**BEFORE THE COPYRIGHT OFFICE**
**LIBRARY OF CONGRESS**

**IN THE MATTER OF**
**EXEMPTION TO THE PROHIBITION OF CIRCUMVENTION OF**
**COPYRIGHT PROTECTION SYSTEMS FOR ACCESS CONTROL**
**TECHNOLOGIES**

**REPLY COMMENTS BY DAVID TYRRELL**

**In response to Comments #2 and #5**

**Classes of Work for Exemption**

*(1) Compilations consisting of lists of Internet locations blocked by commercially marketed filtering software applications that are intended to prevent access to domains, websites or portions of websites, but not including lists of Internet locations blocked by software applications that operate exclusively to protect against damage to a computer or a computer network or lists of Internet locations blocked by software applications that operate exclusively to prevent receipt of email.*

*(2) Computer programs protected by dongles that prevent access due to malfunction or damage and which are obsolete.*

*(3) Computer programs and video games distributed in formats that have become obsolete and which require the original media or hardware as a condition of access. A format shall be considered obsolete if the machine or system necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.*

*(4) Literary works distributed in ebook format when all existing ebook editions of the work (including digital text editions made available by authorized entities) contain access controls that prevent the enabling of the ebook's read-aloud function and that prevent the enabling of screen readers to render the text into a specialized format.*

*(5) Audiovisual works and sound recording distributed in digital format when all commercially available edition contain access controls that prevent the creation of clip compilations and other educational uses.*

*(6) Sound recordings or audiovisual works (including motion pictures) embodied in copies and phonorecords; computer programs or video games; or pictorial, graphic, or literary works or compilations distributed in formats protected by access controls that threaten privacy and security.*

**Summary of Argument**

The 4 exemption granted in the 2003 rulemaking should be renewed for several reasons. First, there has not been a change in the market that would require such a change nor have changes affected the value of the underlying classes of works. Further, if these exemptions are not renewed it will only lead to a perpetual cycle of denying an exemption for a period until the problem rises again and requires the exemption. This can and should be avoided by renewal of these exemptions.

There is also a need for 2 proposed exemptions to be put into effect. The exemption proposed in Comment 2 by the LCA and MLA and Comment 5 regarding clip compilations is necessary and important to the continued use of digital material in the educational setting. The use of clip compilations is becoming increasingly difficult in our digital world and requires that this rulemaking proceeding look to existing legislation on fair use in 17 U.S.C. §107 and educational uses in 17 U.S.C. §110(1).

Another proposed exemption is required in response to privacy and security threats recently discovered in access controls. Specifically, it must be understood that actions such as Sony's use of rootkit code in their Digital Rights Management is well beyond what is allowed by the DMCA for anti-circumvention technologies.

**Argument**

A. Renewal of existing exemptions

During the 2003 rulemaking proceeding four exemptions were granted. These four exemptions are necessary and must be renewed during the current rulemaking proceeding for several reasons. Foremost, these narrow and specific exemptions are necessary in order to allow some flexibility in the overbearing DMCA. Further, if any of

these exemptions are not renewed it will merely exemplify the control the industry asserts over this area of law.  The only instance in which any of these exemptions should not be renewed would be a strong showing that the market has clearly removed the technological restrictions placed on the protected content without any evidence that they will be initiated in the future.

Specifically, the first exemption granted dealing with compilations of filtering lists and the third exemption directed at software and games in formats that are obsolete were recommended during the first rulemaking proceeding in 2000 and renewed in the 2003 rulemaking proceeding.   Both of these exemptions should be renewed again because of their existence in both of the previous rulemaking proceedings.  If there was evidence to justify these exemptions before, the conditions in the market must change substantially in order for these to no longer be necessary.  It does not appear as if any market changes exist and therefore no reasons to assume that the exemptions will not be renewed.  Further, the exemption for dongles should also be renewed.  The dongle exemption and obsolete software exemptions are similar in that they both are based on the idea that they are no longer accessible because of the nature of the item.  Both of these should be upheld as valid exemptions.  Also, the exemption for ebook formatted works should also be renewed unless the market has changed so that the read aloud function is always accessible.  But, it could be that all new ebooks allow access to the read aloud function and some older ebooks exist without this feature.  If this is the case, then the exemption must be renewed because of the older ones, even if the market is moving to allowing access of current ebooks.

Overall, the current exemptions must be renewed. An important consideration here is to question the effects of one of the exemptions not being renewed. If this were to happen because of evidence of market remedies, then it could open the doors for abuse of this restriction by copyright holders. In turn, the users affected will argue in the next rulemaking proceeding to have the exemption. This could turn into a cyclical cycle where the rulemaking proceeding would not allow for the exemption to hold its ground and allow for only temporary relief from the prohibitions of the DMCA. This is a strong argument in support of renewing the existing exemptions and also for the need of legislation to make some of these exemptions permanent and outside the scope of the Copyright Office's discretion.

B. Requested Exemptions

In addition to the renewal of all existing exemptions there are several timely issues that give rise to the need for additional exemptions. First, an exemption should be granted for audiovisual works whose access controls prevent the creation of clip compilations. This exemption has been proposed by the Library Copyright Alliance (LCA) and Music Library Association (MLA) in Comment 2, the same group that was a driving force in passing the ebook exemption in 2003. First, the class of works for which the exemption is requested must be defined. In this case, the LCA has defined the class of works to include audiovisual works distributed in DVD format when all commercially available editions contain access controls that prevent the creation of clip compilations. The construction of the class of works is an important aspect of the request. For example, if the phrase "when all commercially available editions" were to be removed, then the exemption would most likely fail due to the provisions of the DMCA which require that

no reasonable alternatives exist for users of a specific format.  Therefore, by using this

phrase the LCA has clearly stated a class of works for which there are not clear

alternatives for, such as VHS.  This is an important consideration, especially where it is

clear that there are increasingly more releases on DVD only.

Going beyond the construction of the class of works, there are several very

important reasons that this exemption is appropriate for the rulemaking proceeding and

strong arguments for the Recommendation to include such an exemption.  First, this is

honing in on one of the roots of the copyright infringement exemptions and fair use.

Within the DMCA, it is acknowledged that educational purposes will be used in

determining what exemptions are appropriate.[1]  Also, an exemption exists for certain

performances and displays under 17 U.S.C. §110(1).  Specifically, classroom activities

are exempt from copyright infringement.  Further, the fair use doctrine also has

exemptions for the use of clip compilations for classroom use.[2]  Therefore, all of these

statutory provisions relay the strong intent in the legislature to protect educational uses.

Therefore, there are strong reasons to adopt such an exemption in the current rulemaking

proceeding.

In order to implement such an exemption it would require that education faculty

be allowed access to a program that would remove the Content Scrambling System (CSS)

protection employed by copyright holders.  The program to achieve such ends by

allowing access is appropriately named DeCSS.  The LSA contends that DeCSS is

currently available and would not become any more prevalent if this exemption is passed.

(Comment 2 at 6)   The availability of DeCSS in the status quo does not completely

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[1] *See* 17 U.S.C. § 1201(a)(1)(C)(ii) (2005).
[2] *See* 17 U.S.C. § 107 (2005).

provide access to all users of copyrighted works, because there is still a technical barrier

for the common user.  It also would act as a barrier to those who are exempt and wish to

use a clip compilation. This line of argument raises a noteworthy question; what happens

if the clip compilation exemption is passed?  In executing such an exemption it would be

necessary for DeCSS or a program enabled with DeCSS to be distributed to those who

whish to make a clip compilation.  This tool is prevented from being distributed under 17

U.S.C. 1201(a)(2).  It is clear that the exemptions granted by the rulemaking proceeding

apply to "acts" and not to tools.  This creates a difficult conflict in the DMCA.  How will

this be resolved?  The most effective way to deal with inherent barriers, such as this, will

be for legislation to pass to expand the scope of the rulemaking proceeding to include

exemptions to be granted for the prohibition of trafficking in circumvention tools.  This

legislation could be limited to only allow for tools that are necessary to allow for ordinary

consumers to take advantage of the exemptions.  This could mean that it would allow for

software with the specific intention of making it an easy process of creating clip

compilations.  Although this reasoning seems logical and necessary to allow for what was

once fair use, the current scope of this rulemaking proceeding limits the availability of

such options.

       A second area that is current and must be a strong topic of discussion at this years

hearings on the rulemaking proceeding is the issue of privacy and infrastructure.

Recently, it became apparent that Sony BMG had employed the use of XCP, a copy

protection, in many of their releases.  The XCP technology relied upon the use of what

hackers refer to as a "rootkit".  This rootkit enables the software to run undetected on the

most basic levels of the computer with nearly unrestricted access.  The rootkit threatens

security of a computer system by allowing any file to be hidden by simply affixing a prefix to the filename.  This allows for virus writers to use the kit to install and spread malicious code onto an "infected" computer.  Further, once the rootkit was discovered people attempted to remove it with the patch provided by Sony BMG only to have system failure after critical files were damaged.[3]

The "Sony incident" can be seen as one more way the industry is out of control.  This is just one form of copyright protection systems that have been escalating in scope and impact in recent times.  This rulemaking proceeding provides an avenue for the Copyright Office to make a statement that such overbearing use of technological measures to protect copyright will not be tolerated.

In response to this issue, there are many proponents for an exemption to deal with the impacts of such action.  Again, the LCA and MLA articulated an exemption for works whose access controls threaten privacy and security.  This exemption would need to define the class of works broadly to ensure that a Sony videogame, or any other work, is not released with similar software.  Also, even though this was released specifically as a copy control, the rootkit would allow for additional software to be installed to prevent access as well.  There is a strong argument that even though this is a copy control it will prevent use as well.  When a user knows of the potential harms that could be done, they will not use the item.  Therefore access is restricted by such measures.

Another important consideration when examining this exemption is the impact this had on the computer world.  The estimated number of people to be infected by the

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[3] *See Mark Russinovich & Bryce Cogswell, Sony's Rootkit: First 4 Internet Responds, (Nov. 6, 2005) available at http://www.sysinternals.com/blog/2005/11/sonys-rootkit-first-4-internet.html.*

rootkit is unknown, but some research would put the number in the millions.[4] Even when

an event as ugly as this has occurred the industry continues to support Sony's efforts.

The Recording Industry Association of America (RIAA) president Cary Sherman went so

far as to say that Sony has acted very responsibly.[5]   It is clear there is strong opposition

to the use of such measures and lawsuits have been filed against Sony.[6] Overall, this is

an appropriate time for the Copyright Office to make a statement that such action is not

only worth of an exemption but will not be tolerated in the future.

[4] *See* Mark Russinovich & Bryce Cogswell, *More on Sony: Dangerous Decloaking Patch, EULAs and Phoning Home*, (Nov. 6, 2005) *available at* http://www.sysinternals.com/blog/2005/11/more-on-sony-dangerous-decloaking.html.
[5] *See* Interview with Cary Sherman, President, Recording Industry Association of America (Nov. 18, 2005) *available at* http://www.cpwire.com/artman/publish/article_1212.asp.
[6] *See Nate Mook, Texas Sues Sony BMG Over CD Rootkit, BetaNews, (Nov. 21, 2005) available at http://www.betanews.com/article/Texas_Sues_Sony_BMG_Over_CD_Rootkit/1132596035.*