February 19, 2003

David O. Carson
General Counsel
Copyright Office
LM-403, James Madison Building
101 Independence Ave., S.E.
Washington, D.C.

> **RE: Notice of Inquiry, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies (Docket No. RM 2002-4)**

Dear Mr. Carson:

    Overall Summary of Comment/Argument. These comments address the requests for exemption of the following **classes of works**: (1) CSS encrypted DVD video discs (so identified by the requestor or included by the requestor within a larger class of works either identified as works distributed to the public using encryption or identified by reference to the use of the work proposed to be made in relation to the request for authorized circumvention) and (2) DVD video discs containing region coding set for regions other than region 1. Individual comments addressed are identified in relation to each specific class of work and comment and argument section, below.[1] We urge that all requests for exemptions involving CSS encrypted DVD video discs or region coding required by the CSS license be rejected as contrary to the purposes of the Digital Millennium Copyright Act ("DMCA") and inconsistent with goals of the copyright law in general.

    Introduction. The DVD Copy Control Association, Inc. ("DVD CCA"), appreciates the opportunity to submit these reply comments in the above captioned proceeding. A number of the requests for exemptions for classes of works from the prohibition against circumvention of technological measures that control access to copyrighted works would directly affect technology licensed by DVD CCA, namely, the Content Scramble System ("CSS") and the region code protection technologies implemented by CSS licensees.

    By way of background, DVD CCA is a not-for-profit corporation with its principal office in Morgan Hill, California. DVD CCA is responsible for licensing technical protection measures applicable to prerecorded video content contained on DVD discs. Our licensees include manufacturers of DVD hardware, software, discs and related products, who are the owners and manufacturers of the content of DVD discs; creators of encryption engines, hardware and software decrypters; and manufacturers of DVD players and DVD-ROM drives. CSS was developed to allow 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

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[1] We have done our best to identify each comment in relation to a specific class of work, have indicated such specific comments in relation to specific topics in the discussion, and have summarized our argument in relation to each such topic, below. To the extent that we have not identified a specific comment that properly belongs with a particular topic below, we hereby request that our comments made in relation to other identified requests be understood to apply to requests that we may not have specifically identified in relation to a particular argument or basis for the request.

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" anti-circumvention provisions of Section 1201(a). *See Universal City Studio v. Corley*, 273 F.3d 429 (2nd Cir. 2001) (posting of DeCSS, program designed to defeat CSS, is a violation of Section 1201(a)(2)(A) since CSS is a technological measure that "effectively controls access to a work"). While certain commentors may differ with the decisions of the judiciary in this area, it would be improper to use this limited proceeding to address technical issues associated with CSS in particular, or the use of technological protection measures in general.

Use-Based Exemptions

<u>Requests Addressed, Classes of Work Requested to Be Exempted, and Summary of DVD CCA Comment</u>. The following comments request exemption of a class or classes of works based on the use to be made by the individual requested to be authorized to circumvent a technological measure: 1 (works to be used in "demo" reels), 10 (generalized "fair uses"), 11 ("fair uses"), 28 ("per se educational fair use works"). A number of other comments seek to justify their requests for exempting "CSS encrypted DVD video discs" on the grounds that the requestor wishes to make a specific use of the video material and, hence, these requests also contain elements of this argument (i.e., that the use to be made by the individual justifies the request for exemption from the circumvention prohibition of Section 1201(a)(1)). DVD CCA believes that these exemption requests should be rejected as not identifying a proper "class of works" as required by the statute.

<u>Further Comment</u>. As our comments in the first proceeding indicated, DVD-CCA has always been – and remains –willing to discuss legitimate concerns that might arise in regard to the application of CSS in certain circumstances and to cooperate with affected parties to find a mutually acceptable solution. However, it is simply not acceptable to resolve such cases by permitting CSS to be hacked for the various purposes suggested by the commentors. 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. 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, we respectfully request that the Copyright Office reject the requested exemptions.

Such requestors, who seem to be unhappy with the anti-circumvention provisions of the DMCA, should more properly petition Congress and not attempt to use a narrow regulatory proceeding to jeopardize the lawful rights of content holders.

Broad and Generic Exemptions.

<u>Requests Addressed, Classes of Work Requested to Be Exempted, and Summary of DVD CCA Comment</u>. The following comments request exemption of a class of work identified as "CSS encrypted DVD video discs" or in which CSS encrypted DVD video discs would be included within a more broadly defined category of works and where DVD CCA's comments relate to the inclusion of CSS encrypted DVD video discs: 5, 7, 8, 10, 11, 15, 17 (limited to specific type of video), 20, 21, 29, 30, 32, 34, 37, 38, 39, 42, 43, 44, 47, 50 (limited to specific type of video). DVD CCA urges rejection of these requests primarily because (1) allowing CSS to be hacked routinely would eviscerate this technology as a means of preventing copyright infringement and (2) there is no need to permit hacking of CSS in order to allow access to the content protected by CSS.

Further Comment. As explained in our comments submitted in the first rulemaking on exemptions, the CSS technology was developed and is utilized to provide security for the high-value copyrighted audiovisual content that is made available 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.

Linux Compatible Systems.   Some of the requests noted above advocate broad exemptions from the prohibitions on circumvention on the alleged ground that users with a preference for Linux-based equipment believe that Linux DVD players are simply not available in the marketplace, a situation that supposedly deprives them of the opportunity to use DVDs. However, 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 license so as to satisfy the supposed demand from Linux users for such product. While we understand that there are Linux implementations of CSS available, 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.

Specific Exemption Requests

DVD Region Coding

Requests Addressed, Classes of Work Requested to Be Exempted, and Summary of DVD CCA Comment. The following comments request exemption of a class of work identified as DVD video discs encoded for regions other than region 1: 17, 35, 36. DVD CCA urges rejection of these requests because (1) these requestors have not shown any new need for the request to justify a change from the decision made in 2000, (2) the region code system is designed for the protection of specific rights of copyright holders, and (3) there are alternative means of gaining access to non-region 1 discs other than circumventing the technological protections required by the CSS license.

Further Comments. A number of commentors asked for an exemption to hack CSS to defeat so-called region coding of DVDs. We oppose the granting of this exemption. 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. For content owners that choose to use the DVD region coding, this system serves a number of legitimate purposes as explained below.

Moreover, as a threshold matter, we note that the Librarian concluded in the 2000 rulemaking that regional coding serves a legitimate purpose as an access control measure. We believe that the comments submitted in the current proceeding are not persuasive in arguing that the alleged adverse effects on use of foreign DVDs due to region coding now amount to substantial harm significant enough so as to warrant a different conclusion from that reached in 2000.

As described in the 2000 rulemaking, region coding allows a copyright owner to protect its exclusive right of distribution. Such right is divisible geographically, so that distribution rights granted to licensees may, in effect, be divided up by regions. For instance, a copyright owner may grant one company the right to distribute a particular film in only certain territories of the world while granting another company the distribution rights to that same film in different parts of the world. In an era where content is stored in digital form, DVD region coding, as enforced by CSS, allows copyright owners to exercise the full distribution rights guaranteed them by law.

Region coding also allows the content owner to choose the sequence and overall timetable for the various channels in which its copyrighted content will be distributed. For example, a film that opens on screens in December in the U.S. might not premiere theatrically in a foreign country until several months later. The region coding system ensures that a movie company can move forward with home viewing releases on DVD in those geographic areas where a theatrical film run has been completed while the same film enters an initial theatrical release in another country or region. Without the capability to separate different markets through regional coding, a movie company might well decide that all home viewers would have to wait until a film completes its entire global theatrical run before a DVD could be released anywhere in the world in order to avoid "cannibalizing" or undermining the theatrical markets with its own DVDs. If regional coding in the DVD content were permitted to be ignored or circumvented, the content owner's ability to lawfully exercise its rights in the manner it chooses would be frustrated in relation to the choice and timing of distribution channels in different parts of the world. The CSS regional coding system is thus a means of protecting the copyright rights of content owners through the use of technological measures which have the effect of enabling a broad array of choices for consumers.

Furthermore, if a consumer in the United States desires to view a DVD disc that has been region coded only for Europe, then that consumer is free to purchase a DVD player (either hardware or software) that is coded to play European DVDs. No legal restrictions apply – either through the CSS license or otherwise – to the importation and use of non-U.S. region players in the United States.

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, any exemption from the prohibitions on circumvention would impact the variety of implementations that numerous manufacturers have put into the market. Authorizing the circumvention of various robust methods raises complex issues that require careful consideration. Of immediate concern is the fact that some of the technologies used to provide the robust region code playback may be used in other contexts for other copyright protection related purposes. For that reason alone, the Copyright Office should reject the requests, at least until it has undertaken a sufficient investigation to satisfy itself that permitting the "hacking" of region code implementations would not cause unanticipated adverse effects on the use of the robustness methods used by some manufacturers for region code playback control purposes.

Research Relating to Access Control Technologies

Requests Addressed, Classes of Work Requested to Be Exempted, and Summary of DVD CCA Comment. The following comments request exemption of a class of work identified as works where the primary purpose of the requested exemption is research related to access control technologies: 27. DVD CCA urges rejection of this request on the ground that the DMCA already provides for an exemption for legitimate encryption research activities. Proponents have not established the need for any additional exemption.

Public Domain Film on DVD

Requests Addressed, Classes of Work Requested to Be Exempted, and Summary of DVD CCA Comment. The following comments request exemption of a class of work identified as public domain works distributed using either CSS or any encryption-based access control technology: 14. DVD CCA urges rejection of this request on the following basis: The commentor has not identified any specific work that is distributed using CSS where that work is in the public domain. DVD CCA is unaware of any public

domain content that is protected using CSS, and so is unable to address the claim that particular situations may warrant relief. Since there is no indication that access to public domain works is an actual problem, and there is a significant basis for concern that the effectiveness of CSS would be undermined in relation to its protection of copyrighted works, the Copyright Office should reject the request to circumvent CSS as to public domain works.
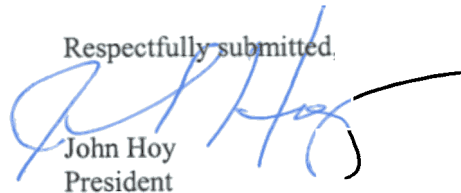
Unskippable DVD Advertising

Some commentors claim that CSS is somehow used to prevent consumers from fast-forwarding through advertisements that are placed before the feature film on a DVD. The assertion is inaccurate. There is no requirement associated with CSS or its license and specifications that relates to the issue raised by these commentors. CSS plays no part in such advertising; consequently, the Copyright Office should not authorize circumvention of CSS as a means of enabling the skipping of advertisements placed on DVD video discs.

DVD CCA stands ready to respond to any questions that the Copyright Office may have concerning CSS and its licensing and related requirements.

Based on the foregoing, we request that the Copyright Office reject all requests made in this proceeding for permission to circumvent CSS and the region coding system implemented through the CSS license.

Respectfully submitted,

John Hoy
President