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101 Independence Avenue, SE
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> Re: Docket No. RM 2002-4
> Exemption to Prohibition on Circumvention of
> Copyright Protection Systems for Access Control
> Technologies

Dear Mr. Carson:

On behalf of the Joint Reply Commenters, I am pleased to submit the following responses to the questions contained in your letter of June 5. For convenience, I repeat below the questions to which I previously submitted responses (on June 20), and the responses sent at that time.

> *1.   How many DVDs which are encrypted using CSS contain a compilation of works including both audiovisual works in the public domain and audiovisual works protected by copyright? (Please provide the specific titles in each such case.)*

Based on the transcript of the May 15 hearing (pp. 195-98), we assume this question is directed principally to the representative of EFF who offered to supplement the record on this point, and that we would be given an opportunity to respond to any list presented by her.

With regard to the two reply comments referenced by Ms. Hinze on pages 195-96 of the transcript:

Reply Comment #271 of Brian Degenhardt refers to a DVD title, Charlie Chaplin Marathon. According to Amazon.com (see link below), that DVD contains the films, The Rink (1916), The Immigrant (1917), Tillie's Punctured Romance (1914), and The Vagabond (1916). Presumably these

films are in the public domain in the U.S., although we have not researched their status. It is not clear whether the DVD also includes audiovisual material still protected by copyright, although there is a reference in the Amazon listing to an introduction by Tony Curtis. The Amazon listing suggests that the title is protected by CSS but we have not independently verified this. The distributor listed by Amazon, Laserlight, is not a member of any group participating in the Joint Reply Comments. See   http://www.amazon.com/exec/obidos/tg/detail/-/B00003ES31/qid=1055887436/sr=1-1/ref=sr_1_1/102-3430491-0040920?v=glance&s=dvd

Reply Comment #272 of Fritz Swanson references a Lumiere Bros. picture entitled From the Earth to the Moon. We did not locate a silent film by that title, and await further details from the EFF submission.

> *2.   Can copyrightable works on a DVD be encrypted with CSS without also encrypting the public domain works contained on the same DVD? For example, if a public domain motion picture is placed on a DVD, can it be left unencrypted while the ancillary new works added, such as interviews, etc., are encrypted?*

The Joint Reply Commenters have nothing to add at this time to the response to this question submitted by AOL Time Warner.

> *3.   What is the estimated failure rate of DVDs? What is the average life span of a DVD? What is DVD rot ? What are the specific marketing claims for works distributed on DVDs in terms of life span and are these claims different from the reality, if at all?*

The Joint Reply Commenters have nothing to add at this time to the response to this question submitted by AOL Time Warner.

> *4.   What are the differences between region coding and the newer enhanced region coding? How many DVDs embodying audiovisual works are currently using enhanced region coding? To what extent will the enhanced version be applied to DVDs embodying audiovisual works in the next three years? (Please provide any evidence you have to support that prediction.) To what extent will the enhanced version be applied to DVDs embodying video games in the next three years? (Please provide any evidence you have to support that prediction.)*

The Joint Reply Commenters have nothing to add at this time to the response to these questions submitted by (1) IDSA; (2) MPAA; and (3) AOL Time Warner.

> *5.   Are there currently any devices on the market which use the Linux-based operating system and which will play DVDs? How is the availability of such devices likely to change (if at all) in the next three years?*

The Joint Reply Commenters have nothing to add at this time to the response to this question submitted by AOL Time Warner.

> *6.   Is CSS a computer program ?*

It would not be accurate to describe CSS as a "computer program." Rather, it is an algorithm that can be implemented in a variety of ways, including but not limited to a computer program.

A review of the court decisions regarding CSS demonstrates that neither the District Court nor the Court of Appeals described CSS as a computer program.

In *Reimerdes*, the Court described CSS as follows:

"CSS, or Content Scramble System, is an access control and copy prevention system for DVDs developed by the motion picture companies, including plaintiffs. It is an encryption-based system that requires the use of appropriately configured hardware such as a DVD player or a computer DVD drive to decrypt, unscramble and play back, but not copy, motion pictures on DVDs." *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp.2d 294, 308 (S.D.N.Y. 2000).

The *Reimerdes* court also noted that "CSS involves encrypting, according to an encryption algorithm, the digital sound and graphics files on a DVD that together constitute a motion picture." Id. at 309-310. It further defines an algorithm as "a recipe that contains instructions for completing a task. It can be expressed in any language, from natural spoken language to computer programming language." Id. at 309 n.59.

In *Corley*, the Court of Appeals described CSS as follows:

"CSS is an encryption scheme that employs an algorithm configured by a set of 'keys' to encrypt a DVD's contents. The algorithm is a type of mathematical formula for transforming the contents of the movie file into gibberish; the 'keys' are in actuality strings of 0's and 1's that serve as values for the mathematical formula." *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 436 (2d Cir. 2001).

The fact that neither court used the term "computer program" to define CSS is particularly striking in light of the use by both courts of that label to describe DeCSS. See *Reimerdes*, 111 F.Supp.2d at 303; *Corley*, 273 F.3d at 437.

7. Which, if any, DVD-CCA licenses are available for public inspection? What licenses or parts of licenses are not publicly available for inspection?

The Joint Reply Commenters have nothing to add at this time to the response to this question submitted by AOL Time Warner.

8. Please clarify, as specifically as possible, the types of applications you believe should or should not be subject to an exception for the circumvention of access controls on filtering software lists, if such an exception is recommended.

We do not believe that the proponents have fulfilled their burden of persuasion with regard to the recognition of an exemption in this field, nor with regard to the parameters of the class of works involved. It is important to note the broad array of critical network security tools that may employ lists of websites that are protected by access controls. These include, for example, firewalls (which in effect filter traffic based on defined parameters contained in a compilation or database) and anti-virus products (which perform a similar function using compilations or databases of virus definitions

or characteristics). Maintaining the security and integrity of these compilations or databases through the use of access control mechanisms is an extremely common feature of these security tools. Thus, recognizing any broad exception in this area could have a substantial adverse impact on the security and privacy of many Internet users, far outstripping any benefit to be gained by allowing circumvention of these access control mechanisms.

If any exemption in this field were to be recognized, it must be limited to the particular class of works as to which there is persuasive record evidence regarding the adverse impact of section 1201(a)(1) on specific non-infringing uses. Without regard to whether the proponents have met their burden with regard to any exception, the following formulation would more closely conform to the evidence in the record than the formulation advocated by the proponents:

"Compilations, not otherwise accessible, consisting of lists of websites that are employed in connection with commercially marketed filtering software applications to prevent access to Internet sites containing content deemed to be obscene, child pornography, harmful to minors, or otherwise inappropriate for display in a defined public setting."

Thank you once again for extending the deadline for submission of these responses. I would appreciate an opportunity to supplement these responses should further information become available, and of course would be glad to respond to any further questions you may have.

Sincerely yours,

Steven J. Metalitz
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