

Before the
Library of Congress
Copyright Office

Notice of Inquiry

***In re* Exemption to Prohibition on
Circumvention of Copyright
Protection Systems for Access
Control Technologies**

Docket No. RM 2002-4

Comments of
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and
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I. The Commenting Parties

Based in San Francisco, the Electronic Frontier Foundation (“EFF”) is a member-supported nonprofit organization devoted to protecting civil liberties and free expression in the digital world. With over 8,000 dues-paying members and over 30,000 mailing-list subscribers, EFF has for over a decade fought to ensure that fundamental liberties are respected and the public’s rights protected in the digital environment. In addition to educating the public and policy-makers about the implications of the Digital Millennium Copyright Act (“DMCA”), EFF has been involved in virtually all of the leading cases testing the law’s anti-circumvention provisions in court.

Public Knowledge is a public-interest advocacy organization dedicated to fortifying and defending a vibrant “information commons”—the shared information resources and cultural assets that we own as a people. Based in Washington, D.C., Public Knowledge speaks in a single voice for a wide spectrum of stakeholders—libraries, educators, scientists, artists, musicians, journalists, consumers, software programmers, civic groups and enlightened businesses. Despite varying concerns in their respective fields, the constituency leaders who comprise Public Knowledge are united in a core conviction, that some fundamental democratic principles and cultural values—openness, public access, and the capacity to create and compete—must be given new embodiment in the digital age.¹

II. Introduction

EFF and Public Knowledge submit the following comments in connection with the Copyright Office’s October 15, 2002 Notice of Inquiry.² The commenting parties propose exemptions from the Section 1201(a)(1)³ prohibition on the circumvention of technological measures that control access to copyrighted works for the following four classes of works:

Class #1 (Copy-Protected CDs): Sound recordings released on compact disc (“CDs”) that are protected by technological protection measures that malfunction so as to prevent access on certain playback devices.

Class #2 (DVD Region Coding): Audiovisual works stored on Digital Versatile Disks (“DVDs”) that are not available in Region 1 DVD format and access to which is prevented by technological measures.

Class #3 (Unskippable DVD Advertising): Audiovisual works released on DVD that contain access control measures that interfere with the ability to control private performance, including the ability to skip promotional materials.

¹ EFF and Public Knowledge express special thanks to L. Batya Schwartz Ehrens, Sarah Long, Gene Park and Zuberi Williams of the Glushko-Samuelsan Intellectual Property Law Clinic, Washington College of Law, American University, for their invaluable assistance in preparing these comments.

² See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 67 Fed. Reg. 63578 (2002).

³ Unless otherwise note, all section reference will be to the current Title 17 of the U.S. Code.

Class #4 (Public Domain Film on DVD): Audiovisual works that are in the public domain in the United States and that are released solely on DVDs, access to which is prevented by technological protection measures.

III. Proposed Class #1: Copy-Protected CDs

A. Class of Works for Which Exemption is Sought

Sound recordings released on compact disc (“CDs”) that are protected by technological protection measures that malfunction so as to prevent access on certain playback devices.

B. Summary

“Copy-protected” CDs are intended to prevent the unauthorized reproduction of sound recordings. Unfortunately, the technological protection measures involved can malfunction so as to make the copy-protected CDs unplayable in certain playback equipment. A consumer should be entitled to take steps to restore the playability of such a CD. To the extent this activity may constitute a violation of Section 1201(a)(1), consumers should be exempted from liability.

C. Facts

In the last 18 months, a number of record labels have begun deploying technological protection measures in connection with certain of their sound recordings released on CD. Colloquially known as “copy-protected CDs,” these discs include technologies apparently intended to interfere with a consumer’s ability to make copies of the discs using typical mass-market PCs. Unfortunately, these technological measures also appear to have the largely unintended consequence of making these discs entirely inaccessible and unplayable on certain PCs and playback devices.

1. Technological Protection Measures Involved

The precise details of the technological measures used in conjunction with these copy-protected CDs are difficult to obtain, as neither the technology vendors that created them nor the record labels that use them have been willing to discuss them publicly. Nevertheless, independent reporting indicates that at least four distinct protection technologies have been deployed in the marketplace:

- Midbar’s Cactus Data Shield⁴
- TTR’s SafeAudio⁵

⁴ See Midbar Tech Ltd. (a subsidiary of Macrovision) website, at <http://www.midbartech.com>; John Borland, *Universal Copy-Protected CD Shuns Players*, CNET NEWS (Dec. 18, 2001) (reporting that *More Music From The Fast and the Furious* CD released in U.S. includes Cactus Data Shield), at <http://news.com.com/2100-1023-277197.html>.

⁵ See TTR Technologies Inc. website, at <http://www.trtech.com/tech.htm>; Greg Wright, *Could CD protection end music swaps?*, USA TODAY, Aug. 20, 2001 (reporting that BMG had released 200,000 SafeAudio-protected CDs), at <http://www.usatoday.com/tech/bonus/qa/2001-08-20-cd-protection.htm>. TTR’s SafeAudio technology was jointly developed with Macrovision, and appears to have been superseded by Cactus Data Shield in the wake of Macrovision’s acquisition of Midbar Tech. See Macrovision, *Music CD Copy Protection FAQ* at 4 (December 2002), at <http://www.macrovision.com/solutions/audio/audiofaq.pdf>.

- SunnComm’s MediaCloQ⁶
- Sony’s key2audio⁷

Relying on reverse engineering and publicly available sources (such as published patents), researchers have been able to uncover certain details relating to these technological measures.⁸ These technologies appear to rely on a variety of methods aimed at confusing computer CD-ROM and CD-RW drives. These methods include: deliberate errors in error correction code data, inclusion of corrupt audio data masked by P subchannel data, audio files mismarked as data files, and malformed “Table of Contents” (“TOC”) data.⁹

The techniques used, however, do more than merely confuse the PC-based CD drives. In particular, it appears that all of the technologies exploit the weaknesses inherent in players that recognize and respond to “multisession” CDs. Modern CD drives support a number of different data formats, including traditional digital audio (known as CDDA or “Red Book”), data CD (CD-ROM or “Yellow Book”), and recordable CD (known as CD-R or “Orange Book”).¹⁰ The more recent format standards introduced support for “multisession” CDs. It is these multisession formats that make it possible to include both audio tracks and data tracks on the same CD, a capability that has spawned “enhanced CDs” that often include special content intended for computers.

These various formats were intended to be backward compatible—the audio tracks on a current-generation “enhanced CD” should play in even the earliest CD players, even though the player will not be able to take advantage of the newer multimedia features. This is possible because the later formats build on the older CDDA format in such a way that the data included in newer formats is simply invisible to players built to the older standards.

Copy-protected CDs, however, take a different approach. The technologies in question all appear to exploit differences between audio-only players and newer, modern CD drives (such as those found in PCs, DVD players, digital audio jukeboxes, newer car CD/MP3 players and game consoles).¹¹ These protection technologies aim to permit general playback compatibility, while interfering with copying (or “ripping”) on PCs. In many cases, these copy-protected CDs also

⁶ See SunnComm Technologies, Inc. website (<http://www.sunncomm.com>); Greg Wright, *supra* (reporting BMG releasing MediaCloQ-protected CDs). The MediaCloQ technology has apparently been superseded by a newer SunnComm system called “MediaMax CD-3.” See Jon Iverson, *Music in a Cage*, Oct. 21, 2002 (describing new MediaMax CD-3 technology), at <http://www.stereophile.com/shownews.cgi?1471>.

⁷ See Evan Hansen, *Dion Disc Could Bring PCs to a Standstill*, CNET NEWS (April 4, 2002) (Celine Dion’s *A New Day Has Come* released in Europe with key2audio protection), at <http://news.com.com/2100-1023-876055.html>.

⁸ See John Alexander Halderman, *Evaluating New Copy-Prevention Techniques for Audio CDs* (Nov. 2002) (unpublished manuscript presented at the 2002 ACM Workshop on Digital Right Management), at http://house.ofdoom.com/~hungerf3/pdf/halderman_drm2002_pp.pdf.

⁹ See *id.* at § 4.1-4.5.

¹⁰ See *id.* at § 4.1.

¹¹ See *id.* at § 4.4.

include multimedia content that is meant to be accessible on PCs *in place of* the CDDA audio content contained on the disc.¹²

The trouble is that these technologies, relying as they do on unintended lacunae in the various CD formats, often fail to accomplish their task with precision. When these CDs are inserted into certain modern CD drives, instead of neatly substituting the protected multimedia content for the unprotected CDDA audio data, they may fail entirely.¹³ The user will be left with a CD that entirely inaccessible and unplayable on one or more playback devices. In fact, an executive with Midbar has admitted that perfect protection and perfect playability can never be achieved.¹⁴

The problem will only get worse over the next three years, as consumers eschew older, audio-only CD players for modern multi-format CD/DVD/MP3 players. The press has already reported a precipitous drop in consumer demand for audio-only CD players. Consumers are opting instead to play their audio CDs in DVD players, game consoles (like Microsoft's Xbox), multi-format car players, and digital jukebox devices.¹⁵ In addition, of course, an increasing number of consumers have come to rely on their PCs as a primary playback device for audio CDs. Each of these new categories of playback device relies on modern CD drives, which in turn are more likely to encounter difficulties accessing copy-protected CDs.

2. Scope of the Problem

The number of copy-protected CDs appears to be on the rise. Unfortunately, the five major record labels have not been forthcoming when asked to identify which titles currently bear copy protection in the U.S. market. Moreover, they have not been willing to commit to labeling copy-protected CDs, leaving consumers to guess whether their difficulties accessing the music

¹² See, e.g., *id.* at § 2 (both MediaCloQ and Cactus Data Shield titles included compressed music files intended for PC playback in place of protected audio tracks); *Music CD Copy Protection FAQ*, *supra* n.5, at 3 (Cactus Data Shield CDS-300 includes “pre-ripped” content intended for PC playback); John Borland, *Labels Look To Put Digital Files On CDs*, CNET NEWS, Oct. 23, 2002 (“Putting compressed audio files on CDs is part of a broader trend by record labels to add exclusive content to CDs in hopes of making them more attractive...”), at <http://news.com.com/2100-1023-963121.html>; Iverson, *supra* n.6 (SunnComm's MediaMax CD-3 includes compressed audio files for PC playback).

¹³ See, e.g., Halderman, *supra* n.8, at § 3.2 (discussing failure of several PCs to recognize the protected CDs being tested); Bryan Chaffin, *Apple Addresses Problems With Copy-Protected CDs In AppleCare Support Article*, MACOBSERVER (May 10, 2002) (describing instructions issued by Apple Computer to address copy-protected CDs that were not playable on Macintosh computers), at <http://www.macobserver.com/article/2002/05/10.10.shtml>; Chris Oakes, *Copy Protected CDs Taken Back*, WIRED NEWS, Feb. 3, 2000 (3 to 4 percent of German customers returned protected CDs introduced by BMG after they would not play in various CD players), at <http://www.wired.com/news/technology/0,1282,33921,00.html>.

¹⁴ See John Borland, *Labels Loosening Up on CD Copy Locks*, CNET NEWS, Sept. 3, 2002, at <http://news.com.com/2100-1023-956069.html>.

¹⁵ See *CD Players May Go Way of the Turntable*, MSNBC, Dec. 2, 2002 (reporting that unit sales of home deck CD players are down 48.1 percent year-to-date), at <http://www.msnbc.com/news/842302.asp?cp1=1>.

result from protection technologies or unrelated problems.¹⁶ Nevertheless, the chorus of consumer complaints that have appeared in a number of Internet forums suggests that protection technologies are being deployed on a nontrivial number of CD titles.¹⁷

At this point, the presence of protection technologies has been independently verified on at least the following titles:

- Charley Pride, *A Tribute to Jim Reeves* (Fahrenheit)
- Soundtrack, *More Music from The Fast and the Furious* (Universal)
- Celine Dion, *A New Day Has Come* (UK release)
- The Donnas, *Spend the Night* (Atlantic)

In addition to these titles, unconfirmed reports claim that protection technologies have also been deployed on hundreds of additional titles, some labeled, some not.¹⁸ Copy-protected CDs already appear to be commonplace in many parts of Europe and Asia.¹⁹ The protection technology vendors have announced that their technologies have already been included in tens of millions of CDs.²⁰

Although announcements of copy-protected titles have fallen off in the U.S. in recent months, no major record label has renounced the use of protection technologies on music CDs in the U.S. market. It is safe to assume that additional titles will be released in the U.S. market during the next three years, and that the protection technologies used will result in malfunctions that deny access to consumers on at least some players that would otherwise have access to the audio CDDA tracks.

D. Argument

1. Nature of the Exemption Sought

It is the view of the commenting parties that the technological measures used on copy-protected CDs do not “effectively control[] access to a work” and thus do not come within the provisions of Section 1201(a).²¹ In particular, based on our understanding of the technological

¹⁶ An optional copy-protection logo has been proposed by IFPI, but the five major labels have made no commitment to use it. *See* Desiree Everts, *Logo Would Identify Copy-Protected CDs*, CNET NEWS, Sept. 17, 2002, at <http://news.com.com/2100-1023-958353.html>.

¹⁷ *See, e.g.*, FatChuck’s Corrupt CDs website (collecting hundreds of consumer complaints regarding copy-protected CD incompatibilities, at <http://www.fatchucks.com/z3.cd.html>); Campaign for Digital Rights Corrupt Audio Discs website (same), at <http://ukcdr.org/issues/cd/bad>.

¹⁸ *See id.*

¹⁹ *See* Midbar Tech Press Release, Aug. 26, 2002 (stating that over 30 million CDs protected by Cactus Data Shield have been distributed, including over 10 million in Japan), at <http://www.midbartech.com/pr/26082002.html>; Jon Iverson, *A Universal CD Problem?*, STEREOPHILE, Feb. 11, 2002 (reporting that Sony has announced distribution of 11 million key2audio-protected CDs in Europe), at <http://www.stereophile.com/shownews.cgi?1261>.

²⁰ *Id.*

²¹ *See* 17 U.S.C. § 1201(a)(3)(B) (“A technological measure ‘effectively controls access to a

measures in the marketplace today, it does not appear that they “require[] application of information, or a process or treatment, with the authority of the copyright owner.”²² The content on copy-protected CDs remains unencrypted (albeit error-ridden), and the players that do manage to access the content do not “apply” any special “information, process or treatment” to the disc in the course of their operation. Conversely, while certain modern CD drives are unable to access the content, it does not appear that this arises from any failure to “apply” any special “information, process or treatment” to the CD.

Nevertheless, some have suggested otherwise, causing considerable uncertainty and potentially chilling otherwise legitimate activities.²³ Accordingly, in order to remove this uncertainty, the commenting parties respectfully request that an exemption be granted for circumvention of protection measures that malfunction so as to prevent access to the sound recording on copy-protected CDs.²⁴

The exemption sought here is effectively identical in scope to the second exemption granted by the Librarian in the 2000 Final Rule, which applied to “literary works . . . protected by access controls mechanisms that fail to permit access because of malfunction, damage or obsolescence.”²⁵ Where that exemption extended to only to literary works, the exemption sought here would extend the exemption to include sound recordings. As noted above, the technological measures that have been deployed on copy-protected CDs have been primarily intended not to block access on CD playback devices, but rather to interfere with reproduction. As a result, to the extent these technologies block access on PCs, DVD players, and other playback devices that utilize modern CD drives, they are blocking access as a result of malfunction. The exemption being requested would simply permit circumvention of these protection measures insofar as they malfunction to deny access.

2. Noninfringing Activity Is Being Impaired

The technological protection measures discussed above prevent consumers from playing legitimately obtained audio CDs in certain playback devices that utilize modern CD drives, including certain PCs, game consoles, digital jukeboxes, car players and DVD players. Using these devices to access (i.e., to play) an audio CD is plainly a noninfringing activity, insofar as it constitutes a private performance outside the exclusive rights granted to a copyright owner.

This denial of access is no less damaging to consumers because it may have been inadvertent. For example, it appears that Atlantic Recording Corporation intended that

work’ if the measure, in its ordinary course of operation, requires application of information, or a process or treatment, with the authority of the copyright owner, to gain access to the work.”).

²² *Id.*

²³ See, e.g., Dan Hellman, *No Bad Copies*, COMPUTERUSER, March 2002 (expressing uncertainty regarding application of Section 1201 to Philips efforts to restore compatibility with copy-protected discs), at <http://www.computeruser.com/articles/2103,4,27,1,0301,02.html>.

²⁴ In the alternative, the Copyright Office could endorse the view of the commenting parties that the technologies in question simply do not fall within the scope of Section 1201(a)(3)(B), rendering an exemption superfluous.

²⁵ See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 Fed. Reg. 64,556, 64,564 (2000) (hereinafter “2000 Final Rule”).

consumers would be able to have access from their PCs to the music on the latest CD by the band The Donnas, entitled *Spend the Night*. As an “enhanced CD,” the disc includes content intended for access on a PC. Unfortunately, however, the protection technology on the disc blocks access altogether on Apple computers running Apple’s current-generation OS X operating system.²⁶

This experience illustrates the dilemma facing consumers who purchase these copy-protected CDs. Prior to trying the CD in their particular playback devices (whether they be PC, DVD player, game console, or digital audio jukebox), a consumer has no way of knowing whether the CD will play. Once the CD has been opened, most retail outlets will refuse to accept a return of the CD.

Even if a consumer had a guaranteed right of return for copy-protected CDs, in many cases there may be no alternative format for the music in question. For example, with respect to both The Donnas *Spend the Night* and the *More Music from the Fast and the Furious* album, a search on Amazon.com indicates that neither sound recording is available in any format other than CD. With the precipitous decline in the number of titles released on cassette, as well as the near-disappearance of vinyl records as a format, CD is rapidly becoming the only format available for many works. If that CD is copy-protected, and the protection technology prevents access in the players a consumer happens to own, she will have no alternative source for the work (short of being required to purchase a new player).

3. Exemption Scope

The exemption being sought here would only reach circumvention of a protection measure that prevented *access and playback*. The commenting parties express no opinion with respect to, and need not seek an exemption for, any additional circumvention that may be necessary to facilitate *reproduction*. After all, consumers today do not need an exemption in order to circumvent a protection technology insofar as it prevents reproduction, as circumvention of this kind is not prohibited by Section 1201.

The exemption being sought here also would not shield a consumer for liability to the extent she may engage in infringement after gaining access to the work. For example, if a consumer were to play a CD in a public place without a license after circumventing a protection measure that prevented playback, copyright law would provide a remedy to the extent the playback constituted a public performance. Similarly, the exemption sought here would not diminish any remedies that would be available if the consumer made infringing reproductions of the CD after obtaining access by circumvention.

Finally, this exemption does not presuppose any modification to the “tools” provisions of Section 1201(a)(2) or 1201(b). If consumers were granted an exemption that would permit circumvention in order to enable access to lawfully obtained audio CDs, it appears likely that they could locate tools to facilitate such circumvention without violating 1201(a)(2). In fact, one

²⁶ This anecdote taken from the personal experiences of one of the preparers of this comment. The CD in question included a “copy protected” logo, although it was so small as to be essentially illegible.

copy-protection system was defeated by use of a black felt tip marker (which would not be a prohibited circumvention tool within the meaning of section 1201(a)(2)).²⁷

E. Statutory Factors

The Notice of Inquiry specifically requests that commenting parties address the statutory factors that the Librarian has been instructed by Congress to consider in evaluating requests for exemptions.²⁸ The commenting parties address each of the statutory factors in turn.

1. Availability for Use of Copyrighted Works

a) Availability in Alternate Formats

During the next three years, the declining popularity of cassettes and vinyl records will leave CDs as the sole format for many sound recordings. As a result, with respect to many copy-protected CDs, the sound recordings in question will not be available in any alternative, unprotected format. Recent authorized online sources, moreover, are unlikely to constitute an adequate alternative for access, as these services are less accessible than even copy-protected CDs, being entirely inaccessible to users of minority operating systems (such as Mac or Linux) and non-PC devices (such as DVD players and audio jukeboxes). Next-generation music formats (such as DVD-A and SACD) include their own protection measures, making them an inadequate substitute for an unprotected analog source, and are not likely to gain enough acceptance in the next triennial exemption term to constitute a good substitute for most CD titles.

Moreover, even assuming that the sound recording contained on a copy-protected CD is available in an unprotected, inferior format (such as analog cassette), this alternative source is not likely to be a good substitute for consumers who find that the copy-protected CD fails to play in their existing equipment. First, many of these copy-protected CDs lack any labeling, leaving consumers in the dark about potential incompatibilities until after they have purchased the CD. In addition, having discovered a playback incompatibility, a consumer may not be able to return the opened CD to the retailer for an unprotected analog alternative, either because the retailer does not accept returns of opened merchandise or because the retailer does not stock analog cassettes or vinyl.

Forcing the consumer to purchase different equipment in order to play a single copy-protected CD is obviously an unrealistic course, especially as the consumer may have no way to verify compatibility before purchasing a CD player, nor any assurance that any device will maintain compatibility with future copy-protected CDs. Similarly, it is no answer that a consumer might be able to obtain an accessible copy of a work by playing it on an unaffected player, capturing the signal at the analog output, and redigitize the signal for reproduction onto an unprotected recordable CD medium. Even assuming that this process would not itself result in an infringing reproduction, most consumers do not have the equipment required to make this a reasonable alternative.

Of course, the sound recordings may be available from unauthorized online channels, such as public peer-to-peer networks. Downloading a copy of a CD that has been legitimately purchased, but that is inaccessible due to technological protections, may well be lawful within

²⁷ See *CD Crack: Magic Marker Indeed*, WIRED NEWS, May 20, 2002, at <http://www.wired.com/news/technology/0,1282,52665,00.html>.

²⁸ See 17 U.S.C. § 1201(a)(2)(C).

the fair use doctrine. Nevertheless, to the extent an exemption to Section 1201(a) may reduce incentives for frustrated CD owners to seek out accessible copies from unauthorized sources, such an exemption would appear to be consistent with the spirit of the Copyright Act and Section 1201.

b) Does Not Support a Model that Benefits the Public

The Notice of Inquiry also asks that a commenting party seeking an exemption consider whether the protection measure in question supports a “model that is likely to benefit the public.”²⁹ Whether or not the widespread deployment of protection technologies on audio CDs supports a “model that is likely to benefit the public,” the exemption being sought here would not undermine the “model” in use by record labels today. The record labels themselves disavow any desire to impede access to (as distinguished from reproduction of) the copy-protected CDs. To the extent these protection technologies impair access for some CD playback drives, this appears to be an unintended consequence or malfunction of the protection technologies.

Furthermore, there is no credible evidence, much less the “compelling” evidence required by the Notice of Inquiry, that any sound recordings would not be offered without the protection afforded by the technologies for which an exemption is being sought. The audio compact disc remains the primary commercial format for sound recordings, and is certain to remain so during the upcoming triennial review period. In fact, taking record labels and protection technology vendors at their word, it is their aim that protection technologies never block access (as distinguished from reproduction) in any CD playback device.

2. Availability for Use by Nonprofit Archival, Preservation and Educational Purposes

The commenting parties do not believe that this factor is relevant to the instant exemption.

3. Impact on Criticism, Comment, News Reporting, Teaching, Scholarship, or Research

The commenting parties do not believe that this factor is relevant to the instant exemption.

4. Impact on Market for or Value of the Protected Work

An exemption permitting consumers to access legitimately-obtained copy-protected CDs will have no impact on the market for or value of the sound recordings in question.

As noted above, it appears that the record labels who have deployed these protection technologies do not intend them to interfere with access and playback, but rather with reproduction.³⁰ There is no evidence suggesting any necessary relationship between devices that fail to access a copy-protected CD and those that are capable of circumventing the technological measure in order to make unauthorized reproductions. When a copy-protected CD fails in a DVD player or game console, for example, no unauthorized reproduction has been averted, as these devices are not capable of making reproductions. Similarly, when a copy-protected CD fails in an Apple Macintosh PC, there is no reason to expect that this platform is any more susceptible to

²⁹ Notice of Inquiry, *supra* n.2, 67 Fed. Reg. at 63580.

³⁰ *See* n.12, *supra*.

use for unauthorized reproductions than Windows PCs that are able to access the sound recording on the CD, but are prevented from reproducing it.

In addition, this exemption would likely be applicable to only a minority of CD purchasers, assuming that the protection technologies succeed in their effort to prevent reproduction while enabling access on most playback devices. In fact, the record labels would themselves be able to control the number of people able to make use of this exemption—by refining the protection technologies so as to permit access on the widest number of playback devices, the copyright owners could reduce the scope of this exemption during the upcoming triennial review period.

The requested exemption would not reach the question of the trafficking of prohibited circumvention tools. Accordingly, the exemption would have no impact on the proliferation of circumvention tools, which would continue to be regulated under Section 1201. In any event, Section 1201 currently does not reach acts aimed at circumventing copy-control mechanisms. As a result, copyright owners have always only had the tools provisions of Section 1201 to rely on in their effort to use technological measures to prevent reproduction. Accordingly, an exemption granted to permit circumvention in order to access copy-protected CDs would not change the range of remedies available to a copyright owner seeking to prevent unauthorized reproduction.

It is also worth noting that a number of devices are already widely available on the market that facilitate the reproduction of these copy-protected CDs. Many of these products do not fall within the scope of the tools provisions of the tools provisions of Section 1201 insofar as they were not primarily designed or marketed for circumvention, and have commercially significant uses other than circumvention. Perhaps the most glaring example of such a device is the common black felt-tipped marker, which has been used to gain circumvent technological measures used on copy-protected CDs.³¹ In addition, a variety of commonly-available CD drives and software packages exhibit different responses to copy-protected CDs, and can be used to circumvent protections on audio CDs.³² As a result, the tools of circumvention are already widely, and legally, available on the market. Any incremental increase in the risks of unauthorized *reproduction* indirectly occasioned by the requested exemption aimed at enabling *access* would likely be trivial.

Finally, it is simply illegitimate for copyright owners to obtain some indirect protection against unauthorized reproduction by interfering with the noninfringing private performance activities of law-abiding CD purchasers. In other words, where a technological protection denies access altogether, it may also succeed in preventing unauthorized reproduction. However, it does so only by preventing innocent consumers from making *any* use of the CDs they have legitimately obtained. The innocent consumer who is unable play her purchased CD on her iMac or Xbox has effectively been made to pay for a useless (or, at a minimum, significantly less useful, assuming she may play it, but only in her car) disc. A model that supports this outcome does not serve the public interest, even if it yields some indirect benefit to copyright owners.

³¹ See n.27, *supra*.

³² See Halderman, *supra* n.8, at § 5 (discussing methods of circumventing copy-protection technologies by using widely available hardware and software that was not designed for circumvention, has commercial value independent of circumvention capabilities, and is not marketed for circumvention, thus falling outside the scope of Section 1201(a)(2) and (b).

5. Other Factors

The statute authorizing these proceedings specifically instructs the Librarian to consider “other factors” in addition to those it sets forth expressly.³³ The commenting parties urge the Copyright Office to consider at least two additional factors in connection with this requested exemption: the importance of legitimate consumer expectations and the value in fostering sound technical standards that advance interoperability.

In evaluating this proposed exemption, the Copyright Office should consider the importance of legitimate consumer expectations with respect to a well-established technology standard like the audio CD. In its over 20 years of evolution as a mass-market music format, the compact disc has successfully maintained backward-compatibility and universal playback among all CD playback devices. As a result, when purchasing a product labeled as a “compact disc,” consumers have come to expect that the disc will play in any compact disc player, whether it be a portable discman, a home stereo CD player, a DVD player, a car changer, or a PC CD-ROM drive. These well-developed expectations serve the salutary purpose of assisting consumers to make sense of a rapidly evolving technology and media market.³⁴

Of course, copyright owners are free to release their content in any format they desire. For example, next-generation high-resolution formats, such as Super Audio CD (“SACD”) and DVD-Audio (“DVD-A”), incorporate technological protection measures and are not backward-compatible with CD drives. But it is one thing to introduce technological protections in *new* formats where consumers have little in the way of developed expectations. It is quite another matter, however, to make changes to an existing format, where those changes upset settled expectations, impair *noninfringing* activities, and fail to announce themselves to consumers prior to purchase.

When purchasing an SACD or DVD-A, a consumer does not expect to be able to play these formats in all of her CD players. Prominent labeling and product segregation in most retail establishments further protects consumers from being misled. A majority of copy-protected CDs, by contrast, are unlabeled (or not clearly labeled) and are sold alongside regular audio CDs at retail.³⁵

Interfering with the backward-compatibility of the CD standard not only undermines the legitimate expectations of the consumers who cannot play their purchased CDs on one or more players, but also creates uncertainty and confusion in the music and consumer electronics marketplace generally. As a result, electronics giant Philips has expressed opposition to the continued deployment of copy-protected CDs that do not play in all CD-compatible drives.³⁶

³³ See 17 U.S.C. § 1201(a)(1)(C).

³⁴ See Jon Iverson, *Record Labels Beware*, STEREOPHILE, Nov. 4, 2002 (describing study conducted by GartnerG2 showing that the vast majority of consumers polled expected to be able to play a CD in any player), at <http://www.stereophile.com/shownews.cgi?1482>.

³⁵ One welcome exception is Amazon, which prominently informs customers that a CD is copy-protected in its CD listings.

³⁶ See *Anti-Copying Row Asks: When is a CD not a CD?*, USA TODAY, Jan. 18, 2002 (Philips expressing opposition to technical measures that impair universal playability), at <http://www.usatoday.com/tech/techreviews/2002/1/18/cd-row.htm>.

The commenting parties also encourage the Copyright Office to consider the value in supporting the development of sound technical standards. In order to appeal to the widest market of consumers, technologists interested in developing CD players strive to make their devices compatible with the widest possible array of audio CDs. In the absence of legal prohibitions, these technologists would refine their designs to overcome the technological protection measures that interfere with access to copy-protected CDs.³⁷ The existence of Section 1201, however, is likely to have a chilling effect on technologists in at least three ways. First, technologists and their companies may refrain from certain research relating to the protection measures being used by record labels, for fear of circumvention liability. Secondly, technologists and their companies may be concerned regarding any secondary circumvention liability that may arise in connection with distribution devices to consumers who will use them for circumvention in connection with copy-protected CDs. Third, technologists may be concerned about liability for “trafficking” in a circumvention tool that can be used to circumvent measures deployed on copy-protected CDs. While the Librarian lacks the power to address the third concern, the exemption requested here would address the other two categories.

F. Balance of Harms

As discussed above, the proposed exemption imposes virtually no costs on copyright owners, while addressing a serious impairment of noninfringing activities in connection with copy-protected CDs that are unplayable due to malfunction.

For consumers who have legitimately obtained a copy-protected CD and discover they are unable to access the sound recording, the harm is acute. They are essentially denied the benefit of their bargain and left to seek a refund from the retailer, if one is available. Moreover, unless the sound recording is available on cassette or vinyl (assuming the disappointed purchaser has playback equipment for these formats), the consumer is left with no alternative source for the work.

While copy-protected CDs may constitute a minority of CDs released today, the number of copy-protected titles appears to be on the rise, both in the U.S. and abroad. Furthermore, the number of titles is only part of the story—if protection technologies are deployed on a few of the most popular releases, they may find their way into millions of American households. If they cause accessibility difficulties for even a small minority of purchasers, it could easily amount to thousands of consumers.

On the record label side of the ledger, the harm posed by granting the proposed exemption is negligible. The protection measures involved are intended to prevent reproduction, not access, indicating that the copyright owners themselves do not view the universal accessibility of these works to be a threat. Moreover, where the effected devices have no reproduction capability, there does not appear to be any chance of harm to copyright owners. Finally, to the extent that an exemption permitting access might open the door to unauthorized reproduction on some devices, copyright owners retain the full panoply of infringement remedies, as well as the protections against the proliferation of circumvention technologies afforded by Section 1201(b).

³⁷ See Halderman, *supra* n.8, at § 5-6 (discussing ways in which CD standards can be refined to block CD protection technologies from functioning on future players).

IV. Proposed Class #2: DVD Region Coding

A. Class of Work for Which Exemption is Sought

Audiovisual works stored on DVDs that are not available in Region 1 DVD format and access to which is prevented by technological measures.

B. Summary

DVDs are region coded, so they can only be played on a DVD player coded to the same region as the DVD. A substantial and growing number of Americans wish to view foreign DVDs that are not available in Region 1 versions. An exemption is required to allow these consumers to modify their DVD players to view their legitimately obtained foreign DVDs.

C. Facts

1. Technological Protection Measures Involved

DVDs currently contain several³⁸ different types of technological protection measures that control access to content stored on the disk in the ordinary course of their operation. The exemption requested focuses on only two. The technology involved is quite complex and has been set out in more detail in materials provided to the Library of Congress during the 2000 rule-making process.³⁹ Accordingly, the following is a functional description of these technologies as they relate to consumers' use of DVDs.

a) Content Scrambling System ("CSS")

CSS is a software program that scrambles the content (usually an audio sound recording and a MPEG-2 video file) stored on a DVD. Content that has been scrambled with CSS must be played on an authorized DVD player in order to unscramble the content and make it playable. Courts⁴⁰ have held that CSS is a technological measure controlling access to a copyrighted work for the purposes of Section 1201, because it requires the application of a process authorized by the copyright owner (namely, descrambling by an authorized DVD player) in order to access the content. (See 17 USC §1201(a)(3)(B)).

b) Region Playback Control ("RPC")

RPC is a second technological measure on DVDs, separate from CSS,⁴¹ that controls access to DVD video content. RPC is a one-byte piece of data stored on a DVD that indicates in

³⁸ DVDs also employ a number of copy control measures, such as Macrovision and CGMS/A.

³⁹ For further technical details about how CSS works, *see generally* DVD Frequently Asked Questions, Question 1.11, at <http://www.dvddemystified.com/dvdfaq.html#1.11> (hereinafter "DVD FAQ"); *see also* Harvard Law School's OpenLaw OpenDVD Frequently Asked Questions, at <http://www.eon.law.harvard.edu/openlaw/DVD/dvd-discuss-faq.html>.

⁴⁰ *Universal City Studios, Inc. v. Reimerdes*, 111 F.Supp.2d 294, 308 (S.D.N.Y. 2000), *aff'd sub nom*, *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2nd Circ. 2001).

⁴¹ The interaction between CSS and RPC is complex. For the purpose of this exemption, it is not necessary to examine the interrelationship in detail, as the proposed exemption would entitle the consumer to circumvent any access controls (whether current or deployed in future) that interfere with access to this class of works.

which of six geographical “regions”⁴² a particular DVD is to be played. RPC is a technological measure that controls access to the copyrighted video content because it prevents access to a DVD by a player that is not coded to the same region as the disc. RPC does not prevent a DVD from being copied.

RPC was purportedly designed to restrict distribution, by enforcing a system of phased releases of copyrighted movies. Under this system, major movie studios generally first release DVDs of domestic films in the United States, followed approximately six months’ later by release in Japan and Australia, and a year later in England and Europe. RPC was also intended to support geographically-zoned distribution agreements and price discrimination, where consumers pay different prices to purchase a DVD depending on where they reside.

c) Region Code Enhancement

Some DVDs also contain a third technological protection measure controlling access to the stored content, called Region Code Enhancement (RCE).⁴³ RCE was purportedly designed to prevent RCE-protected DVDs from playing on DVD players (both computer DVD-ROM readers and stand-alone players) that have been modified to be region-code free and players that have been manufactured to play DVDs from all regions (multi-region players). There is very little reliable, publicly-available documentation on the technological details of RCE. It appears that RCE is data stored on a DVD that, upon insertion into a DVD player, queries the DVD player as to which region it was last set to. If the player indicates compatibility with multiple regions, the DVD player displays a warning screen advising the viewer that the DVD player has been modified and will not play the RCE-protected DVD.⁴⁴

2. Scope of the Problem

A significant and growing number of American consumers wish to view foreign films that are not available on Region 1 DVDs. While it is difficult to quantify the numbers of people and titles involved, the available evidence suggests that the problem is significant and likely to worsen.

It is impossible to trace the number of DVDs brought back from abroad by tourists, business travelers and those visiting family overseas. There are also no reliable reports of the number of DVDs shipped from abroad into the United States. Nevertheless, the growing enthusiasm for foreign films is evident, as illustrated by the proliferation of fan magazines and burgeoning American market for Japanese animation works (“anime”) and Indian Bollywood musicals, as well as films the of Hong Kong, China, and Australia.⁴⁵ As the majority of works

⁴² There are six geographical regions, one reserved region (Region 7) and one special purpose region for airlines and cruise ships (region 8). The United States is in Region 1. *See* DVD FAQ, *supra* n.39, Question 1.10, at <http://www.dvddemystified.com/dvdfaq.html#1.10>.

⁴³ *See* Region Coding Enhancement FAQ, at <http://www.dvdtalk.com/rce.html>.

⁴⁴ *Id.*

⁴⁵ For instance, for Japanese Anime fan websites (all located in the United States), *see*: AnimEigo at: <http://www.animeigo.com/>, Anime on DVD at: <http://www.animeondvd.com/>; Planet Anime at: <http://www.planetanime.com/cgi-bin/anime/index.html>, CentralParkMedia: <http://www.centralparkmedia.com/>.

For Bollywood movies, *see*: <http://www.bollywood.com/>, <http://www.planetbollywood.com/>,

from these foreign markets are never released in the United States, and as new foreign works continue to be released only on DVD in those markets, the number of non-Region 1 DVDs that American consumers will seek to import and view will increase in coming years.

a) Number of People Involved/ Size of Audience

The prohibition on circumvention of RPC affects all consumers who wish to play a legitimately purchased foreign movie on a non-Region 1 DVD format. This comprises:

- (a) non-Region 1 DVDs purchased outside of the United States in the relevant zone and lawfully imported into the United States by the purchaser for personal, non-commercial use; and
- (b) non-Region 1 DVDs purchased from vendors located outside of the U.S. by consumers residing in the United States.

Both of these activities is plainly legal under the Copyright Act, notwithstanding the distribution rights of copyright owners.⁴⁶

There is no mechanism for tracking these informal, private-use importations. However, it is possible to extrapolate from foreign national expatriate population figures and Amazon.com sales of foreign movies. There are approximately 1.9 million Indian nationals⁴⁷ living in the United States, approximately 64,300 resident Australian nationals, and 33,700 Australian visitors on any given day.⁴⁸ There are in addition, substantial numbers of native-born American nationals who have become fans of these films – particularly the Region 3 Hong Kong and Region 2 Japanese anime movies.⁴⁹

b) Number of Titles Affected

(1) Current

Many foreign movies are simply never released in the U.S., and American consumers have no means of viewing those works other than by purchasing the movie from a foreign retailer. The number of works is neither quantitatively nor qualitatively insignificant. For instance, the Australian film industry produced 282 feature films in the period from 1980-1996, of which only 30% achieved US cinematic release⁵⁰ and only 38% of which were released in the

<http://www.bollywoodpremiere.com/>.

For Hong Kong moves, see: <http://www.hkmdb.com/>.

⁴⁶ See 17 U.S.C. § 602(1).

⁴⁷ Ranjan Roy, 'Bollywood' Movies Gaining Fans, CINCINNATI ENQUIRER, Sept. 18, 2002, at: http://www.enquirer.com/editions/2002/09/18/tem_bollywood_movies.html.

⁴⁸ Figures for 2001, provided by the Australian Embassy, Washington D.C..

⁴⁹ See note 6, *infra*.

⁵⁰ Figures provided by the Australian Film Commission, based on 1980-1996 period. See also statistics in taken from *Get the Picture*, Australian Government Film Commission, as of May 2001, at <http://www.afc.gov.au/gtp/mrproportions.html>. The figures for 1999, the most recent data available, indicate an even greater disparity: 41 films produced, of which only 5 achieved U.S. cinematic release. (This may increase slightly due to the time lag of approximately 12-24 months from Australian to U.S. cinematic release.)

U.S. on VHS.⁵¹ Currently, only 66 Australian titles have been released on DVD in the United States.⁵² The “Bollywood” movie industry of India, the world’s largest movie producing industry, produces about 800 movies each year, but one estimate suggests that only 55 titles are available on Region 1 DVD.⁵³ The Hong Kong/Chinese market produces about 140 films a year and accounts for export revenue of about HK\$541 million,⁵⁴ but many of those titles are never released in the United States. The Japanese anime market has produced about 150 titles per year⁵⁵ on DVD alone in the last few years, but on one estimate only 96 DVD titles are available in the United States.⁵⁶

The movies that are not available in the United States include some of the most popular and critically acclaimed movies from the relevant markets. For instance, two of the most popular Australian movies of 1999 according to cinema takings, *Two Hands* (which won five Australian Film Industry awards) and *Paperback Hero*,⁵⁷ are still not available for purchase at U.S. retailers.

(2) Future

The number of titles currently affected is significant, but within the next three years, it is clear that the problem will grow much worse as the VHS tape format is phased out.

DVDs are now the dominant distribution media for the home video entertainment market. As the *New York Times* reported recently, DVD technology has been the fastest adopted home entertainment in history, with DVD players having entered 30 million households over a five year period. Sales revenues for DVDs have surpassed those for VHS tapes and are anticipated to increase another 50% this year.⁵⁸ In line with this trend, many foreign movies are now being released solely or primarily in DVD format, where previously they were released in VHS format or in both formats.

By the end of 2001, one of the major Japanese anime distributors, Bandai Entertainment, shifted to DVD-only releases. Two other major distributors of anime, Pioneer Entertainment and ADV Films, also dropped VHS releases and released some series solely in DVD format.⁵⁹ In Australia, two of the most popular and highly acclaimed movies released in the last two years, *The Bank* (2000) and *Follow the Rabbit-Proof Fence* (2001), are currently available only on

⁵¹ Figures supplied by the Australian Film Commission, based on 1980-1996 period. See also statistics listed in *Get the Picture*, at <http://www.afc.gov.au/gtp/mrvideosum.html>.

⁵² Figures supplied by the Australian Film Commission as of December 18, 2002.

⁵³ Based on Internet Movie Database search via <http://www.imdb.com>.

⁵⁴ Hong Kong Government Film Services Office of the Television and Entertainment Licensing Authority, 1999 production figures, at http://www.fso-tela.gov.hk/guide_to_filming_02_01.cfm.

⁵⁵ Chris Beveridge, 2001 – Year in Review, at <http://www.animedondvd.com/specials/year-in-review/2001>.

⁵⁶ Based on search at <http://www.centralparkmedia.com>.

⁵⁷ *Id.*, at <http://www.afc.gov.au/gtp/mrboxausttop5.html#Rfd58701>.

⁵⁸ Rick Lyman, *In Revolt in the Den, DVD Has the VCR Headed to the Attic*, NEW YORK TIMES, August 26, 2002, at <http://www.nytimes.com/08/26/technology26.html>

⁵⁹ Chris Beveridge, 2001 – Year in Review, at <http://www.animedondvd.com/specials/year-in-review/2001>.

Region 4 DVD versions at major Australian retailers.⁶⁰ Therefore, as a practical matter, anyone in the United States who wishes to obtain a copy of either movie for home viewing must purchase a Region 4 DVD, which will not play on a U.S. Region 1 DVD player.

This trend will continue in coming years, resulting in fewer foreign movies available to U.S. purchasers.⁶¹ In part, this reflects the strategic business decision of the distributors of the major studios to shift production and release towards DVD, and phase out VHS tapes. The major motion picture studios have intentionally established pricing strategies that encourage consumer transition to DVD format.⁶² This is also reinforced by the decisions of the major U.S. home entertainment media distributors, led by Blockbuster, Inc., to reduce their VHS inventory by 25% to make more room for DVD titles,⁶³ and by Circuit City, which has now ceased to carry VHS tapes.⁶⁴ Consumer demand for DVD format content is also being driven by the exponential increase in consumer uptake of DVD players from 15 million units sold in 1997-2000 to 12 million units sold in 2001 alone, with a current total of over 30 million DVD players in U.S. households.⁶⁵

As a result, in the next three years, consumers will be increasingly unlikely to find foreign movies on VHS format and will have no option except to purchase the relevant region coded DVD version of the film.

⁶⁰ While *Long Walk Home - Rabbit-Proof Fence* (as it is titled in the United States) has just commenced cinematic release in the United States, and is currently unavailable for purchase for home-viewing in any format, *The Bank* was released in Australian cinemas in 1999 and U.S. cinemas in mid-2002, but is still not available for purchase for home-viewing in *any* format in the United States. A VHS version was apparently produced for the Australian rental market, but despite considerable effort, the commenting parties were not able to locate an ex-rental copy to purchase for use in a multi-format VCR, either through major retail outlets in Australia or through online retail services.

⁶¹ Although specialist video providers may be able to assist some devoted U.S. videophiles in locating VHS format versions of some of these works, this is an expensive and difficult process that is unlikely to be widely available to the vast number of U.S. residents who wish to view these works.

⁶² For instance, while it is available in the United States on Region 1 DVD and therefore would not fall within the class of works for which an exemption is sought, the highly-acclaimed 2001 Australian movie *Lantana* (released in US cinemas in mid-2002), is available from the internet retailer, Amazon, on Region 1 DVD for approximately \$23.00. An American consumer would have to pay almost \$70 for the VHS tape version.

⁶³ *Blockbuster Taking Charge to Reduce VHS Inventory*, N.Y. TIMES, Sept. 11, 2001, at C4.

⁶⁴ *Circuit City To Drop VHS Movies to Clear Way for DVDs*, N.Y. TIMES, June 21, 2002, at C4.

⁶⁵ *Id.*; see also Lyman, *supra* n.58.

D. Argument

1. Non-infringing Activity Is Being Impaired

The prohibition on circumventing CSS and RPC prevents consumers from playing legitimately-obtained non-Region 1 foreign DVDs on computer DVD-ROM readers and on stand-alone DVD playback machines (collectively, “DVD players”) which are coded for Region 1. There is no dispute that personal playback of these works is a non-infringing private performance. It is also clearly lawful to import foreign-coded DVDs into the country for personal, non-commercial use.⁶⁶

In addition, a consumer can accomplish these non-infringing uses without violating the tools prohibitions in Sections 1201(a)(2) or 1201(b). For example, a consumer could acquire a Region 1 DVD player and subsequently modify the player to allow it to play DVDs from other regions, thereby turning the DVD player into a multi-region DVD player. By subsequently using the modified player to play legitimately-obtained foreign works, the consumer would not reproduce a copyrighted work, nor would he or she violate any of the copyright owner’s other exclusive rights under 17 USC §106. Nor would the consumer have “trafficked” in circumvention tools in violation of Section 1201(a)(2) or (b).⁶⁷

The act of playing a DVD on a modified player, however, may violate Section 1201(a)(1), and accordingly an exemption is necessary to resolve the question. A number of major motion picture studios have previously taken the position that would make playback of a DVD on a modified player at violation of Section 1201(a)(1). On their view, when a consumer purchases a CSS-protected DVD, the “authorization of the copyright owner” that accompanies the purchase only extends to playback on a DVD-CCA compliant player.⁶⁸ Playing a CSS-protected DVD on a region-free player, then, would exceed “the authority of the copyright owner,” violating Section 1201(a)(1). In other words, a purchaser of a CSS-protected DVD receives “authorization” only to play the DVD on a single-region, DVD-CCA compliant player.

⁶⁶ See 17 U.S.C. § 602(1). Section 602 makes lawful both importation for personal use by a consumer carrying back a work from overseas and ordering a work from a foreign vendor and having it delivered in the United States.

⁶⁷ It is worth noting that the vendor of the DVD player may also avoid liability under Section 1201. To the extent the unmodified DVD player in question (nor any part or component thereof) was neither primarily designed nor marketed for circumvention, and to the extent it has significant commercial purposes other than circumvention, it would not qualify as a circumvention device within the meaning of Section 1201(a)(2) or (b)(1). Of course, the ease with which a player can be modified to region-free status may bear on whether the manufacturer has violated its contractual “tamper-resistance” obligations to DVD-CCA. This contractual inquiry, however, is unrelated to the question of Section 1201 liability.

⁶⁸ See Reply Brief for Plaintiffs-Appellees at 63, note 43, *Universal City Studios, Inc. v. Remeirdes*, No. 00-9185 (2d Cir. filed Feb. 28, 2001) (“[A]uthorization by the Studios [upon purchase of a DVD] has been limited to accessing DVD content via authorized equipment.”), at http://www.eff.org/IP/Video/MPAA_DVD_cases/20010228_ny_op_reply_brief.html.

The commenting parties disagree with this view. Nevertheless, if the proposed exemption is granted, then a determination of the question becomes unnecessary with respect to the works that fall within the exempted class.

2. Scope of Exemption Sought

An exemption is sought for the class of foreign audiovisual works on non-Region 1 format DVDs that are not otherwise accessible to U.S. residents because they are not available in Region 1 DVD format.⁶⁹

The exemption sought is narrow. It seeks to exempt only those works that are legitimately obtained by individuals in the United States and that are not otherwise available on Region 1 DVD in the United States.

As the scope of this rule-making process is confined to exemptions from Section 1201(a), the exemption sought would not have the effect of immunizing the distribution or trafficking in tools which could circumvent access or use technological protection measures. Accordingly, the distribution of tools such as DeCSS that might effect the circumvention of the DVD's access controls would continue to be illegal under Section 1201(a)(2). Nor would an exemption sanction infringement of the copyrighted works in issue. A copyright owner would continue to have the right to sue a user for infringement if the user violated any of the copyright owner's exclusive rights after gaining access for playback.

E. Statutory Factors

1. Availability of Copyrighted Works for Use

a) Availability of Unprotected Alternative Sources

The only alternative source for works released on non-Region 1 RPC-protected DVDs would be analog VHS. This alternative, however, is considerably less attractive than is the case for domestically-released Region 1 content.⁷⁰

First, as discussed earlier, finding a VHS copy of a foreign film that has never been released in the United States can pose a serious challenge for even the most seasoned film connoisseur. This difficulty is further exacerbated by the incompatibility of the three different worldwide video display standards⁷¹ and different electricity voltage standards. For example, in order to watch an Australian VHS tape which uses a PAL output format, a U.S. resident would need to purchase a PAL-NTSC converter VCR, or an Australian VCR and TV set, along with a separate electricity converter.⁷²

⁶⁹ The exact number of works that would comprise this class will vary as new foreign works are released on non-Region 1 DVDs, and as any previously released foreign works are subsequently released on Region 1 DVDs.

⁷⁰ See 2000 Final Rule, 65 FR 64,568.

⁷¹ See PAL, SECAM and NTSC (U.S.) See PAL-NTSC Frequently Asked Questions, at: <http://www.dvdupgrades.info/cgi-bin/shop/videofaq.html>, and chart of Country Standards at: <http://www.spcomms.com/standards.html>.

⁷² *Id.*

Moreover, for the reasons discussed above, consumers will be increasingly unlikely to find foreign movies on VHS format in the next three years as VHS is phased out in favor of DVD. Accordingly, it will frequently be impossible to watch such movies on videotape with a PAL/SECAM-NTSC converter video cassette player, even if the consumer has purchased such a device and overcome the video display standard incompatibility issues.

- b) Unclear legal status of use of non-Region 1 DVD player, multi-region or region-free DVD players under the DMCA.

American consumers who wish to view a foreign region-coded DVDs currently have several options, all of which demonstrate the adverse effect of the circumvention prohibition on their non-infringing use of this class of works.

First, as recognized in the 2000 Final Rule,⁷³ they may purchase and use a DVD player or players from each of the relevant foreign regions from which they have purchased DVDs. Aside from the expense, this is not feasible without also purchasing an expensive multi-standard televisions or signal converters, due to incompatibility between the main three video display standards used across the world (PAL, SECAM, and NTSC) and differing power international standards. Therefore, even if an American consumer purchases a player from a different zone, the signal output from the player would be in either a PAL or SECAM format for use with a television using the relevant standard, which could not be viewed on a U.S. NTSC standard television.⁷⁴ The commenting parties contend that imposing this burden on consumers interested simply playing lawfully obtained works constitutes a “substantial adverse effect” on consumers.

Second, again as noted in the 2000 Final Rule,⁷⁵ in some later generation computer DVD-ROM drives (using RPC-2 technology), consumers can reset their region code up to *five* times⁷⁶ before the player will lock on the last viewed zone, allowing a consumer to watch up to four or five foreign-purchased DVDs. While this technology is useful, the limitation on viewing four or five foreign DVDs at most (and then potentially being prevented from further viewing of Region 1 DVDs unless the last resetting was to Region 1) prevents it from dispelling the substantial adverse effect identified above.

Third, consumers can purchase a modified zone-free DVD player⁷⁷ or a multi-region player, or can themselves modify a Region 1 player to operate in this manner. While the commenting parties take the view that the modification and subsequent use of such a player does

⁷³ See 65 Fed. Reg. 64,569.

⁷⁴ See Roger Chang, *Multi-Region DVD Solution*, August 19, 2002, TechTV, at <http://www.techtv.com/callforhelp/answerstips/print/0,23102,3396330,00.html>.

⁷⁵ *Id.*

⁷⁶ See DVD FAQ, Question 1.10, *supra* n.39, at <http://www.dvddemystified.com/dvdfaq.html#1.10>.

⁷⁷ Region-free DVD players are usually DVD-CCA licensed DVD players that have been physically modified by removal of a chip. Multi-region or multi-zone players are usually licensed DVD players that have been modified by implementing a sequence of button pushes on the player’s remote control, which changes the player’s region code registry. A player can be switched from one region to a different region, or can be set to play all regions. See *id.*

not violate sections 1201, copyright owners have previously argued the contrary position.⁷⁸ If this interpretation were upheld, purchasing, and/or modifying a DVD player to play non-Region 1 DVDs would put the consumer at risk of liability under Section 1201(a).

2. Availability for Use by Nonprofit Archival, Preservation and Educational Purposes

The prohibition on circumvention would also place a significant burden on archivists and libraries who seek to make this class of works available to their patrons and on teachers and academics who seek to access these works for non-infringing uses. In order to access foreign movies on non-Region 1 DVDs, archivists and librarians (and their patrons) and academics would face the same obstacles and inconveniences discussed above in relation to consumers. Having to acquire a set of region-specific DVD players, multi-standard televisions, PAL/SECAM – NTSC converters, and an electricity voltage converters in order to play back legitimately-obtained foreign works would constitute a costly and substantial adverse impact on these users.⁷⁹

3. Impact on Criticism, Comment, News Reporting, Teaching, Scholarship, or Research

Similarly, journalists, teachers, scholars and researchers would all face a burden to that faced by consumers in attempting to lawfully access this class of works for these purposes.

4. Impact on Market for or Value of the Work
a) Harm to Copyright Owners

The exemption sought would have no adverse effect on the market for or value of the class of works. First, the proposed exemption would not result in any loss of revenue to copyright owners as it would only apply to works that are otherwise not available in the United States. Second, since this class of works is defined to include legitimately obtained foreign DVDs, consumers will have already paid compensation to the relevant copyright owners for use of their work.

Third, and most importantly, an exemption clarifying the legal status of circumvention activities relating to this class would remove the current chill on consumers' access to foreign film works and the associated required technology and devices. This would ultimately have the effect of increasing demand and the audience size for this class of works, to the benefit of motion picture copyright owners.

Further, as discussed above, granting the exemption sought would have no adverse impact on copyright owners due to the limited scope of the exemption being sought. The exemption would cover only the act of circumvention for access and would not diminish the legal rights and remedies available to the motion picture copyright owners in respect of either trafficking provisions of 1201(a)(2) or 1201(b), or copyright infringement, if a consumer made an inappropriate use of a work after gaining authorized access.

⁷⁸ See n.68, *supra*.

⁷⁹ CSS and RPC would interfere with the ability of archivists and librarians to create back-up and archival copies of this class of works, undermining their preservation mission.

Nor would the proposed exemption restrict any of the copyright owners' existing rights and abilities under the RPC system. Copyright owners would still be able to make timed releases and at differential prices in different regions. The DVD-CCA would still be able to restrict the distribution and availability of region-coded DVD players via licensing agreements with device manufacturers. Many consumers not interested in foreign films will likely continue to purchase Region 1 players and continue to be subject to the limitations enforced by RPC.

Finally, some copyright owners might have concerns that the exemption would have the effect of endorsing payment for foreign works to the relevant foreign rights-holder that might otherwise be collected by the U.S. rights-holder entity if the consumer were to purchase a Region 1 version of the motion picture. Of course, in that instance, a domestic copyright owner would be able to pull a work out of the exempted class by simply releasing a Region 1 version of the work in question, thereby putting the work outside the class.

Accordingly, since copyright owners themselves would be able to control the scope of the exemption in this way, the commenting parties contend that the proposed exemption does not have an adverse impact on copyright owners.

b) Harm to Consumers

By comparison, not granting the exemption sought would have a substantial adverse effect on consumers because the prohibition on circumvention precludes *all* access to the lawfully obtained works. Without an exemption for this class of works, consumers who want access to their own legitimately-obtained DVDs are essentially required to make a choice between having to purchase expensive, redundant equipment (i.e., multiple DVD players and televisions) to watch their own foreign movies, or obtaining and modifying a Region 1 DVD player and putting themselves at risk of legal action and significant civil penalties under the DMCA. Thus, the harm to consumers if the exemption sought is not granted far outweighs any potential harm to copyright owners.

5. Other Factors

a) Neither CSS nor RPC Technological Protection Measures support a model that is of benefit to the Public

In the 2000 Final Rule, the Library of Congress and the Copyright Office accepted the submission of motion picture industry representatives that the industry would not have made content available on DVD format in the absence of RPC and CSS because of the threat of piracy, and concluded that “[s]ince the region coding of audiovisual works on DVDs serves legitimate purposes as an access control, and since this coding encourages the distribution and availability of digital audiovisual works, on balance, the benefit to the public exceeds the de minimis harm alleged at this time.”⁸⁰

As noted above, RPC is an access control, but does not control or prevent copying of the content of a DVD. There is no evidence that RPC or CSS has actually had any effect on commercial piracy. Rather, the available evidence suggests the contrary conclusion. It is beyond doubt that the unauthorized distribution of copyrighted works released on DVD is widespread, and that neither CSS nor RPC has been successful in slowing the phenomenon. Surprisingly, however, the market for DVDs has continued to climb, rather than plummeting in the way the

⁸⁰ 65 Fed. Reg. at 64569.

motion picture studios' argument would have suggested.⁸¹ In other words, to the extent the motion picture industry thought that CSS and RPC would serve as a bulwark against unauthorized distribution, they were wrong. More importantly, they were wrong to think that they needed a bulwark in the first place—the upside of swelling DVD sales has more than made up for the downside of digital piracy.

This exemption is specifically being sought because RPC has *not* had the effect of making content from other regions accessible to U.S. residents. While it is clearly lawful to import foreign movies on DVDs for personal, non-commercial use under Section 602, consumers who merely wish to play back their legitimately obtained movies must bear the burden of either foregoing access, to avoid breaching an unclear and vague law, or must invest substantial capital to purchase additional technology in order to watch the purchased content on a multi-region player with the attendant risk of violating the DMCA.

Put another way, the rights granted to American consumers by Section 602 are in danger of being wiped out by Section 1201 in this era of ubiquitous RPC-protected DVDs. There is nothing that indicates Congress intended this result when enacting Section 1201. An exemption from that law for this narrow class would harmonize the two provisions.

(1) Harm to consumers from RPC

Finally, there is clear evidence in foreign zones, that RPC and the RPC system have in fact rendered substantial harm, rather than a benefit, to consumers. For instance, in Australia, the Federal Government's anti-trust regulatory entity, the Australia Consumers and Competition Commission, has begun an anti-trust investigation into the effects of RPC and has publicly voiced concerns⁸² that the RPC system has severely disadvantaged residents of zone 4, by enforcing a system in which they have access to only a small proportion of works available elsewhere (approximately 700 titles compared to over 5000 titles in zone 1) and have had to pay significantly higher prices than those paid by region 1 residents. The Commission's Chairman, Professor Fels, stated:

*"The ACCC has for some time been investigating the regional playback control (RPC) technology present in DVD players and accompanying films. The ACCC is aware that DVD RPC effectively divides the world into six regions for the purposes of DVD distribution, preventing inter-region substitution of discs and hardware. The practical effect of RPC is that a consumer who has purchased a DVD player in Australia may be prevented from playing films obtained from overseas. The ACCC believes that overseas markets give Australian consumers access to a wider range of competitively priced film titles, with special features not otherwise available in Australia. In the ACCC's view, this means Australian consumers are forced to pay higher prices for films with fewer features and a lesser range of film titles."*⁸³

⁸¹ See Rick Lyman, *In Revolt in the Den, DVD Has the VCR Headed to the Attic*, N.Y. TIMES, August 26, 2002.

⁸² ACCC July 2002 Newsletter, "ACCC chips away at region coding", reporting on Australian Federal Court decision; ACCC Speech, May 2001, at <http://www.accc.gov.au/fs-search.htm>.

⁸³ ACCC Media Release, February 8, 2002, "ACCC Defends the rights of Playstation owners" at <http://www.accc.gov.au/fs-search.htm>; ACCC Media Release, July 29, 2002, "Game over for Sony Playstation", at <http://www.accc.gov.au/fs-search.htm>, reporting on Australian Federal Court decision interpreting Australian Copyright Act's equivalent of 17 USC 1201, and holding that RPC does not serve the purpose of prohibiting or inhibiting copyright infringement or any

V. Proposed Class #3: Unskippable DVD Advertising

A. Class of Works for Which Exemption is Sought

Audiovisual works released on DVD that contain access control measures that interfere with the ability to control private performance, including the ability to skip promotional materials.

B. Summary

Movie studios are able to make certain DVD content “unskippable” during playback. Some studios have abused this feature by preventing the skipping of advertising shown prior to the start of the feature presentation. DVD owners should be entitled to eliminate these mandatory ads, or, in the alternative, defeat the “UOP blocking” feature, and should enjoy an exemption from DMCA liability when they do so.

C. Facts

1. Technological Protection Measure Involved

Copyright owners have the ability to designate content on DVD as “unskippable,” preventing consumers from using the fast-forward feature. In order to obtain a license to the trademarks and trade secrets associated with the DVD format from the DVD Format/Logo Licensing Corporation (“DVDFLC”), DVD player manufacturers must ensure that their players detect and respect these “unskippable” designations. This functionality in DVD players is known as “UOP (user operation) blocking” and is required as a condition of obtaining a DVDFLC license.⁸⁴

This feature has been used by some DVD publishers to force consumers to watch advertising before being able to begin viewing the feature presentation. For example, purchasers of Disney’s animated feature *Tarzan* (one of the most popular video titles in 2000) on DVD were required to watch four minutes of unskippable promotional material before having access to the menu or movie.⁸⁵ Included in these four minutes were not only promotions for other Disney films, but also advertising for the Disney website.⁸⁶ Literally hundreds of thousands of Americans sat through those four minutes, and most presumably will sit through them again each time they play the DVD in the future.⁸⁷ Given that Disney’s animated features are primarily marketed to children, many parents were outraged.⁸⁸

right protected under copyright law.

⁸⁴ See DVD Format/Logo Licensing Corp. (DVDFLC), DVD Video Player Test Specification Version 1.1 (September 2002), at http://www.dvdfllc.co.jp/forms/form_a.pdf.

⁸⁵ See Greg Sandoval, “*Tarzan*” DVD Forces Viewers Through A Jungle Of Previews, CNET NEWS, March 2, 2000, at <http://news.com.com/2100-1017-237585.html>.

⁸⁶ *Id.*

⁸⁷ The *Tarzan* DVD sold more than 400,000 units in the first half of its 13 month release window. See DVDPhile Reader Mail, at http://www.dvdfile.com/news/viewpoints/reader_mail/2000/8_16.htm.

⁸⁸ *Id.* (“I have to let Disney know just how offensive this is that they would shove this material

2. Scope of the Problem

It is difficult to assess how widespread the insertion of unskippable promotional content has become on commercial DVDs, as the major motion picture studios have not published this information. Nevertheless, the complaints of DVD enthusiasts in a number of fora suggest that this technique is being used on a substantial number of titles.⁸⁹

D. Argument

1. Noninfringing Activity Being Impaired

Restrictions on a consumer's ability to fast forward through advertising impair what would otherwise be a plainly noninfringing activity. Copyright owners do not enjoy any exclusive rights over private performances. Their rights under Section 106 relate only to public performance.⁹⁰ Accordingly, when a consumer engages the "fast forward" function on a playback device, no exclusive right is implicated and no infringement can occur. In other words, just as a reader's skipping a chapter in a novel never violates copyright law, simply pressing the "fast forward" button can never, under any circumstances, constitute copyright infringement.⁹¹

In the case of DVDs, however, the requirements of the interlocking licensing schemes that govern player manufacturers make it impossible for consumers to override the UOP blocking present on all players without circumventing CSS, thereby courting liability under Section 1201(a). For example, a parent who wanted to spare their children repeated viewings of the "unskippable" *Tarzan* content might, but for CSS, make a backup copy onto VCD or DVD-R omitting the objectionable advertising or editing its UOP blocking designation to permit fast-forwarding.⁹² In the absence of the circumvention ban contained in Section 1201(a), such a private, noncommercial reproduction would almost certainly qualify as a fair use.

The Section 1201 prohibition on circumventing CSS eliminates the question of fair use and replaces it with a flat ban, leaving the consumer with no avenue that would permit her to

down my throat every single time my kids want to watch.")

⁸⁹ See, e.g., <http://www.amazon.com/exec/obidos/tg/cm/member-reviews/-/A28GJQ0D06OTSY/103-8213743-6921403> (complaint regarding forced ads in *The Sixth Sense*); <http://www.digitallyobsessed.com/showreview.php3?ID=760> (complaint regarding multiple advertisements embedded into DVD of *Shorts 4*); <http://www.dvdfire.com/interactive/forum/ubb/Forum1/HTML/000050.html> (complaints regarding "forced" ads in DVDs); <http://dvdmg.com/getalife.shtml> (complaint regarding forced ads in *Get a Life* DVDs).

⁹⁰ See 17 U.S.C. § 106(4).

⁹¹ Of course, if the "fast forwarding" depends upon a reproduction or transmission, these other activities may independently infringe on the exclusive rights of a copyright owner. But the mere fast-forwarding of a playback device, by itself, never constitutes infringement.

⁹² A parent may be able to acquire an unlicensed DVD player that did not support UOP controls. We are not aware of any widely available players that offer this functionality, however. In addition, the use of such a player may itself involve a prohibited circumvention of CSS. Copyright owners have argued that the playback of a DVD on an unlicensed player constitutes a violation of Section 1201(a), as it circumvents CSS without the authority (normally conveyed via DVD-CCA license) of the copyright owner. See n.68, *supra*.

control the private performance of a DVD she legitimately obtained. This situation is yet another that arises from the “merger of access and use controls” on DVDs, as described in the 2000 Final Rule.⁹³ Here, a restriction on private performance (e.g., making ads unskippable) is implemented through a set of interlocking license schemes which, in turn, are premised on the use of an access control. As a result, by dint of CSS, copyright owners are given de facto control over private performance.

An exemption is justified here in order to prevent copyright owners from bootstrapping the protections granted by Section 1201(a) into control over lawful uses, such as fast-forwarding, that fall entirely outside the exclusive rights secured by the Copyright Act. As noted above, when Congress enacted Section 1201, it did not intend to dramatically expand the scope of the exclusive rights enjoyed by copyright owners. In particular, there is nothing in the legislative history of the DMCA that suggests that Congress meant Section 1201 to give legal remedies to copyright owners intent on stopping consumers from skipping objectionable advertising that accompanies legitimately-obtained DVDs.

E. Statutory Factors

1. Availability of the Work

a) Availability in Alternate Formats

The fact that some DVD titles with unskippable advertising may also be available in analog VHS formats does not adequately address the harm imposed on DVD purchasers for at least two reasons.

As an initial matter, a consumer has no way to discover, prior to purchasing a DVD, whether or not unskippable advertising is contained on the DVD, nor whether she might object to such advertising. For example, a parent’s decision regarding which children’s DVD title to purchase may well be influenced by whether her children will be exposed to advertising each time they view the DVD, as well as the content of the advertising in question. Avoiding these mandatory ads would put the parent to the burden of returning the DVD after purchase (assuming that a retailer were willing to accept an opened DVD for refund) and locating the same title on VHS.

In addition, the analog VHS version of a title is an increasingly poor substitute for the DVD version, as DVDs are rapidly incorporating additional content that is not available on VHS. The recent “Platinum Series Special Edition” of *The Lord of the Rings: The Fellowship of the Ring* illustrates the point: available in a four DVD collection, this enormously popular DVD title includes over 20 hours of additional content that is not available on VHS.⁹⁴ Virtually every major DVD release today includes exclusive content not available in any other format. Thanks to CSS and the interlocking licenses that govern DVD players, a consumer’s ability to access this exclusive additional content can be conditioned on a requirement that the consumer first be confronted with unskippable ads.

⁹³ See 2000 Final Rule, *supra* n.25, at 64,568.

⁹⁴ This content includes 14 hours of commentary, as well as more than 7 hours of documentary footage. For a complete review of the additional materials on this DVD release, which will almost certainly be one of the top sellers of 2002, see Joseph Krebs, *Extras to Fill Up the Corners*, SOUND & VISION, at 86, January 2003.

b) Does Not Support a Model that Benefits the Public

There is no credible evidence that the use of “unskippable” advertising is integral to any business model that benefits the public.

First, the commenting parties are not aware of any evidence suggesting that motion picture studios would withhold or fail to produce any significant content if they were denied the ability to *force* advertising on consumers. Even if the proposed exemption were granted, copyright owners would remain free to *include* advertising on DVDs. They would also remain free to designate such content as “unskippable.” The proposed exemption would merely *allow* consumers interested in avoiding advertising to do so, if they had the know-how and interest necessary to accomplish the task. Consumers interested in watching the ads would remain free to do so, and those who were either unwilling or unable to circumvent the access protections would actually remain unable to avoid the content.

So the question becomes whether the ability to embed “unskippable” content meaningfully encourages the distribution of creative works that would otherwise not be made available, and whether allowing a certain portion of the DVD audience the legal right to circumvent CSS in order to accomplish this end would meaningfully erode this incremental incentive.

As to the former question, the sorts of content that have been made “unskippable” suggest that this feature is not viewed by most motion picture studios as a major source of revenue or control. If it were, one would expect to see promotions for products by companies who would pay for access to a captive DVD audience. Instead, the “unskippable” ads tend to be promotions for upcoming releases from the same studio, as well as advertisements for related businesses (such as the Disney website advertised in *Tarzan*). As to the latter question, since an exemption would only result in the loss of only a portion of the audience for unskippable ads (i.e., those who have the know-how to circumvent CSS), it is unlikely that the proposed exemption would undermine the unskippable ads “model” in any event.⁹⁵

2. Availability for Use by Nonprofit Archival, Preservation and Educational Purposes.

The commenting parties do not believe that this factor is relevant to the instant exemption.

3. Impact on Criticism, Comment, News Reporting, Teaching, Scholarship, or Research.

Inclusion of “unskippable” material hinders viewing of the DVD title in teaching, criticism, and commentary by barring random access to a clip without the prior showing of advertisements. The professor who wants to demonstrate an animation technique or the reviewer who wants to praise or criticize a scene cannot simply put the DVD into its player and jump to the desired scene, but is forced to view the ads each and every time. By virtue of 1201(b), they lack the tools necessary to copy these fair use excerpts to another medium, so they must start

⁹⁵ It is worth emphasizing that the proposed exemption would not apply to all CSS-protected DVDs, but only those that contained unskippable promotional content. As a result, copyright owners would be entitled to control the scope of the exemption by limiting the number of DVDs that included unskippable content.

each DVD anew to show any scene. Since public performance of excerpts in the course of teaching or criticism would be a lawful use,⁹⁶ teachers and critics should not be made to interrupt their lessons for commercial breaks.

4. Impact on Market for or Value of the Protected Work.

An exemption for circumvention of CSS on DVD titles that include “unskippable” advertising would have no impact on the market for or value of the CSS-protected work. Furthermore, to the extent any impact could be shown, a motion picture studio could unilaterally remove its work from the scope of the proposed exemption by eschewing the “unskippable” feature with respect to DVD advertisements.

In light of the widespread circumvention of CSS on DVD titles and its minimal impact on the value of audiovisual works generally, it is implausible that creating an exemption for the narrow class of works identified here would meaningfully damage the market for or value of the works in question. There is ample evidence that CSS is commonly circumvented today, with circumvention tools available from literally hundreds of websites around the world. In addition, the proliferation of unauthorized copies of DVD content on public peer-to-peer networks suggests that CSS circumvention is commonplace for a large segment of the global community. Nevertheless, DVD sales continue to surge in the U.S., increasing in the first six months of 2002 by more than 80% over the same period a year before.⁹⁷ If even widespread unauthorized CSS circumvention has proven to have little or no impact on the value of works released on DVD, it seems wildly unlikely that an exemption giving legal sanction to circumvention for only a small number of DVD titles (i.e., those that include “unskippable” ads) would have any measurable impact on the value of the works in question.

More importantly, even if the exemption could be expected to have some effect on the market for or value of the work, the copyright owner retains the unilateral ability to put the work beyond the reach of the proposed exemption by permitting consumers to skip any ads contained on the DVD.

5. Other Factors

In connection with the instant exemption, the commenting parties urge the Copyright Office to consider an additional factor that weighs in favor of the proposed exemption: the public interest in maintaining control over private performances in their own homes.

As noted above, private performance has never been within the exclusive rights of a copyright owner. Instead, total control over private performance of a copy of a work, once legitimately acquired, has vested with the owner of that copy. Once I obtain a vinyl record, or a prerecorded VHS cassette, or an audio CD, copyright law has nothing to say about when or how I listen to or view the work. Nor does copyright law govern whether I experience it chronologically, in one sitting, or one bit at a time over the course of several days. This control over private performance is not only an integral part of the historical copyright balance struck by the Copyright Act, but is also dictated by our traditional notions of what it means to own physical property, whether it be a paperback book, a music CD, or a DVD.

⁹⁶ See 17 U.S.C. 110(1) (exception to exclusive rights for classroom teaching).

⁹⁷ See *Disc-gusting Sales?*, SOUND & VISION (January 2003) at 17.

Granting to copyright owners control over how a copy of a work is experienced after it is purchased would represent an unprecedented expansion of the exclusive rights reserved to copyright owners. Where a copyright owner has sought to control private performance by making certain content “unskippable,” nothing in Section 106 would prevent the owner of a DVD from evading such a restriction. In fact, to the extent a reproduction was necessary in order to permit the owner to restore his control over private performance (by making a copy that omits the “unskippable” content), such a reproduction would likely qualify as a fair use. There is nothing in the legislative history of the DMCA to suggest that Congress meant Section 1201 to effect a change in this traditional arrangement.

F. Balance of Harms

In balancing the respective harms of copyright owners and DVD purchaser, it is clear that the latter greatly outweigh the former.

Copyright owners have little to fear from this exemption. First, the exemption would only apply to CSS-protected DVDs that contained unskippable advertising, which currently comprise a minority of titles. Second, copyright owners are able unilaterally to put their works beyond the reach of this exemption simply by permitting purchasers of DVDs to skip the ads. Third, to the extent that the ability to prevent ad skipping did somehow enhance the value of the work, this enhancement is premised on an illegitimate appropriation of value from consumers, who under well-established copyright law principles retain exclusive control over private performances.

Consumers, by contrast, are directly harmed by unskippable ads on the DVDs they legitimately obtain, especially as there is often no way to discover them prior to purchase. Instead, consumers discover the restriction for the first time when they attempt to play the movie at home. The use of unskippable ads on children’s titles is particularly troubling, as parents may object to the advertising. These objections would be amplified to the extent that children generally watch DVD titles repeatedly, and are thus exposed to the advertising repeatedly. In the end, the release of even a few DVD titles with “forced ads” can be a serious imposition on hundreds of thousands of consumers, if the title involved is a hit movie that sells well in DVD.

In light of the balance of harms involved, the commenting parties ask that the Copyright Office recommend that the proposed exemption be granted.

VI. Proposed Class #4: Public Domain Film on DVD

A. Class of Work

Audiovisual works that are in the public domain in the United States and that are released solely on DVDs, access to which is prevented by technological protection measures.

B. Summary of Argument

Public domain works are increasingly being released or re-released only on CSS-protected DVDs, which preclude consumer access to, and use of, these works for a range of non-infringing purposes. To the extent that the Librarian considers that public domain works which are stored on CSS-protected DVDs fall within the prohibition in Section 1201(a), an exemption to circumvent CSS is required for consumers to access and use these public domain works.

C. Facts

1. Technological Protection Measures Involved

As discussed above, DVDs contain several technological protection measures that control access to content stored on the disc. The relevant technological protection measure controlling access to this class of works is CSS, which is also described above.

2. Scope of the Problem

It is estimated that there are at least 20,000 motion pictures in the public domain in the United States.⁹⁸ A substantial proportion of these are stored on formats that are no longer accessible by the public, such as silver nitrate or celluloid film. In recent years, a number of public domain motion pictures have been re-released on CSS-protected DVDs. At least 70 pre-1923 public domain films have now been released on DVD.⁹⁹ As VHS tapes degrade with age, and cease to be produced in favor of DVDs,¹⁰⁰ public domain works will increasingly be available to consumers only in a CSS-protected DVD format. At the date of submitting these comments, the commenting parties were able to identify nine public domain works that are now available *only* on DVD format and not in VHS format, but this number is certain to grow significantly in the next three years as VHS format is phased out and existing VHS inventory degrades.¹⁰¹

D. Argument

1. Threshold Issue – Application of section 1201(a)

The commenting parties believe that the prohibition in Section 1201(a) does not apply to public domain works stored on DVDs that are subject to technological protection measures controlling access, because a public domain work is not “a work protected under [title 17].” However, in the absence of congressional or judicial guidance on this issue, the applicability remains uncertain and that uncertainty is having actual effects in the marketplace and on consumers.

If the Copyright Office takes the view that section 1201(a)(1) applies, the commenting parties urge the Librarian to grant the proposed exemption. If the Librarian and the Copyright Office agree with the commenting parties that Section 1201(a)(1) does not apply, the commenting parties urge them to clarify this in this rulemaking process in order to assist the public. The remainder of this comment assumes that 1201(a)(1) does apply in arguing for an exemption.

⁹⁸ The Film Superlist: 20,000 Motion Pictures in the public domain, by Johnny Minu and William Storm Hale (Seven Art Press), *cited in* The public domain: How to Find & Use Copyright-Free Writings, Music, Art & More, by Stephen Fishman (Nolo Press), chapter 7, page 11.

⁹⁹ Search of Internet Movie Database, <http://www.IMDBpro.com> conducted on December 11, 2002.

¹⁰⁰ See Rick Lyman, *In Revolt in the Den, DVD Has the VCR Headed to the Attic*, N.Y. TIMES, August 26, 2002.

¹⁰¹ Along Came Annie (1926), Any Bonds Today (1942), The Beloved Rogue (1927), Bromo and Juliet (1926), Jungle Dreams (1943), Our Gang of Follies of 1938 (1937), The River (1937), Roughest Africa (1923) and Should Sailors Marry? (1925). [

2. Non-infringing Activity Is Being Impaired

The circumvention prohibition prevents consumers from accessing and making any use of these public domain works.

First, the prohibition prevents playback of public domain works on devices other than DVD players authorized by the DVD-CCA. Public domain works are not subject to copyright, and the public is free to view them in any format and play them on any device. Accordingly, playing a public domain work on a device other than a DVD-CCA licensed DVD player is a non-infringing activity that is precluded by CSS. Second, the prohibition precludes consumers from copying any portion of a public domain motion picture because of CSS's merged access and use control functionality, as discussed above and in the 2000 Final Report.

Third, the prohibition prevents other uses of the public domain work that are lawful, non-infringing uses. These include every use reliant on reproduction, such as the creation of an archival copy or excerpting a film for use in a critique. These also include the creation of a derivative work or transmission, such as public performance of a film, and use for teaching purposes in distance education. The prohibition on circumventing CSS precludes or impairs consumers' ability to make all of these uses.

E. Statutory Factors

1. Availability of copyrighted works for use.

a) Availability of Unprotected Alternative Sources Of Content

No alternative unprotected versions of works in this class exist.

b) Consumers' Rights to Access Public Domain Works Persist in Compilation

Most importantly, the proposed exemption is required to preserve the constitutionally-mandated copyright balance. Where a DVD producer chooses to re-release a public domain work bundled with other copyrighted work on a DVD, consumers are lawfully entitled to access the public domain portion of the compilation, for the same reasons that Courts have recognized that a reverse engineer has a right of access to unprotected facts embodied in copyrighted expression.¹⁰² An exemption is required to preserve this balance and ensure that a DVD producer cannot use the circumvention prohibition in Section 1201(a)(1) to improperly obtain private rights in a public domain work.

In the 2000 Final Report, the Librarian and the Copyright Office took the view that no actual or likely harm from this sort of activity had been established.¹⁰³ The commenting parties contend that now, two years later, harm from this sort of activity has begun to occur and is more likely to occur within the next three year period for several reasons. First, more public domain works have become available only on CSS-protected DVD format in the last three years. Second, even if an unprotected version of the public domain work exists in some format, it is becoming considerably more difficult for consumers to locate these unprotected versions. Third, even if an analog VHS format version of the public domain work exists and can be located, the unprotected

¹⁰² See *Sega Enterprises Ltd v. Accolade, Inc.*, 977 F.2d 1510 (9th Circ., 1992); *Sony Computer Entertainment v. Connectix Corp.*, 203 F.3d 596 (9th Circ., 2000).

¹⁰³ 65 Fed. Reg. 64,566.

format is frequently significantly more expensive to purchase than the more recent DVD version. For instance, a recent search of D.W. Griffiths' 1915 film, *Birth of a Nation*, at Amazon.com found two DVD versions of the work in the range of \$7.98 to \$9.99. While one cheaper VHS version was available, five other VHS tape versions were more expensive, with prices reaching \$26.95. The DVD versions were all immediately available for shipping; not all of the VHS versions were.¹⁰⁴

c) CSS Does Not Support A Business Model That Benefits The Public

Instead of providing support for a business model that makes additional copyrighted content available for consumer use, the use of CSS-protection on public domain movies released solely on DVD actually has the opposite effect, *removing* currently available content from the public arena. Accordingly, CSS does not support a model that benefits the public.

2. Availability for Use by Nonprofit Archival, Preservation and Educational Purposes

Use of public domain motion pictures for (nonprofit) archival and preservation purposes requires the ability to reproduce the public domain work and may also require the ability to distribute or transmit the work. Use of one of the public domain motion pictures in the class for an educational purpose may take many different forms, but it is likely to require the ability to reproduce the work in whole or part -- for instance, if the public domain work is to be included in a new presentation or a comparative review. Educational purposes also often include modification of the work or creation of a derivative work, as well as the ability to publicly broadcast the public domain work.

While all of these uses are lawful and do not infringe on the copyright for a work that is in the public domain, CSS prevents them for public domain motion pictures in this class. As a result, the prohibition on circumventing CSS for this class of works severely impairs consumers' ability to make these uses.

3. Impact on Criticism, Comment, News Reporting, Teaching, Scholarship, or Research.

Use of public domain works for these purposes requires the ability to access and reproduce the work involved. For the reasons outlined above, the prohibition on circumventing CSS's access control functionality precludes both access and the ability to excerpt or reproduce a CSS-protected work because of CSS's merged access and use control functionality. Therefore, the prohibition in Section 1201(a)(1) significantly impairs the public's ability to make these uses of this class of public domain works.

4. Effect of Circumvention of Technological Measures on the Market for or Value of the Work

a) Harm to DVD Producers

To the extent that a DVD producer is concerned that the grant of the proposed exemption would have the effect of allowing unlawful access to the copyrighted portions of the new compilation DVD, the producer is able to ameliorate any potential harm to the value of those

¹⁰⁴ Amazon database search conducted at: <http://www.amazon.com>, visited December 11, 2002.

works by choosing to release those segments on a separate DVD. The proposed exemption would not remove any rights or remedies that the DVD producer would otherwise have. In particular, the DVD producer would continue to have the ability to sue for infringement if a user made unauthorized use of the copyrighted material after gaining access to the public domain work residing on the same DVD via the exemption.

b) Harm to the Public

Any marginal harm to the DVD producer from an exemption for circumvention to gain access to public domain works is outweighed by the very significant harm to the public and to society as a whole, if Section 1201(a)(1) applies and the exemption is not granted.

Public domain works are society's cultural building blocks as well as our history. D.W. Griffiths' 1912 film, *The Massacre*, for example, documents General Custer's famous battle. In addition to educating us on our past, public domain works such as *The Birth of a Nation*, are the wellspring from which future creativity flows. For these and other reasons, the Constitution mandates that public domain works should be freely available for access and use by all. By releasing a public domain work on a CSS-protected DVD without releasing it in any other format, public access to the work is drastically restricted. An exemption to permit circumvention for access to this class of public domain works—limited to those works not available in other formats—is therefore required to preserve the public's ability to make culturally-important non-infringing uses and to permit preservation and archival uses of public domain works.

F. Balance of Harm

To the extent that the proposed exemption does have an adverse market impact on the DVD Producers, that harm is outweighed by the harm that would occur to consumers if the proposed exemption were not granted. The exemption sought is narrowly crafted to extend only to those public domain works that are released solely on DVD and are not otherwise available on analog VHS format in the United States.

Without an exemption for this class of works, consumers will not be able to obtain access and use many significant cultural icons for whom the exclusive period of the copyright monopoly has ended. Due to the merged nature of the access and use controls embodied in CSS, an exemption that permits circumvention of CSS, or clarification that Section 1201(a)(1) does not apply, is required to ensure that the public can access and make practical use of these public domain works.

VII. Conclusion

For the reasons set forth above, the commenting parties respectfully request that the Copyright Office recommend to the Librarian that the four proposed exemptions herein be granted.