

Proposed Class of Works: Any digital-format work, including but not limited to Compact Discs (CDs) and Digital Versatile Discs (DVDs) which contain material not available in a comparable analog format at a price no more than ten percent (10%) higher than the cost of the digital work.

Summary of Argument: In its prior rulemaking, the Register of Copyrights indicated that concerns of inability to make use of these works were invalid, because the works were also available in analog format. A large number of digital media works are released with extra material not available in analog format. Therefore, following the Register's own logic, it is reasonable to create an exemption to allow users to access these works if the use is legitimate and lawful.

Factual: The presence of digital works which contain extra material not available in their analog versions is well-documented. One need only consult the nearest media vendor's advertisements to see a wide variety of DVD-format movies offering "bonus extra footage" and "special director's commentary", among other attractions. This content is generally not available in the VHS-format analog tape of the same movie.

Technological restrictions on access to such works already exist. For example, a lawfully purchased DVD will not play on a lawfully purchased player with a non-matching region code. This deprives the consumer of the ability to enjoy the extra content which he or she has paid for. There exist methods to modify DVD players to ignore region codes, but making such a modification circumvents an access control, and is thus illegal under 17 1201(a)(1)(A).

My family is from India, and my parents enjoy watching Indian movies. If they set their player to view DVDs from India, it will be unable to play DVDs from the USA. The reverse is also true. Therefore, if they wish to enjoy the output of two cultures, they must purchase two separate DVD players if they do not wish to become DMCA violators. This is an unreasonable restriction, and is limiting anyone who enjoys foreign films.

Argument: Based on the facts above, I argue that any digital work without an exact analog counterpart should be exempted from access control. Without such an exemption, access controls would prevent purchasers and consumers from making legitimate and lawful use of the class of works.

This decreases consumer choice and forces the market towards an all-digital environment where access restrictions can cause even greater harms.

It can reasonably be argued that there is an additional cost to making all the material available in digital and analog formats. Since there may not be a large demand for some material in an analog format, the publisher will have to charge higher prices. This is acceptable, but there must be a reasonable limit on the cost differential. Given that analog copies are no more expensive to create than digital copies when one is copying on an industrial scale (e.g., with professional-grade videotape mastering equipment), ten percent seems like a reasonable limit on the increase. This particularly figure is not in and of itself strongly justified, however, and could be adjusted in the face of solid data on the

true extra cost. Inaccuracy of this one figure should not be construed as a limitation on the entire proposal.

I wish to end by commenting more generally on the scope of the comments sought. It is my opinion that the Copyright Office is in error by not considering the "trafficking" provisions, because these provisions themselves limit access to copyrighted works. If any proposed class is accepted as exemptable, but no person is permitted to sell a product or service that allows circumvention of access controls for this class, then the exemption is moot.

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