
PROPOSAL FOR A SPECIFIC EXEMPTION FROM PROHIBITION ON CIRCUMVENTION
OF
TECHNOLOGICAL MEASURES THAT CONTROL ACCESS TO A CERTAIN CLASS OF
COPYRIGHTED WORKS

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1. CLASS OF WORKS PROPOSED FOR EXEMPTION.

Audiovisual works as follows: foreign-language audiovisual works not available for sale in the United States but available for purchase outside the US on DVDs that are regionally encoded to prevent playback on DVD players purchased in the United States.

The exemption requested is to permit circumvention of the region coding mechanism.

(This is the only class of works discussed in this proposal.)

2. SUMMARY OF ARGUMENT.

Audiovisual works on DVD video discs currently are released with a "regional locking" mechanism that prevents discs manufactured in one part of the world from being played on DVD players or DVD-ROM drives sold in other parts of the world. This region coding functions as an access control as per subsection 1201(a)(1)(A). We argue that this access control causes substantial adverse impact on devotees and students of foreign cultures or languages since a significant quantity of foreign audiovisual material is available for purchase only on DVDs coded for use outside the United States. Specific markets are discussed and examples offered. Such individuals are forced to spend hundreds of dollars on specialized yet essentially redundant equipment in order to view the material they have purchased. The remedy proposed is to allow such individuals to circumvent the region locking mechanism on their DVD playback device for the purpose of noninfringing viewing of materials in

the exempted class.

The Library's reasons for rejecting such an exemption in 2000 are reexamined in light of marketplaces changes.

3. FACTS AND EVIDENCE IN SUPPORT OF AN EXEMPTION.

3.1. Review of the Library's reasoning for rejecting an exemption for region code circumvention.

In 2000 the Library of Congress rejected an exemption for region code circumvention [1] for the following reasons, summarized below:

3.1.1. The problem appears to be confined to a relatively small number of users.

3.1.2. The region coding also seems to result in inconvenience rather than actual or likely harm, because there are numerous options available to individuals seeking access to this foreign content:

- Purchase of VHS rather than DVD format.
- PAL converters.
- Limited reset of regional code option.
- Purchase and import of foreign DVD players.

3.1.3. Regional encoding of audiovisual DVDs serves a legitimate purpose as an access control. It encourages distribution and availability of digital audiovisual works; it allows titles to be released to DVD in one region before or during their theatrical run in other regions.

I shall consider these issues below. Examples of foreign audiovisual works will be drawn from imported Japanese animation because that is the medium with which we are most familiar. Japanese audiovisual DVDs are region-locked to region 2; US-distributed audiovisual DVDs are region-locked to region 1 [2]

3.2. Scope of impact of problems caused by regional encoding.

There are two issues to consider here: How many US consumers are affected by regional restrictions? How many titles are so affected? If the number of consumers is significant, AND the number of titles is significant, then the impact must be taken to be significant.

3.2.1. Number of US consumers potentially adversely affected by region coding.

The question here is: how large is the US market for foreign audiovisual works? In fact, considering just Japanese animation as a subset of foreign audiovisual works, the market is significant. Estimates for the US Market for such works in 2001 was \$250 million [3]. For comparison, total DVD sales in the US for 2001 were \$4.53 billion [4], thus sales imported Japanese animation constituted about 5.5% of total DVD sales that year. 326 unique titles were released in 2001 [5], suggesting that the average title sold between 20,000 to 40,000 copies given an average retail cost of \$25-\$30.

Thus if we can demonstrate that regional coding is blocking access to, for instance, a dozen potentially popular titles, that suggests that up to 300,000 purchases have been prevented. Even if only 10,000 people (i.e. 3%) were blocked from purchasing & viewing desirable copyrighted material, they are certainly numerous enough to invalidate the claim that only a small number of individuals desire this exemption.

3.2.2. Scale of unavailability of certain foreign language audiovisual works in the US.

Again considering the case of imported Japanese animation, the very size of the market discussed above indicates that licensing and importation is a thriving, healthy business. There are, however, specific categories of content which are not sufficiently available for sale in the US. These include:

- Not all titles are licensed. Only 50% of all recently produced Japanese animation ever gets licensed for a US release. For instance, in 1998 there were 67 animated series broadcast on Japanese television[6], of which I believe roughly 35 have been licensed for US release.
- Older animated titles. These tend to appeal to hardcore fans as opposed to casual viewers; only a much smaller percentage of these titles are ever licensed.
- Titles aimed at female viewers. Most Japanese animation is produced with either a male or female audience in mind. Less than 20% of titles licensed for release in the US are aimed at a female viewership; women wishing to view additional such works have little

recourse but to import from Japan.

- Titles by Hayao Miyazaki and Isao Takahata. These two individuals are the preeminent and critically respected creators of theatrical animation in Japan. Despite this fact, a significant percentage of their work (for unclear reasons) has never been offered for sale in the United States.

Miyazaki's most recent film, "Spirited Away", is finishing a theatrical run of roughly \$5.3 million [7]. His much older "My Neighbor Toro" is "a perennial best seller on video [8]." Roger Ebert writes that Takahata's 1988 film "Grave of the Fireflies" "... belongs on any list of the greatest war films ever made.[9]" Thus there is a known market for the entire body of their work. Despite this fact, over a dozen older works associated to Miyazaki and Takahata remain unreleased in the US. These will be enumerated below.

3.2.3 Vanishing availability of works in non-regionally-encoded formats.

In considering a possible exemption for circumvention of regional encoding for DVDs for the 2000 rulemaking process, the Library of Congress determined that no such exemption was necessary due to (among other reasons) the availability of audiovisual works on nonprotected formats, namely VHS. While that may have been true at the time, it is no longer true. In the US, many studios are releasing titles only on DVD, and not on VHS. This is especially true for re-releases of older titles and releases aimed at minority tastes. Studios that release some or all of their titles purely on DVD include:

- The Criterion Collection: <http://www.criterionco.com/asp/about.asp>
- AD Vision: <http://www.advfilms.com/>
- Pioneer Entertainment USA: <http://www.pioneeranimation.com>
- Bandai Entertainment: <http://www.bandai-ent.com>

And in Japan, the following studios have made DVD-only releases in the past:

- Pioneer LDC.
- Bandai Visual.

VHS editions also can be long out-of-print when a DVD release of an older title is offered.

To cite some specific examples [10], among animated titles directed by Miyazaki and Takahata, the following are unavailable on VHS in region 2 and unavailable in any format in region 1:

- o "Chie the Brat" a.k.a "Jarinko Chie" TV - DVD only, VHS never released by Bandai.
- o "Gauche the Cellist" - DVD only, VHS never released by Pioneer LDC.
- o "My Neighbors the Yamadas" - VHS out-of-print.
- o "Mimi wo Sumaseba " - VHS out of print.
- o "Future Boy Conan" - VHS out-of-print or unavailable for sale.
- o "Anne of Green Gables TV" - VHS out-of-print or unavailable for sale.
- o "Rascal the Raccoon TV" - VHS out-of-print or unavailable for sale.
- o "Heidi, Girl of the Alps TV" - VHS out-of-print or unavailable for sale.
- o "A Dog of Flanders TV" - VHS out-of-print or unavailable for sale.
- o "Marco: 3000 Miles in Search of Mother TV" - VHS out-of-print or unavailable for sale.
- o "Perrine's Story TV" - VHS out-of-print or unavailable for sale.

The following titles are unavailable in region 1 and, while available on DVD and VHS in region 2, have English subtitles on their DVD versions but not on their VHS editions:

- o "Laputa: Castle in the Sky".
- o "Porco Rosso".
- o "Pom Poko"

The lack of subtitles on the VHS version can be more than just a nuisance for a beginning language student.

Summarize section 3.2, it has been shown that

- The market for imported Japanese animation is significant;
- There are as yet some significant gaps in US availability;
- Due to changing market conditions foreign VHS editions are frequently unavailable, leaving DVD importation as the only option.

3.3. Difficulty and cost of accessing non-region 1 DVDs.

In 2000 it was asserted that the difficulty in viewing non-region 1 DVDs was merely an inconvenience and did not rise to the level of a substantial adverse impact. This, however, is not the case. Many purchasers of foreign audiovisual content are students or recent graduates who do not have the disposable income available to purchase

and import a DVD player (and possibly a PAL- or SECAM-compliant television) at a cost of hundreds of dollars including shipping. Almost all such students do, however, own or have access to a computer as a requirement for coursework, and most computers sold today have the capability to play DVDs. (A computer capable of playing DVDs, including speakers, monitor and DVD-ROM drive, can be purchased for less than \$700 from, e.g., Dell.) Such a computer is capable of accessing and playing and DVD conforming to any audiovisual standard in the world without requiring additional equipment - were it not for the regional encoding flag that blocked such use. I know of students with limited resources who could budget effectively for the purchase of some foreign audiovisual content (DVDs), but cannot afford the added expense (beyond that of a computer required for coursework) for separate, dedicated equipment for viewing foreign content.

It was also proposed that the ability to reset the region of DVD players for a limited number of times allowed for sufficient access as to render circumvention unnecessary. This, however, is incorrect. DVD players allow the region to be changed up to five times, so a US resident who needs his / her player to "end up" on region 1 has a maximum of two possible switches into another region and back:

Region 1 ----> Region N ---> Region 1 ---> Region N ---> Region 1.

Now take the case of a foreign language student. If s/he resets this DVD player once per semester to view foreign language content, then resets it afterward to view region 1 content, then s/he will no longer be able to access purchased foreign content in the third semester of study. Thus s/he will eventually be forced to purchase another player for each relevant region in order to view purchased audiovisual content. This is not an inconvenience, it is a significant adverse impact, one which limited region-switching was supposed to have avoided.

3.4. Effects of proposed exemption on the availability for use of copyrighted works.

The question here is: if US residents can import and view foreign editions of foreign-language audiovisual works, will this negatively impact the licensing of such works in the US for local distribution? An analysis indicates not:

- US distributors of foreign-language content provide a valuable service, namely subtitling and dubbing. In the anime marketplace it

has been shown that the viewing public prefers dubbed versions of foreign content to subtitled versions at over 5:1. In addition, most (not all) foreign editions of foreign language content aren't English subtitled, reducing their effective US market impact still further.

- US DVD editions of foreign-language audiovisual works are frequently *cheaper* than the original foreign versions. For instance, in Japan, Japanese animation sells for two to three TIMES as much as it does in the US. A comparison of US prices versus European [11] shows that US prices are competitive to or lower than European prices. Add in the additional nuisance and cost of international shipping, and US versions are clearly preferable.
- Even if the Library approves this exemption, trafficking in circumventing technology - i.e. multiregion DVD players - will continue to be prohibited. Thus an individual wishing to view non-region one content must personally circumvent the region access control, such playback devices will not be available for sale.

Combining the above three points, it's clear that it will always be preferable to purchase a region one DVD over a non-region one DVD. Only when there is no alternative - i.e. the content is not available in the US and is unlikely to be available anytime soon - does importation become remotely viable.

3.5. Effects of proposed exemption on the availability for use of works for nonprofit archival, preservation, and educational purposes.

Not relevant.

3.6. The impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research.

Regional encoding of DVDs can in principle have an adverse impact on the availability of foreign audiovisual works for use in film criticism and analysis. This is because many older, influential foreign films have not achieved release in the US, thus film critics and scholars can have difficulty tracing the references and influences of more modern works. Pixar's films, for instance, show influences of Japanese animation. Granting this exemption would make it easier for film critics and students to trace these relationships.

3.7. The effect of circumvention of DVD regional encoding on the market for or value of copyrighted works.

According to the DVD Copy Control Association ("DVD CCA") - the industry consortium responsible for designing the region mechanism in DVDs [12]:

Why are DVDs encoded so that they can only be played in machines in the region in which they were purchased?

Movies are often released at different times in different parts of the world. For example, a film that opens in December in the U.S. might not premier in Tokyo until several months later. By the time that Tokyo premier occurs, the film may be ready for DVD distribution in the U.S.

Regional DVD coding allows viewers to enjoy films on DVD at home shortly after their region's theatrical run is complete by enabling regions to operate on their own schedules. A film can be released on DVD in one region even though it is still being played in theaters in another region because regional coding ensures it will not interfere with the theatrical run in another region. Without regional coding, all home viewers would have to wait until a film completes its entire global theatrical run before a DVD could be released anywhere.

We accept the general statement that the primary value of regional encoding is to promote the value of theatrical runs. Nevertheless a question arises: does this apply to the American "region one" marketplace? As it turns out, it does not. Almost all films that run theatrically in the US do so *first*, before running elsewhere in the world. Only very, very rarely does a film run theatrically in the US after being released on DVD elsewhere in the world. Further, the dynamics of the US market being what they are, US consumers generally aren't even aware of foreign films until brought over by a promoter.

Exceptions to this arise when certain categories of foreign audiovisual works have a pre-established viewership in the US. The largest such category is, I believe, the abovementioned one of imported Japanese animation. In this case, however, the vast majority of revenue is generated by direct-to-video sales rather than theatrical runs, so the possibility to import such titles (at a higher price than a typical domestic release) isn't going to have significant impact on US theatrical revenues.

If the US film market were to change so that a significant number of audiovisual works were released to DVD elsewhere before being screened in the US, this issue would need to be revisited. At this time, however, it is clear that occasional region-coding circumvention in the US isn't going to have a measurable impact on US theatrical film runs.

4. ADDITIONAL INFORMATION OR DOCUMENTATION.

The act of circumvention of DVD region encoding is technically independent of the act of circumvention of the "Content Scrambling System" ("CSS") encryption used to prevent access to DVD contents by anything other than software or hardware licensed by the DVD CCA. The region code is a single number that is burned onto a DVD. The licensed player then compares the value of that number against its own region, and accepts or rejects the disc [13]. This processing is entirely unrelated to the eventual decryption of the audiovisual content.

Thus it is entirely possible for the Library of Congress to grant an exemption for circumvention of regional encoding without granting an exemption for circumvention of CSS for purposes of playback on unlicensed hardware or software, or vice versa.

5. FOOTNOTES.

[1] <http://www.copyright.gov/fedreg/65fr64555.html>

[2] <http://www.unik.no/~robert/hifi/dvd/world.html>

[3] <http://www.animeondvd.com/press/conventions/axny2002/anime101.php>

[4] <http://www.boxofficemojo.com/dvdsales/2001/top20.htm>

[5] <http://www.animeondvd.com/releases/checklist2001.php>

[6] <http://www.public.iastate.edu/~rllew/chronst.html>

[7] <http://www.boxofficemojo.com/movies/?id=spiritedaway.htm>

[8] http://www.suntimes.com/ebert/ebert_reviews/2001/12/122301.html

[9] http://www.suntimes.com/ebert/ebert_reviews/2000/03/fireflies.html

[10] Release and availability information collected from

<http://www.nausicaa.net/>
<http://www.cdjapan.co.jp/>
<http://www.animeondvd.com/>

[11] Compare <http://www.amazon.co.uk/> versus <http://www.amazon.com/>

[12] <http://www.dvdcca.org/faq.html>

[13] <http://www.dvddemystified.com/dvdfaq.html#1.10>