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A Reply Comment.

Librarian: I seek to reply to comments posted by interested parties in response to questions 1-29 (inclusive) posed in DOCID:fr24no99-23, "Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies" with regard specifically to the class of copyrighted works known as DVD (digital versatile disc), CD (compact disc), computer software, and VHS videotape.

After reading through the comments posted by the various parties and individuals concerned in this matter, there are several comments which I would like to address in my response. I will quote and cite these comments as they are used, and have broken my reply comment up into sections based on specific topics.

The first issue I will address is the affect of the DMCA on noninfringing use of electronically protected copyrighted works. Several comments, most notably those from large media corporations and organizations, state falsely that there will be no impact on noninfringing use of media to do section 1201c of the DMCA. Specifically, according to comment #209 by the MPAA:

"MPAA does not believe that such a delay is justified for any class of works. In other words, we do not believe that the users of any class of works are likely to be adversely affected, in their ability to make noninfringing uses of those works, by the coming into force of section 1201(a)(1)(A)."

Similarly, Time Warner had the following to say:

"Will such protections and prohibitions adversely affect users as described above? Certainly, at present and for the foreseeable future, the answer is "no"."

Claiming that there is no affect on noninfringing use of works is simply false. The following specific groups of people are immediately affected by these restrictions and their ability to make noninfringing uses of works are restricted.

1. Individuals who own a computer running any operating system besides Windows or MacOS with a DVD-ROM drive but who does not own a standalone DVD player is prevented from playing back legally purchased DVD movies on his computer, despite the fact that he legally owns both the hardware and media required to play back the DVDs. Such individuals are also prevented from creating their own software player for the OS that they are using, as this would require breaking the copy protection on the DVDs to play back the content. Such operating systems include, but are not limited to, Linux, BeOS, AmigaOS, BSD, and many UNIX variants.
2. Individuals who own older (by only a few years) or less expensive televisions sets that do not have RCA inputs will find that they cannot connect a commercial DVD player to their televisions do to the lack of a coaxial output for connection to older TVs. A simple workaround would (as is commonly done with videogame consoles that have a similar problem) be to connect the RCA outputs of the DVD player to the RCA inputs of a VCR, and then connect the VCR via coaxial cable to the television. Unfortunately, because of the Macrovision copy protection applied to the outputs of a DVD player, users will not be able to play legally owned DVDs on legally purchased standalone DVD players. There is no technical reason why this should be the case, other than the Macrovision protection. Asking everyone to purchase a new television simply to play legally purchased DVDs on a legal player that they already own sounds like an infringement on the basic right to play back a work you have purchased to me.
3. Individuals who wish to play legally purchased DVDs from "regions" (as artificially defined by the DVD standard) other than their own are prevented from doing so. If a professor studying cinema from other cultures wishes to view a DVD from outside of his region, he cannot. If a tourist purchases a DVD in another country that is not part of his region, he will be unable to play it back at home. If non-English-speaking US citizens or US citizens trying to learn a foreign language wish to purchase and play back DVDs in another language from another country that is not part of their region, they will be unable to do so. This is in stark contrast to the music market, where imported CDs and LPs have been available and usable since the formats were created. Music stores commonly have an "imports" section, where music otherwise unavailable is sold to customers. DVDs make the importing and playback of movies from another region nearly impossible. The only reason that this is the case is that DVD CSS encryption keeps DVDs from being played back on players from a different region. If it were legal to circumvent this copy protection for legal uses, a company could produce a player that would play DVDs from any region. (this is a technically simple thing to do, as DVDs are the same from region to region except for how they are encoded) It would also allow computer users to write software that could play back DVDs from any region. This limit on the use of legally owned DVDs with legally owned players

produced by the CSS copy protection certainly seems to affect my ability to make legal, noninfringing uses of a DVD.

4. For a specific example of how noninfringing use is blocked, see comment #100 by Brian R. Mueller of CreoTech. His company primarily uses Linux-based computers, and in the course of business is often asked to produce, preview, or prototype DVD material for use in projects for customers. The DeCSS tool that (used to break DVD CSS encryption) allows them to play back DVDs on their Linux computers (which otherwise have no DVD video support). They are losing business as a direct result of the questionable legality of tools like DeCSS. Clearly, if the ability to produce and legally view DVDs on the type of computers that they own is prevented by the encryption on the DVDs, then they are at a significant disadvantage in their business. Linux machines with DVD-ROM drives are technically capable of DVD playback, but not without breaking the DVD encryption. This certainly interferes with the right of Mr. Mueller to view legally purchased DVDs or even DVDs that he and his company have created. (It seems awfully silly to make illegal the playback of something you yourself have created!)
5. Backup copies become extremely difficult for the average user to make. Macrovision prevents copying to videotape, and degrades quality even when Macrovision is circumvented, since VHS is a lower-resolution analog format. CSS prevents copying to a file on a computer. Consumer DVD burners could bit-for-bit copy DVDs despite the encryption, but the only blank DVDs available have the "keys" section of the disk pre-burned so that the decryption keys from the original cannot be copied, rendering the copied DVD useless. Commercial DVD production equipment can easily copy DVDs, though, and although too expensive for the average home user is certainly not out of the price range of a piracy organization. So by attempting to restrict the ability to make copies, we fail to prevent piracy, but do directly interfere with a user's right to make backup copies of media.
6. If sanctioned players for encrypted media disappear due to market changes, (i.e. the format becomes obsolete, much as LPs are gradually disappearing) users will have no legal way to play back their own media. If a library has a collection of DVDs, for example, and DVD players cease to be manufactured, the library will have no way to play back the DVDs once their existing players break down. Since DMCA makes it illegal to circumvent the copy protection, it is illegal to copy the DVD to a newer format (which requires breaking the encryption) and to build your own player to play back the DVDs (which again requires breaking the encryption to get at the content of the disk for playback). So there is no recourse when the legal players disappear. Users simply lose the right to play back their collections of DVDs altogether when the format becomes obsolete, due to the illegality of circumventing the copy protection.

What we can see from this, is that despite claims to the contrary by the groups quoted above, there are at least 5 groups of users whose rights to make noninfringing uses of legally owned media are blocked. Additionally, there is at least one (and most certainly more) specific case of

a business losing money and being deprived of the ability to compete fairly because of the restrictions on breaking copy protection.

Finally, Sony claims that:

> "The essential noninfringing use of videogames is the playing of the game by consumers in the home. Consumers' ability to make such use is not adversely affected by the technological measures that SCEA uses to control access to its copyrighted works. On the contrary, the measures enable SCEA to provide the consumer with a high level of quality control in protecting the consumer against the deficiencies of counterfeit games and attempted "substitutes" for the Playstation console for use in playing games."

This statement shows that Sony is not interested in the customer's noninfringing rights at all. If a user purchases a Playstation video game produced by Sony, the user has the right to use play that game in his home. This much is clear even to Sony, who (in the quote above) states that the playing of videogames in the home is the essential noninfringing use of such games. If a user does not own a Playstation, but does legally own games and another mechanism to play them, (such as a Playstation emulator like Bleem or Connectix Virtual Game Station) then the user is within his rights to play the game via that mechanism. While Sony claims that copy protection provides them with a way to provide the consumer with a higher level of quality, emulators can often run games in a higher resolution (which makes the game clearer and more attractive to watch) and at a higher framerate (which makes the game appear more fluid and realistic) than the original Playstation console. Emulators are often less expensive than the Playstation console, as well, again giving the user an increase in quality and value. Clearly Sony wishes to restrict the user's noninfringing right to use Playstation games they have legally purchased on other legally purchased mechanisms. If the DMCA makes breaking copy protection illegal, it will directly interfere with a user's right of "playing of the game by consumers in the home", which Sony states is the essential noninfringing use of such games.

To conclude, there is very little ground for a company claiming benefits to users from copy protection mechanisms to stand on. It restricts the ability to make backup copies while doing little to keep large piracy operations at bay. It forces users to upgrade equipment that, without the copy protection, would be adequate for viewing media they have purchased. Users are subject to arbitrary marketing restrictions like DVD region coding that limit the ability of users to play media the legally own. It puts archival media collections at risk due to the certain eventual obsolescence of media formats by making it illegal to break the copy protection without a sanctioned player even if no such player exists. And finally, it keeps users with computers that are technically capable of playing DVDs, but that do not use an operating system for which there exists a sanctioned player, from doing so

legally even if they are willing to write their own DVD player software. There is no real benefit to the consumer from these copy protection mechanisms, and the mechanisms do not prevent large-scale pirates from copying the media. However, there is significant harm in the number of noninfringing uses that users are no longer able to engage in. It is clear, then, that any form of media that is copy protected in such a way that basic, noninfringing uses are interfered with should form a class of works that is exempted from the anticircumvention clauses of the DMCA.