**Rulemaking on Exemptions from Prohibition on Circumvention of
Technological Measures that Control Access to Copyrighted Works**

**Reply Comments of the Interactive Digital Software Association
to the Static Control Petition**

March 10, 2003

The Interactive Digital Software Association (IDSA) appreciates this opportunity to submit a reply comment to the petition of Static Control Components, Inc. (SCC), seeking to suspend the applicability of Section 1201(a)(1)(A) of Title 17 for the next three years with respect to access controls protecting three specified categories of computer programs. Notice of Inquiry, 68 Fed. Reg. 6678 (Feb. 10, 2003) (hereafter "SCC NOI").

We incorporate by reference the brief description of IDSA and its interest in this proceeding contained in the reply comments previously filed. *See* Reply Comment 23, at 57.

Proposed Class of Works

Static Control proposed class #2: "Computer programs embedded in a machine or product and which cannot be copied during the ordinary operation or use of the machine or product."

Static Control proposed class #3: "Computer programs embedded in a machine or product and that control the operation of a machine or product connected thereto, but that do not otherwise control the performance, display or reproduction of copyrighted works that have an independent economic significance."

Summary of Argument

While IDSA takes no position on SCC's proposed class #1, we do have concerns about proposed classes #2 and #3 and SCC's approach to the DMCA in general. Though SCC asserts that the DMCA was never intended to apply to programs like the one at issue, there is no evidence that Congress intended the DMCA to protect some copyrighted works but not others. Class #2 appears to be some nebulous genus of which class #1 is the only identified species. This lack of clear distinction is the root of IDSA's concern with class #2. For those unnamed species of works that are not class #1, SCC does not appear to have met its burden of showing why an exemption is warranted. SCC asserts that for classes #1 and #2, the copyrighted material is incidental to the commercial value of the good or service being sold. That assertion is unfounded if applied to video game consoles containing embedded programs that fit definition of class #2, especially as

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these features may in fact enhance the commercial value of a video game console.
Finally, class #3 is similarly ill-defined and unsupported, making it unclear whether
products made by IDSA members might fall into the class in some circumstances, but not
in others. For these reasons, the Register should decline to accept Static Control classes
#2 and #3 as exemptions under Section 1201(a)(1)(A).

Arguments Opposing Proposed Exemption

SCC candidly concedes that its petition is motivated by the fact that it has been
named as a defendant in a civil lawsuit accusing it of violations of (*inter alia*) 17 USC
Section 1201(a)(2). See *Lexmark International v. Static Control Components*, Case No.
02-571-KSF (E.D. Ky., Feb. 27, 2003) (granting preliminary injunction to Lexmark).
The first class it proposes for recognition in this proceeding "relates to the specific class
of technological measures at issue" in that lawsuit. Pet. at 4.[1]

Neither IDSA nor any of its members is a party to this lawsuit, nor do we express
any view on its merits or lack thereof. Furthermore, we do not in these reply comments
take any position with respect to proposed class #1. We do note, however, that the statute
governing these proceedings makes clear that whether SCC's petition is granted or
denied, this can have no impact on the merits of the lawsuit in which it is currently
embroiled. In that case, SCC is accused of no violation of Section 1201(a)(1), which is
the only statutory provision at issue in this proceeding. *See* SCC NOI, at 6679. The
lawsuit only concerns other provisions of Title 17, and thus the outcome of this petition
can have no bearing upon the disposition of that case. 17 USC §1201(a)(1)(E).[2]

IDSA does have concerns about the other two classes proposed by SCC, however,
as well as about the approach which the petition takes to the DMCA in general. For
instance, SCC flatly asserts that "the DMCA was not intended to protect the type of
program at issue here" because the computer program in question "is a trivial routine
consisting of rudimentary instructions." Pet. at 2. We know of no evidence that
Congress intended any provision of Section 1201 to be *per se* inapplicable to any work
"protected under this Title." *Cf.* 17 USC §§1201(a)(1), (a)(2)(A), (a)(2)(B), (a)(2)(C).
So long as the program in question is protected by Title 17, and so long as access to it is
controlled by a mechanism that meets the requisites of Section 1201(a)(3)(B), all the

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[1] Class #1 is "computer programs embedded in computer printers and toner cartridges and that control the
interoperation and functions of the printer and toner cartridges."

[2] The genesis of the petition in hotly contested litigation seems to be the source of SCC's claims that, if this
proceeding does not result in the recognition of some or all of its proposed classes, the Librarian would
have "effectively enlist[ed] the DMCA to aid and abet copyright misuse and attempted monopolization."
SCC Comment, at 8. These overheated claims miss the mark. No statute that Congress has ever enacted is
categorically immune from being put to abusive ends by overenthusiastic plaintiffs. SCC's claims that
Lexmark's case exhibits such abusive tendencies belong in the courtroom, not in this proceeding. Indeed,
now that SCC has brought these claims in the proper forum, surely they should be disregarded here. *See*
Patrick Thibodeau, *Antitrust Lawsuit Filed Against Lexmark*, Computerworld.com, Mar. 3, 2003, *at*
http://www.computerworld.com/governmenttopics/government/legalissues/story/0,10801,78995,00.html.
In any event, as noted in the text, the statutory provision that Lexmark is allegedly abusing is not the one at
issue in this proceeding.

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prohibitions against circumvention in Section 1201(a) apply. (Of course, we express no opinion about whether these criteria are satisfied in the specific situation which gave rise to the lawsuit.)

Assuming that Section 1201(a) does apply to the works identified in SCC's petition, we turn to SCC's arguments about why Section 1201(a)(1)(A), at least, should not.[3]

The second class proposed in SCC's petition is:

Computer programs embedded in a machine or product and which cannot be copied during the ordinary operation or use of the machine or product.

SCC describes this proposed class as a "generic class[] of works that include[s] the specific measures at issue in the . . . litigation." Pet. at 4. It is obviously intended to be broader than the first proposed class, but we do not really know how much broader. This is the crux of IDSA's concern. Because SCC has identified in detail only one species belonging to this proposed genus, the practical impact of recognizing the broader, "generic" formulation is extremely difficult to predict.

By the same token, IDSA questions whether, for any work falling within genus #2 but outside species #1, SCC has fulfilled its burden of persuasion in this proceeding. For example, SCC asserts that recognition of proposed class #2 is justified because of "the potential for similar types of technological measures to be applied in other industry contexts, for similar anticompetitive purposes," to those that SCC asserts have motivated the lawsuit against it. Pet. at 4. This falls far short of proving "actual instances of verifiable problems occurring in the marketplace," which the Register has determined "are necessary to satisfy the burden with respect to actual harm." Notice of Inquiry, 67 Fed. Reg. 63578, 63579 (Oct. 15, 2002) (hereafter "NOI"). Since the justification is based on "potential," SCC may be making an argument about "likely" adverse impact, in which case "the burden of proving that the expected adverse impact is more likely than other possible outcomes is on the proponent of the exemption." *Id*. We question whether SCC has carried this burden, at least with regard to any part of the genus other than the species identified in proposed class #1.[4]

While the boundaries of proposed class #2 are only murkily defined, IDSA is certainly not prepared to assume (based on the record as it now stands) that recognition of the proposed class would either significantly promote non-infringing uses of copyrighted works, or that it would not have serious adverse consequences on the efforts of IDSA member companies to protect their intellectual property rights. Indeed, the more rational

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[3] As noted, we make no comment on proposed class #1.

[4] SCC's petition refers in a footnote to exactly one other case in which, assertedly, an anti-competitive purpose underlies an assertion of rights under the DMCA. *See* Pet. at 3, *citing Chamberlain Group v. Skylink Technologies*, Civ. Action No. 02 C 6376 (N.D. Ill. Oct. 16, 2002). Even if this characterization were correct, this single reference is insufficient to meet the burden shouldered by SCC in this proceeding.

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assumption is the opposite one. Consider, for example, a dedicated video game console system that includes a security function intended to prevent the play of pirated copies of video games. That security function may well take the form of a computer program; that program is "embedded in a machine or product;" and during the ordinary use of the console, the program is not copied. Finally, there may well be circumstances in which the producer of the consoles, in order to safeguard the security function against hacking or sabotage, may encrypt the program in question, or otherwise apply access control technologies to it. If these assumptions apply, then if SCC's proposed class #2 were recognized, circumvention of the access control in question would be freely permitted during 2003 - 2006. It would be hard to square this outcome with the goals of Congress in enacting the DMCA and the purpose of this proceeding.

SCC asserts that a "fundamental characteristic of proposed Classes 1 and 2 is that the copyrighted works are wholly incidental to the commercial value of the chattel or service being sold to the public." Pet. at 12. That assertion appears wholly unfounded if applied to the situation described in the preceding paragraph. The legitimate "commercial value" of a video game console system whose security system is compromised may be far less than the value of a similar platform whose security features are intact. (Of course its value to pirates may be far greater but we do not believe that this is the type of commercial value that this proceeding is intended to promote.) Similarly, when SCC claims that works in class #2 have "no value other than the inherent functionality provided by the purchased products and devices in which such works are embedded," Pet. at 10, they gloss over a wide range of security-related functions performed by computer programs – beyond as well as within the entertainment software sector – that may add considerable value to the "purchased products and devices" in which such programs are "embedded."[5] This value – and the concomitant harm from recognizing the exemption – is likely to increase with enhanced attention to security measures in the future.

SCC says virtually nothing in its petition about why proposed class #3 should be recognized.[6] On this ground alone, the Register should reject the petition with respect to this class (at least on the basis of the record as it now stands), since the petitioner has made no effort to meet its burden of persuasion on any of the relevant issues. The boundaries of this proposed class appear just as ill-defined as those of class #2. Perhaps the reference to the function of a program to "control the performance, display or reproduction of copyrighted works" means that programs embedded in products distributed by IDSA members might, in some circumstances, fall outside this class, but in

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[5] The formulation of SCC's proposed class #2 virtually tracks the wording of a provision of the Copyright Act (which SCC cites, *see* Pet. at 8) that denies an exclusive rental right to certain computer programs. *See* 17 USC § 109(b)(1)(B)(i). This appropriation of the statutory language was surely intentional but seems completely insignificant. There is no evidence that Congress intended section 1201 to apply with less than full force to works in which there is no exclusive rental right. To the contrary, the law clearly applies to audio-visual works of all kinds, even though none of these enjoy an exclusive rental right under U.S. law.

[6] This proposed class is "computer programs embedded in a machine or product and that control the operation of a machine or product connected thereto, but that do not otherwise control the performance, display or reproduction of copyrighted works that have an independent economic significance."

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other circumstances they may not. If the main function of a device is to control such performances or displays, or reproduction, and the program in question "control[s] the operation of" that device, then the program falls within the proposed class, and any technology used to control access to the program would be subject to circumvention. In addition, there is considerable uncertainty about how the proposed criterion of "independent economic significance" would be applied, either by the Librarian in delineating to which programs Section 1201(a)(1) would or would not be applicable over the next three years, or (more significantly) by the courts in applying the exemption, if it were recognized in this proceeding. In a proceeding that is focused on proof of "distinct, verifiable, or measurable impacts," Final Rule, 65 Fed. Reg. 64555, 64558 (Oct. 27, 2000), *quoting* the Report of the House Committee on Commerce on the Digital Millennium Copyright Act of 1998, H.R. Rep. No. 105-551, pt. 2, at 37 (1998), such vagueness virtually prevents a favorable decision on this proposed class.

         Thank you for this opportunity to present our views. We look forward to further proceedings in this rulemaking and would be glad to answer any questions which may arise from this submission.

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