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General Counsel
U.S. Copyright Office
Library of Congress
James Madison Memorial Building
Room LM-403
101 Independence Avenue, S.E.
Washington, D.C. 20559-6000

Re: Docket No. RM 2002-4
Exemption to Prohibition on Circumvention of
Copyright Protection Systems for Access Control
Technologies

Dear Mr. Carson:

We write in response to your letter of July 16, posing a number of questions about region coding and navigational controls on DVDs protected with the Content Scramble System (CSS). This response is submitted on behalf of the following addressees of your letter: Fritz Attaway, MPAA; Dean Marks, AOL Time Warner; Shira Perlmutter, AOL Time Warner; Steve Metalitz, Joint Reply Commenters.

As a prefatory remark, many of the questions posed (particularly in question 1) address the mechanics by which the access control measure of regional coding on DVDs might be circumvented.¹ The answers to these questions, while interesting, may not be relevant to this proceeding unless and until the Librarian determines that the prohibition against such circumvention is having a substantial adverse impact on the ability of American consumers to make non-infringing uses of such works. In 2000, the Librarian specifically found that any such impact was not substantial, that it was de minimis, and that it was outweighed by the benefit to the public of regional coding. 65 Fed. Reg. at 64,569. It also identified two factors which, if they changed “at some time in the future,” “might” permit “a more compelling case for an exemption [to] be made.” *Id.*² We respectfully submit that the record in this proceeding does not

¹ The Librarian has previously determined that “the region coding of audiovisual works on DVDs serves legitimate purposes as an access control, and ... encourages the distribution and availability of digital audiovisual works.” 65 Fed. Reg. at 64,569.

² The factors cited by the Librarian were “if ... material is available only in digital format protected by region codes and the availability of alternative players is restricted.”

demonstrate any change that would impact detrimentally on non-infringing uses with regard to either of these factors. To the contrary, it shows a vast increase in foreign audio-visual titles available in the United States in digital, regionally coded, formats that permit viewing on region 1 players.³ For those titles not available in that format, U.S. consumers can access them using alternative mechanisms that are at least as available, if not more so, than they were in 2000. We urge the Copyright Office to review the answers below in this context, and to avoid unnecessary opining on other hypothetical issues that are tangential to the questions that must be decided in this proceeding.

1. Assume that a person is the lawful owner of a copy of a motion picture on a CSS-encrypted DVD which is encoded for a region other than region 1.

A. Should that person be permitted to view that motion picture on that DVD in the United States?

Assuming that the DVD player used is licensed and manufactured in a way that permits such viewing, and that the viewing is not infringing (e.g., an unauthorized public performance), we know of no legal impediments to this activity. Thus, for example, a person in possession in the United States of a region 6 DVD player can play on it a DVD coded for region 6.

B. If that person uses a multizone DVD player in the United States to play that DVD, is that person engaging in a noninfringing use of the motion picture?

Assuming that the viewing involves no other infringing activity (e.g., unauthorized public performance), the mere viewing of a DVD on a multizone DVD player does not infringe copyright in the motion picture. Note, however, that multizone DVD players are not permitted under the DVD CCA license for DVD player devices⁴, so their manufacture, distribution and use may involve other violations of law.

C. Is that person's use of the multizone DVD player to play that DVD encoded for a region other than region 1 an act of circumvention prohibited by 17 U.S.C. §1201(a)(1)?

Yes. As the Librarian concluded in the 2000 rulemaking, regional coding is an access control measure within the meaning of §1201(a). Use of a multizone DVD player, or any other device to avoid, bypass, deactivate, or otherwise impair such regional coding, meets the definition of "circumvent a technological measure" in §1201(a)(3)(A).

D. Are your responses to questions 1.B. and C. affected by whether the multizone player was manufactured in the US or in a foreign country where no prohibitions

³ This fact alone renders the predicate for all of question 1 largely hypothetical. The "lawful owner of a copy of a motion picture on a CSS-encrypted DVD which is encoded for a region other than region 1" can often obtain a DVD copy that is not so encoded.

⁴ For more detail, see the DVD CCA responses to these questions.

on the circumvention of technological measures that protect access exist?

No. Where the device was manufactured is irrelevant to the analysis under §1201(a)(1).

Would your responses be affected by whether a third-party intermediary modified a licensed and fully compliant DVD player to be a multizone player?

No. Neither the identity of the party making the modifications to the player, nor the fact that the player may have been at one point a licensed, compliant player under the DVD CCA license, is relevant to the determination as to whether or not the person using the now-modified player to circumvent region coding violates §1201(a)(1).

Does it make any difference whether the manufacturer of the DVD player is licensed by DVD CCA?

No. Note however, that only a manufacturer licensed by DVD CCA may use DVD CCA's trade secrets, patents and other intellectual property rights in order to build a player that decrypts the encrypted DVD. The DVD CCA license does not permit the use of DVD CCA's intellectual property to manufacture multizone players.

- E. If that person, in the United States, uses a non-region 1, single-zone DVD player which is set to play DVDs from the region encoded on the DVD, is that person engaging in a noninfringing use of the motion picture?

Subject to the caveats in answer 1(A) above, yes.

- F. Is that person's use of the non-region 1, single-zone DVD player set to play DVDs from the region encoded on that DVD an act of circumvention prohibited by 17 U.S.C. §1201(a)(1)?

No, assuming that the region coding of the player has been set in accordance with the DVD CCA license, the person has not circumvented any access control.

- G. Would your responses to questions 1.E. and F. be affected by whether the non-region 1, single-zone player was manufactured in the US or in a foreign country where no prohibitions on the circumvention of technological measures that protect access exist?

No. Where the device was manufactured is irrelevant to the analysis under §1201(a)(1).

Would those responses be affected by whether a third-party intermediary modified a licensed and fully compliant DVD player to be a non-region 1, single

zone player?

No, with respect to infringement of the motion picture copyright owner's copyright (question 1.E). With respect to question 1.F., neither the identity of the party making the modifications to the player, nor the fact that the player may have been at one point a licensed, compliant player under the DVD CCA license, is relevant to the determination as to whether or not the person using the now-modified single zone player to play a non-region 1 disc violates §1201(a)(1).

Does it make any difference whether the manufacturer of the DVD player is licensed by DVD CCA?

No, with respect to 1.E (infringement of the motion picture copyright owner's copyright). With respect to 1F, only entities licensed by DVD CCA are authorized to use DVD CCA's intellectual property to manufacture products that decrypt or process either the CSS access control, or the region coding access control. Use of a player, that is manufactured by an unlicensed party, in a way that decrypts or processes either the CSS access control, or the region coding access control (or both), is an act of circumvention in violation of §1201(a)(1).

2. Are multizone DVD players (other than DVD drives for computers) easily available for purchase by consumers in the United States? If so, please provide details including typical costs and marketing channels for multizone players.

We do not believe that such devices are readily available through retail outlets in the United States. A Google search for the term "Region Free DVD players" returned 190,000 results, and an examination of a few of these sites reveals that many of them purport to offer multizone players for sale. Since, in our view, use of these devices within the U.S. would violate federal law, we do not think it appropriate to provide a more detailed response in this proceeding.

3. Are DVD players (other than DVD drives for computers) set to regions other than region 1 easily available for purchase by consumers in the United States? If so, please provide details including typical costs and marketing channels for multizone players.

U.S. consumers can easily obtain non-region-1 players outside the region and bring them back to the U.S. In addition, online sources for these players are available. For instance, the online auction site, eBay, routinely lists non-region 1 players for sale to customers in the U.S. Attached are examples of four Region 2 DVD players that were offered for sale on eBay within the month of July. Though the final prices are not listed, note that the "buy it now"⁵ price for two of the four players is under \$150.00. Other online retailers carry these devices but some of them will not deliver the product to U.S. addresses. For instance, a United Kingdom electronics store, Curry's, which sells

⁵ eBay's buy it now feature allows users to bypass the bidding process and pay a pre-determined price for the listed item.

Region 2 DVD players, explicitly states it will only ship in the U.K.⁶ To our knowledge, such delivery restrictions are not based in any way upon legal issues arising under Title 17, but rather reflect market segmentation decisions by manufacturers and distributors of DVD players. Our surmise is that the existence of an apparently robust market for illegal, unlicensed, all-zone players (see preceding answer) has hampered the development of the niche market within the US for players set to regions other than region 1.

4. It is our understanding that the region on a DVD drive for a computer may be reset up to 5 times.
 - A. Are there authorized DVD players other than DVD drives for computers for which the region may similarly be reset? If not, why not?
 - B. Is the failure (if any) to make such a feature available on DVD players other than DVD drives for computers based in whole or in part on a legal analysis that finds a relevant distinction between the two types of DVD players? If so, please describe that analysis.
 - C. What are the typical costs associated with resetting the region code on a DVD drive for a computer? Please describe how the region is reset.

We refer you to the answers provided by DVD CCA. We have nothing to add to these responses.

5. Is it technologically possible for a person to modify a licensed DVD player to ignore the UOP blocking commands in order to reactivate the fast-forward function of a lawful copy of a DVD? If so, would the performance of a CSS-encrypted motion picture on that lawful DVD be affected or prevented by such a modification? Does such a modification of the player affect the legal status of the performance of the motion picture on the DVD, either under section 106 or section 1201(a)(1)? Please explain fully.

To the best of our knowledge, it is technologically possible to modify a licensed DVD player to ignore the UOP functions, such as fast-forward enabling and disabling. Because the DVD's navigational features (which include the UOP functions) are not encrypted and are, in fact, unrelated to the CSS license, we know of no reason why doing so should have an effect on the performance of a CSS-encrypted motion picture, other than changing the ability to fast-forward and carry out any other navigational capabilities controlled by UOP. However, we have no particular experience in making such modifications, and in general would not warrant that unauthorized modifications of DVD players by consumers for any purpose will not have an impact on the device's technical performance). We do not believe that such a modification (i.e., disabling

⁶ See Delivery Information: Delivery Terms and Conditions, at http://www.currys.co.uk/martprd/store/cur_page.jsp?BV_SessionID=@@@@1426635680.1059576362@@@@&BV_EngineID=cccccadimkijflcflgcegdhmdfhl.0&page=Delivery.

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response to UOP commands on a licensed hardware or software DVD player in order to enable the user manually to fast-forward portions of a DVD) affects the legal status of the performance of the motion picture on the DVD under either section 106 or section 1201(a)(1).

Please let us know if we can provide any further information responsive to your request.

Sincerely yours,

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On behalf of Joint Reply Commenters (and parties listed in this letter)