquely occur as a result of any proposed exemption for motion pictures on CSS-encrypted DVDs, which is almost exactly none whatsoever. Gandy and I discuss this in "Catch 1201," where we say, for instance:

> For those who would circumvent a TPM en route to committing an infringement of copyright law, the additional dissuasive power of [17 U.S.C. § 1201(a)(1)] is virtually nonexistent. Yet this elephant stands boldly in the rulemaking's living room. Surely the

[3] *Id*. at 1-2.

Register and almost everybody else involved has noticed its presence. Yet the charade proceeds."[4]

Peters' response to Ernest Miller's 2003 comment,[5] available at http://www.copyright.gov/1201/2003/comments/021.pdf, is particularly instructive. Miller writes a carefully reasoned proposal to exempt "[a]ncillary audiovisual works distributed on DVDs encrypted by CSS."[6] Miller insists that, just as the Register can only consider adverse effects on noninfringing users that are directly attributable to the basic ban, she can also only consider the negative effects on content production that are directly attributable to a proposed exemption from the basic ban. Because she is unable to make a ruling affecting either trafficking ban, "any harms that flow from the existence of circumvention devices cannot be considered."[7]

Despite this obvious statutory mandate, Miller claims, the Register's 2000 dismissal of the proposal to exempt audiovisual works on DVDs is defended in part based on the prior existence of DeCSS, a tool for circumventing CSS.[8] I believe it is well beyond her statutory mandate, which permits her only to examine the negative impacts of exemptions to the basic ban.[9] It also appears to be in disregard of the rulemaking's inability to provide "a defense in any action to enforce any provision of this title other than this paragraph,"[10] despite Peters' explicit

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[4] *Id*. at 82.
[5] Ernest Miller, 2003 Comment, at http://www.copyright.gov/1201/2003/comments/021.pdf.
[6] Letter from Marybeth Peters, Register of Copyrights, to James H. Billington, Librarian of Congress, at 115 (Oct. 27, 2003) [hereinafter 2003 Recommendations], at http://www.copyright.gov/1201/docs/registers-recommendation.pdf.
[7] Miller, *supra* note 5, at 18.
[8] *Id*. at 18 (citing Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies: Final Rule, 65 Fed. Reg. 64,556, 64570 (Oct. 27, 2000)).
[9] 17 U.S.C. § 1201(a)(1)(C)(iv) (stating that the rulemaking must consider, as one of five factors, "the effect of circumvention of technological measures on the market for or value of copyrighted works").
[10] 17 U.S.C. § 1201(a)(1)(E) (2004).

reference to this inability at a later point in her 2003 recommendations.[11] Miller uses this demand that the rulemaking set aside all concerns resulting from the trafficking in circumvention devices—as well as from infringing circumventions, which would also not be protected—to build a strong case that his proposed exemption will have virtually no negative impact on the value of copyrighted works:

> The exemption will only apply to noninfringing uses of the ancillary materials on lawfully acquired DVDs. If an individual infringes on the copyright of the ancillary materials, the exemption does not apply. If the individual trafficks [sic] in a circumvention device, the exemption will not apply to that act. For the motion picture studios to prevail in this rulemaking, they will have to make a showing as to why the act of circumventing access control devices for noninfringing uses of physical media, lawfully acquired, is harmful to the value of or market for their works. This they cannot do.[12]

This demand for hard proof of measurable negative impacts from the proposed circumvention is simply never met. Quite the contrary, the movie industry's response pretends that the value of CSS generally stands as a counterargument to granting the proposed, narrow exemption. Their reply comment proudly cites the Register's 2000 conclusion "that 'the availability of access control measures has resulted in greater availability of these materials,' and this remains the case today. Indeed, many of these [ancillary] works would never have been created but for the prospect that they would be distributed on a DVD protected by CSS."[13] This argument that CSS

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[11] 2003 Recommendations, supra *note* 6, at 196.
[12] Miller, *supra* note 5, at 19.
[13] Steven J. Metalitz & Eric J. Schwartz, 2003 Reply Comment, at 36 (Feb. 20, 2003) [hereinafter Metalitz & Schwartz 2003 Reply Comment], at http://www.copyright.gov/1201/2003/reply/023.pdf.

is important in general is not necessarily a reason to dismiss a narrowly defined exemption from the basic ban.

In opposing Miller's proposed exemption, Peters perpetuates the artificial connection between an exemption for noninfringing uses and broader threats of piracy. Specifically, she concludes, "Given the risks of unauthorized reproduction and distribution over the Internet, it is obvious that a compelling case would have to be made in order to outweigh the potential adverse effects."[14] The word "risk" here is absolutely crucial, because it acknowledges that this argument relies upon some *potential* piracy that is *not* happening today but could occur *due to an exemption*. This is crucial because no such risk exists. Neither the Register nor the movie industry has even hypothesized (let alone proven) that there are people who are willing to violate a copyright holder's exclusive right of reproduction but unwilling to violate Section 1201(a)(1). Nobody has made this claim because it is obviously untrue.

As a relatively young person on a major college campus, I can and do learn with ease whether, where, how, and why young people do or do not commit copyright infringement. As a student of the causes and effects of copyright law, I have taken advantage of this ability at every possible opportunity. After an informal survey of literally hundreds of people, I am exceptionally confident that the threat of legal sanctions from Section 1201(a)(1) has prevented almost exactly zero acts of infringement enabled by CSS circumvention. Either people are dissuaded by the knowledge that infringement is illegal or they are not; in the latter category, not one single person has, even when asked specifically, mentioned even the slightest *additional* concern about their violating Section 1201. Despite the Register's stubborn refusal to exempt any class of motion pictures on DVDs, countless Americans circumvent CSS en route to committing

[14] 2003 Recommendations, *supra* note 6, at 118.

wholesale infringements of DVDs. Not one who refuses to commit infringements does so because she would break the law by circumventing CSS; they do not infringe motion pictures on DVD because they respect their understanding of copyright law as it stood even before the DMCA.

For the Register to reject a proposal for which there is substantive evidence[15] of harm to noninfringing uses based on the "risk" (again, *her* word) of an increased level of infringement, it stands to reason that there should be at least some evidence on the record that such a risk is uniquely linked to the choice to grant or not grant an exemption. Instead, her 2003 Recommendations letter simply does not even acknowledge that Miller has made the argument against the claim of infringement. If her 2006 Recommendations letter again fails to recommend any exemptions for motion pictures on DVDs due even in part to the threat of infringement, despite the motion picture industry's near-certain continued inability to substantiate the claim that infringement will uniquely increase due to those proposed exemptions, she will substantially undercut the credibility of these proceedings.

Additionally, allow me to preempt one likely response to this argument, which is to reiterate that proponents face the burden of proof. It is true that the presumption is against any proposed exemption, but this is not the same thing as a free pass for exemption opponents on any claim they would like entered into the record as if it were irrefutable truth. Proponents must

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[15] On the level of proof versus the level of impact that must be proven, see Herman & Gandy, *supra* note 2, *at* 55-62. For instance:

> Peters transposes the notion of substantiality from one context (level of proof) to another (level of impact) in order to create the illusion that proponents must prove a substantial adverse impact. The Commerce Committee report can reasonably be read to require substantial proof—distinct, verifiable, and measurable impacts. But the category of "adverse impacts that are not de minimis" is hardly coextensive with the category of "substantial adverse impacts."

Id. at 58.

prove some meaningful degree of adverse impact due to the ban on circumvention. They do not have to disprove any claim that opponents might conceivably make, especially considering that oral testimony is their first, last, and only chance to do so.

In a civil infringement suit, plaintiffs bear the burden of proving that an act of unauthorized reproduction has occurred. Yet both the motion picture industry and the Register of Copyrights will agree that, in such a suit, a defendant cannot simply allege that an otherwise infringing use is a fair use. Rather, a defendant must demonstrate in some acceptable fashion (i.e., prove) why the use is fair. It would be totally unacceptable for a defendant in that situation to talk at length about the value of fair use but provide no detail whatsoever to substantiate the claim that the particular use in question was indeed fair. Likewise, in this proceeding, once some substantive adverse impact has been adequately demonstrated, the Register simply cannot give the motion picture industry a free pass on the claim that, because infringement generally is bad (and because so much of it is occurring these days), the proposed exemption should be denied. Enjoying presumption in general is not the same thing as enjoying the right to make unsubstantiated claims—in a court of law or in this proceeding.

V. The ability of CSS to prevent unauthorized uses should be irrelevant

Next, I strongly urge the Register to weigh only the threat of infringement that is uniquely tied to unauthorized access of motion pictures on CSS-encrypted DVDs. In other words, I strongly urge the Register to consider the "dual use" status of CSS in weighing these or any proposed exemptions. This problem arises from Section 1201's preferential treatment of protection measures that control access relative to those that prevent unauthorized uses, e.g. copy

controls. By preventing circumvention of the former but not the latter, the statute creates an incentive for copyright holders to deploy protection measures that prevent both unauthorized access and unauthorized uses; circumventing those measures, even to make fair use of a legally acquired media product, then becomes banned under 1201(a)(1) unless otherwise exempted.

In the 2000 Ruling,[16] Peters contends that she is prohibited from solving the dual use problem, yet she acknowledges the need to address this issue. As she explains:

> The merger of technological measures that protect access and copying does not appear to have been anticipated by Congress... [N]either the language of section 1201 nor the legislative history addresses the possibility of access controls that also restrict use. It is unclear how a court might address this issue. It would be helpful if Congress were to clarify its intent...[17]

It would also be helpful, of course, if Ms. Peters were to rectify this problem to the extent that nominal access controls, as built into dual purpose technologies primarily valuable for their capacity to prevent unauthorized copying, have been used in legal venues to leverage 1201(a)(1) protection onto said controls.

CSS is the textbook example of a dual use technology. It serves minimal obstacles to unauthorized access, as many DVD players on the market today will play DVDs of any region coding and many more can be "unlocked" via the remote control. Further, if one pours through the arguments of the motion picture industry as presented in the previous two rulemakings (as well as the Register's rejections of all proposed exemptions for CSS-encrypted films), the concern is that people in the US will circumvent Region 1 DVDs to which they have gained

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[16] Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies: Final Rule, 65 Fed. Reg. 64,556 (Oct. 27, 2000) [hereinafter 2000 Ruling], available at http://www.copyright.gov/fedreg/2000/65fr64555.pdf.

[17] *Id*. at 64,568.

otherwise lawful access. Peters implicitly acknowledges this in 2003 when refusing to grant Ernest Miller's proposed exemption, in part due to "the risks of unauthorized reproduction and distribution."[18] Witnesses rarely if ever mention the risk of arbitrage, and this reasoning has not historically been part of Peters' reasoning. The concern they express is that the copy-controlling aspects of CSS will be compromised, and circumventing copy controls remains legal and was intended to be protected by Congress, which (as Peters notes) did not foresee the dual use problem.

The statute gives the administrators of this hearing wide latitude in determining how to proceed, which is best exemplified by the fifth category of evidence to be considered. "In conducting such rulemaking, the Librarian shall examine … such other factors as the Librarian considers appropriate."[19] The Librarian of Congress has, appropriately, delegated most of the work of the hearing to the US Copyright Office generally and the Register of Copyrights specifically. If the Register identifies a relevant class of issues that are not captured by the first four factors, then she is statutorily bound to admit them into consideration. In the dual use problem, however, he has refused to admit into consideration a problem that she herself as identified as regrettable, deferring to Congress to clarify its intent. Yet she herself has stated that Congress had exactly zero foresight into this problem; Congress therefore has no intent to clarify. The statute itself is perfectly clear, however, on what it intended the rulemaking to consider, and this explicitly includes a fifth category for relevant factors as determined by those overseeing the proceedings. For the Register to state, as in the 2000 Ruling, "it would be imprudent to venture too far on this issue in the absence of congressional guidance,"[20] should not

[18] 2003 Recommendations, *supra* note 6, at 118.
[19] 17 U.S.C. § 1201(a)(1)(C)(v).
[20] 2000 Ruling, *supra* note 16, at 64,568.

be the reaction of a delegate who has been given reasonable power to solve this problem in the context of CSS. Congress gave her ample leash to determine that dual-purpose protection measures, if valuable primarily for their ability to prevent unauthorized uses, are worthy of less protection in the face of substantive adverse impacts.

In the first two rulings, the fifth category of admissible evidence is virtually unused. Combined with Congressional refusal to protect use-controlling protection measures, the fifth category can easily be read as Congressional intent that the overseers of this proceeding feel free to fix these types of problems. In any case, they are certainly permitted by the statute, and I urge them to do so generally and in response to Comment 5 specifically.

VI. Conclusion

The comment by my fellow Penn scholars provides compelling evidence that there is some substantive erosion in academics' rights to make noninfringing uses of films on CSS-encrypted DVDs. Those who oversee this ruling may well conclude that one of the proposed classes is not properly defined and that the only means of rectifying the problems identified would be to exempt all CSS-encrypted motion pictures. Even in such an extreme case, the current record justifies such an exemption; those who would oppose an exemption are not justified for the two above-described reasons. There is no *unique* threat of infringement that will come to pass *as a result of an exemption*. There is much infringement already, and nobody who currently does not infringe films on DVDs out of respect for Section 106 will feel free to begin breaking that law merely because Section 1201(a)(1) no longer applies. Even if there is a threat of infringement, those who administer this proceeding are ignoring their statutory mandate to

bemoan the dual-use problem but refuse to act upon it. Congressional intent is explicit: this rulemaking can consider all relevant factors, and the fact that nobody defends the ability of CSS to prevent unauthorized *access* could hardly be more relevant. Even if there is a threat of infringement, this is not due the failure of CSS to prevent unauthorized access, and the final ruling should acknowledge this fact by granting both exemptions.

Finally, please note that I wish to testify at the oral hearings in Washington, D.C. this spring.