

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket No. RM 2002-4E]

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

AGENCY: Copyright Office, Library of Congress.

ACTION: Final rule.

SUMMARY: This notice announces that during the period from October 28, 2003, through October 27, 2006, the prohibition against circumvention of technological measures that effectively control access to copyrighted works shall not apply to persons who engage in noninfringing uses of four classes of copyrighted works.

EFFECTIVE DATE: October 28, 2003.

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SUPPLEMENTARY INFORMATION:

In this notice, the Librarian of Congress, upon the recommendation of the Register of Copyrights, announces that during the period from October 28, 2003, through October 27, 2006, the prohibition against circumvention of technological measures that effectively control access to copyrighted works shall not apply to persons who engage in noninfringing uses of four classes of copyrighted works. This announcement is the culmination of a year-long rulemaking proceeding conducted by the Register. A more comprehensive statement of the background and legal

requirements of the rulemaking, a discussion of the record and the Register's analysis may be found in the Register's memorandum of October 27, 2003 to the Librarian, which contains the full explanation of the Register's recommendation.¹ This notice summarizes the Register's recommendation and publishes the regulatory text codifying the four exempted classes of works.

I. Background

A. Legislative Requirements for Rulemaking Proceeding

Section 1201 of title 17, United States Code, prohibits circumvention of technological measures employed by or on behalf of copyright owners to protect their works (hereinafter "access controls"). In order to ensure that the public will have continued ability to engage in noninfringing uses of copyrighted works, such as fair use, subparagraph (B) limits this prohibition, exempting noninfringing uses of any "particular class of works" when users are (or in the next 3 years are likely to be) adversely affected by the prohibition in their ability to make noninfringing uses of that class of works. Identification of such classes of works is made in a rulemaking proceeding conducted by the Register of Copyrights, who is to provide notice of the rulemaking, seek comments from the public, consult with the Assistant Secretary for Communications and Information of the Department of Commerce, and recommend final regulations to the Librarian of Congress. The regulations, to be issued by the Librarian of Congress, announce "any class of copyrighted works for which the Librarian has determined, pursuant to the rulemaking conducted under subparagraph (C), that noninfringing uses by persons who are users of a copyrighted work

¹ A copy of the Register's memorandum may be found at <http://www.copyright.gov/1201>.

are, or are likely to be, adversely affected, and the prohibition contained in subparagraph (A) shall not apply to such users with respect to such class of works for the ensuing 3-year period.”²

The first section 1201 rulemaking took place three years ago, and on October 27, 2000, the Librarian announced that noninfringing users of two classes of works would not be subject to the prohibition on circumvention of access controls.³ Exemptions to the prohibition on circumvention remain in force for a three-year period and expire at the end of that period. The Librarian is required to make a determination on potential new exemptions every three years.

B. Responsibilities of Register of Copyrights and Librarian of Congress

The purpose of the rulemaking proceeding conducted by the Register is to determine whether users of particular classes of copyrighted works are, or in the next three years are likely to be, adversely affected by the prohibition in their ability to make noninfringing uses of copyrighted works. In making her recommendation to the Librarian, the Register must carefully balance the availability of works for use, the effect of the prohibition on particular uses and the effect of circumvention on copyrighted works.

C. The Purpose and Focus of the Rulemaking

1. Purpose of the Rulemaking. As originally drafted, section 1201(a)(1) provided simply that “No person shall circumvent a technological measure that effectively controls access to a work protected under this title.” However, in response to concerns that section 1201, in its

² 17 U.S.C. 1201(a)(1)(D).

³ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 FR 64556 (October 27, 2000); <http://www.copyright.gov/fedreg/2000/65fr64555.pdf>. The **Federal Register** notice contained the recommendation of the Register of Copyrights and the determination of the Librarian.

original form, might undermine Congress' commitment to fair use if developments in the marketplace relating to use of access controls result in less access to copyrighted materials that are important to education, scholarship, and other socially vital endeavors, it was determined that a triennial rulemaking proceeding should take place to monitor the use of access controls. If the rulemaking record revealed that access was being unduly restricted, e.g., by elimination of print or other hard-copy versions, permanent encryption of all electronic copies or adoption of business models that restrict distribution and availability of works, then users of particular classes of works who are engaging in noninfringing uses of those works would be allowed to circumvent access controls without running afoul of the prohibition in section 1201(a)(1). The rulemaking proceeding, to be conducted by the Register of Copyrights, was considered a “fail-safe” mechanism, monitoring developments in the marketplace for copyrighted materials, and would allow the enforceability of the prohibition against the act of circumvention to be selectively waived, for limited time periods, if necessary to prevent a diminution in the availability to individual users of a particular category of copyrighted materials.

2. The Necessary Showing. Proponents of an exemption have the burden of proof. In order to make a prima facie case for an exemption, proponents must show by a preponderance of the evidence that there has been or is likely to be a substantial adverse effect on noninfringing uses by users of copyrighted works. De minimis problems, isolated harm or mere inconveniences are insufficient to provide the necessary showing. Similarly, for proof of “likely” adverse effects on noninfringing uses, a proponent must prove by a preponderance of the evidence that the harm alleged is more likely than not; a proponent may not rely on speculation alone to sustain a prima

facie case of likely adverse effects on noninfringing uses. It is also necessary to show a causal nexus between the prohibition on circumvention and the alleged harm.

Proposed exemptions are reviewed *de novo*. The existence of a previous exemption creates no presumption for consideration of a new exemption, but rather the proponent of such an exemption must make a prima facie case in each three-year period.

3. Determination of “Class of Works”. A “particular class of works” to be exempted from the prohibition on circumvention must be based upon attributes of the works themselves, and not by reference to some external criteria such as the intended use or users of the works. The starting point for any definition of a “particular class” of works in this rulemaking must be one of the categories of works set forth in section 102 of the Copyright Act, but those categories are only a starting point and a “class” will generally constitute some subset of a section 102 category. The determination of the appropriate scope of a “class of works” recommended for exemption will also take into account the likely adverse effects on noninfringing uses and the adverse effects an exemption may have on the market for or value of copyrighted works.

While starting with a section 102 category of works, or a subcategory thereof, the description of a “particular class” of works ordinarily should be further refined by reference to other factors that assist in ensuring that the scope of the class addresses the scope of the harm to noninfringing uses. For example, the class might be defined in part by reference to the medium on which the works are distributed, or even to the access control measures applied to them. But classifying a work solely by reference to the medium on which the work appears, or the access control measures applied to the work, would be beyond the scope of what “particular class of

work” is intended to be. And it is not permissible to classify a work by reference to the type of user or use (e.g., libraries, or scholarly research).

D. Consultation with the Assistant Secretary for Communications and Information. As required by section 1201(a)(1)(C), the Register consulted with the Assistant Secretary for Communications and Information of the Department of Commerce, meeting with her at the outset of the rulemaking proceeding and after the record had been compiled, and keeping her and her staff apprised of developments throughout the proceeding. The Assistant Secretary shared her views with the Register orally in July, 2003, and in a letter dated August 11, 2003. Rather than address any particular proposals for exemptions, the Assistant Secretary commented on the rulemaking process itself, focusing exclusively on the Notice of Inquiry (“NOI”) published October 15, 2002.

The Assistant Secretary expressed general agreement with the discussion in the NOI regarding the definition of a “class of works,” but added that the intended use of the work or the attributes of the user will sometimes be critical to that determination. She also agreed with the Register that proponents of exemptions have the burden of proof and that and that the assessment of adverse impacts is to be determined *de novo*. However, she expressed some concern that the NOI may have described the proponents’ burden of proof as higher than required by the statute.

The Assistant Secretary appears to have misread the NOI, which stated the burden of proof using verbatim quotations from the legislative history of section 1201. In particular, the Assistant Secretary appears to have misunderstood the meaning of the requirement that proponents show that the prohibition on circumvention has had a "substantial" adverse effect on noninfringing uses of a particular class of work. Use of the term “substantial” does not impose a

“heightened” requirement; it imposes the requirement found throughout the legislative history, which is variously stated as “substantial adverse impact,” “distinct, verifiable, and measurable impacts,” and more than “de minimis impacts.” As is apparent from the dictionary definition of “substantial” and the Supreme Court’s treatment of the term (e.g., in its articulation of the substantial evidence rule), requiring that one’s proof be “substantial” simply means that it must have substance. The Assistant Secretary’s fear that the Register has imposed a heightened burden is misplaced. When all is said and done, the Register believes that she and the Assistant Secretary view the burden on proponents in much the same way.

II. Solicitation of Public Comments and Hearings

On October 15, 2002, the Librarian and the Register initiated the second rulemaking proceeding pursuant to section 1201(a)(1)(C) with publication of a NOI.⁴ The Copyright Office received 51 written comments proposing a class or classes of works for exemption. Supporters and opponents of these proposals filed 338 reply comments. Six days of public hearings were conducted in Spring 2003 in Washington, D.C., and Los Angeles, California. Following the hearings, the Office sent follow-up questions to some of the hearing witnesses, and responses were received during the summer. The entire record in this and the previous section 1201(a)(1)(C) rulemaking are available on the Office’s website.⁵

The Register has now carefully reviewed and analyzed the entire record in this rulemaking proceeding to determine whether any class of copyrighted works should be exempt from the prohibition against circumvention during the next three years. The Register recommends that

⁴ 67 FR 63578; <http://www.copyright.gov/fedreg/2002/67fr63578.html>.

⁵ <http://www.copyright.gov/1201/index.html>.

noninfringing users of four classes of works be exempt from the prohibition on circumvention of access controls.

III. Discussion

A. The Four Exempted Classes

Based on the Register's review of the record, the case has been made for exemptions of the following four classes of copyrighted works.

1. Compilations consisting of lists of Internet locations blocked by commercially marketed filtering software applications that are intended to prevent access to domains, websites or portions of websites, but not including lists of Internet locations blocked by software applications that operate exclusively to protect against damage to a computer or computer network or lists of Internet locations blocked by software applications that operate exclusively to prevent receipt of email. For purposes of this exemption, "Internet locations" are defined to include "domains, uniform resource locators (URLs), numeric IP addresses or any combination thereof."

This is similar to an exemption made in the previous rulemaking, but with some modifications. The class consists of lists of blocked websites that are used in various filtering software programs sometimes referred to as "censorware." These programs are intended to prevent children and other Internet users from viewing objectionable material while online. It was alleged that although the software is intended to serve a useful societal purpose, the emphasis of the programs is on blocking rather than accuracy. Critics contend that the result of this focus is that filtering software used to prevent access to objectionable material tends to over-block, thereby preventing access to legitimate information resources. In order to comment on this software and expose what they claim is the excessive blocking of websites, critics claim they need to gain access to the lists of blocked websites, which typically are protected by access controls.

Opponents argued that filtering software companies serve a critical societal purpose and that an exemption would undermine the integrity of filtering software. They also argued that filtering software companies provide reasonable means for ascertaining the material or sites that a particular filtering software blocks. They also stated that even if the Register found that an exemption was warranted, the particular class articulated in the previous rulemaking was overly broad and that repeating an exemption for that class could create adverse consequences for other types of software, such as antivirus and spam software.

Although a similar class was exempted in the first rulemaking, proponents are required to make their case anew every three years. The record in the current rulemaking warrants a new exemption. While providers of filtering software offer some information about the websites their software blocks, it is too limited to permit comprehensive or meaningful analysis. Persons wishing to review, comment on and criticize this software as part of an ongoing debate on a matter of public interest should be permitted to gain access to the complete lists of blocked websites.

The particular class of works designated in this rulemaking covers the lists of websites blocked by commercially marketed filtering software applications that are intended to prevent access to domains, websites or portions of websites. However, the exempted class specifically excludes lists of Internet locations blocked by software designed to protect against damage to computers, such as firewalls and antivirus software, or software designed to prevent receipt of unwanted email, such as anti-spam software.

2. Computer programs protected by dongles that prevent access due to malfunction or damage and which are obsolete.

The second exempted class is also similar to a class exempted in 2000, but again the class exempted in this proceeding is somewhat more limited. Many commenters supported a renewal of the previous exemption for “literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage or obsolescence.” Few commenters, however, provided any factual support for such an exemption. The facts that were presented related to a narrower class of works: computer programs using “dongles,” or hardware locks, which control access to the programs. Accordingly, the exempted class is limited to such computer programs. When a dongle is damaged or malfunctions in such a way that the authorized user of the software cannot gain access to the software, the authorized user should be given a means to make the software work. The exempted class includes only that software that actually cannot be accessed due to a damaged or malfunctioning dongle, and only when the dongle cannot be replaced or repaired. The class is formulated as including “computer programs protected by dongles that prevent access due to malfunction or damage and which are obsolete.” Copyright law already provides a definition of obsolete, found in section 108(c) of the Copyright Act, which captures the circumstances under which an exemption is justified: “a [dongle] shall be considered obsolete if [it] is no longer manufactured or is no longer reasonably available in the commercial marketplace.” For purposes of this exemption, a dongle would be considered “obsolete” if replacement or repair are not reasonably available in the marketplace. In addition to encouraging reasonable support to be made available to users, the exemption will allow users who are denied access as a result of a damaged or malfunctioning dongle to circumvent when repair or a replacement are unavailable. This exemption minimizes the adverse effects on noninfringing uses by users of software

protected by these access control measures while also minimizing the adverse effects on copyright owners.

3. Computer programs and video games distributed in formats that have become obsolete and which require the original media or hardware as a condition of access. This is a new exemption, in response to a proposal by The Internet Archive for “[l]iterary and audiovisual works embodied in software whose access control systems prohibit access to replicas of the works.” The Internet Archive, a non-profit library that maintains a collection of websites, software and other works in digital formats in a digital archive, migrates such works to modern storage systems (e.g., by transferring a computer program from a floppy diskette to a hard drive) that are more stable and that will ensure continuing access to the works.

The Internet Archive stated that works distributed in digital formats on physical media (such as floppy diskettes, CD-ROMs, etc.) have sometimes been accompanied by “original only” access controls, technological measures that, while technically permitting copies to be made, prevent those copies from functioning (so that, for example, a copy of a computer program made from the original floppy diskette will not run, or a copy of an audiovisual game made from the original CD-ROM cannot be played). This prevents the Internet Archive from migrating those works to its modern storage system.

The problem is particularly compelling when the physical format in which the copy was originally marketed has become obsolete. If the Internet Archive is given computer software that was marketed on 5 1/4 inch floppy diskettes, it will not even be able to access the work in its original format on the typical computer sold in the marketplace today, because computers sold today are not equipped with 5 1/4 inch floppy drives. However, Internet Archive also desires an exemption that addresses the “original only” problem even when the medium on which the

original copy was marketed (e.g., CD-ROM) is not yet obsolete, noting that it is crucial to archive digital works before they become inaccessible and before the information on the medium has degraded.

The Register has concluded that to the extent that libraries and archives wish to make preservation copies of published software and videogames that were distributed in formats that are (either because the physical medium on which they were distributed is no longer in use or because the use of an obsolete operating system is required), such activity is a noninfringing use covered by section 108(c) of the Copyright Act. The exempted class is therefore limited to works distributed in such now-obsolete formats. Again, “obsolete” has the same meaning that is set forth in section 108(c). A format shall be considered obsolete if the machine or system necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace. The class is also limited to computer programs and video games because the evidence in the record of this rulemaking does not support a broader class of works.

4. Literary works distributed in ebook format when all existing ebook editions of the work (including digital text editions made available by authorized entities) contain access controls that prevent the enabling of the ebook's read-aloud function and that prevent the enabling of screen readers to render the text into a “specialized format.” For purposes of this exemption, “specialized format,” “digital text” and “authorized entities” shall have the same meaning as in 17 U.S.C. 121.

The final exempted class is based upon proposals by the American Foundation for the Blind and five major library associations. It is in response to problems experienced by the blind and visually impaired in gaining meaningful access to literary works distributed as ebooks. Ebooks can offer accessibility to the blind and the visually impaired that is otherwise not available

from a print version. Ebooks may allow the user to activate a “read-aloud” function offered by certain ebook readers. Ebooks may also permit accessibility to the work by means of screen reader software, a separate program for the blind and visually impaired that interacts with an ebook reader and that is capable of converting the text into either synthesized speech or braille.

By using digital rights management tools that implicate access controls, publishers of ebooks can disable the read-aloud function of an ebook and may prevent access to a work in ebook form by means of screen reader software. The record indicates that many ebooks are distributed with these two functions disabled. The disabling of these functions is alleged to prevent the blind and visually impaired from engaging in particular noninfringing uses such as private performance, and to prevent access to these works by blind and visually impaired users altogether. The uses that such persons make by using the “read-aloud” function and screen readers are noninfringing, and are likely to be the most reasonable means of meaningful access for such persons to works that are published in ebook format.

To be included in the exempted class, a literary work must exist in ebook format. Moreover, the exemption is not available if any existing edition of the work permits the “read-aloud” function or is screen reader-enabled. Thus, a publisher may avoid subjecting any of its works to this exemption simply by ensuring that for each of its works published in ebook form, an edition exists which is accessible to the blind and visually impaired in at least one of these two ways.

B. Other Exemptions Considered, But Not Recommended

A number of other proposed exemptions were considered, but rejected. They are briefly discussed below. Similar proposed exemptions are discussed together.

1. Proposed class: All works should be exempt for noninfringing uses, e.g., fair use and private uses, and other use-based proposals.

Many comments declined to specify a “class of works” and instead designated the “class” to be exempted as “all works.” Because the proponents of an exemption for “all works” have utterly failed to propose “a particular class of copyrighted works,” but have simply asked, in effect, for a blanket exemption for all works – in effect, an administrative abrogation of section 1201(a)(1) – these proposals must be rejected.

2. Proposed classes: Several, including “Per se Educational Fair Use Works” and “Fair Use Works.”

Another group of proposals defined the class of works primarily by reference to the type of use of works or the nature of the users, e.g., fair use works. A “use-based” or “user-based” classification is not permitted. The statutory exemptions in section 1201 contain carefully crafted, use-based and user-based exemptions. Congress considered and declined to enact certain use-based exemptions similar to some of the proposals raised in this rulemaking. The statutory text and the legislative history provide no evidence that Congress intended this rulemaking to second-guess congressional determinations. Rather, Congress created this rulemaking as a “fail-safe” mechanism to focus on evidence of adverse effects in particular sub-categories of works that could be ameliorated by appropriately crafted, short-term exemptions.

3. Proposed classes: (1) Musical recordings and audiovisual works protected by access control mechanisms whose circumvention is reasonably necessary to carry out a legitimate research project where the granted exemption applies only to acts of circumvention whose primary purpose is to further a legitimate research project; and (2) Musical recordings and audiovisual works protected by access control mechanisms whose circumvention is reasonably necessary to carry out a legitimate research project.

These two related classes were proposed by one commenter. Each proposed class consists of “musical recordings and audiovisual works,” apparently occupying virtually the entire

field of works in the category of audiovisual works (section 102(6)) and a substantial part of the categories of sound recordings (section 102(7)) and musical works (section 102(2)). The proposed class is further narrowed only by reference to the necessary or intended use by persons wishing to circumvent the access controls. Because each of these proposed classes is defined largely in terms of the purpose of the circumvention, they cannot be considered. They are simply variants of the type of use-based class that is beyond the scope of this proceeding.

4. Proposed class: Any work to which the user had lawful initial access (and variations)

This proposal also failed to propose “a particular class of copyrighted works.” Moreover, commenters proposed this class without providing any factual support whatsoever. Proponents failed to specify particular access controls that have caused adverse effects on noninfringing uses, and have failed to describe what noninfringing uses have been adversely affected.

5. Proposed class: Copies of audiovisual works, including motion pictures, and phonorecords of musical sound recordings that have been previously licensed for reproduction but can no longer be reproduced for private performance after the lawful conditions for prior reproduction have been met.

This class was proposed by a commenter seeking an exemption to permit persons who have obtained digital copies of motion pictures or sound recordings, under agreements that limit the circumstances (typically, a time limitation) under which they may view or hear them, to circumvent access controls that enforce those agreements. The examples cited by the commenter relate primarily to online services that deliver music or movies to subscribers under an agreement that permits the subscriber to obtain access to the work only so long as the subscriber continues to subscribe to the service. The commenter seeks to exempt such works from the prohibition on circumvention so that users of such works would be able to continue to play them even when the agreed-on conditions for their use no longer apply.

A consumer who enters into an agreement to pay a particular sum for the right to listen to or view a copyrighted work for a limited period of time can have no reasonable expectation of continued access once that time has expired. Especially when the works that are the subject of this proposed exemption – motion pictures and sound recordings – are widely available for purchase in formats that have no time restrictions on use, the case for an exemption has not been made. In fact, the DMCA was intended to encourage such use-facilitating services that give consumers the option to pay lower prices for more limited uses of copyrighted works.

6. Proposed class: “Thin copyright” works.

The proposed exemption for “thin copyright works” suffers from the same flaws as the proposals to exempt classes such as “fair use works.” Although it was stated that these “thin copyright” works contain “limited copyrighted subject material,” there was no showing of any present or likely harm to users wishing to engage in noninfringing uses. There was no showing that any such works were unavailable in an alternative, unprotected format. Without any demonstration of an adverse effect, any specific allegation of any particular technological measure protecting access to works, or any discussion of the unavailability of the material cited in unprotected formats, there is little basis for consideration.

7. Proposed class: Public domain works or works distributed without restriction.

Several comments sought an exemption for works that are either public domain, open source or “open access,” but to which access controls are applied. The commenters addressing open source and open access works provided absolutely no information in support of their requests. Aside from a proposal relating to public domain material on DVDs, there was a paucity of information relating to other public domain works. These commenters have overlooked that if a

work that is entirely in the public domain is protected by an access control measure, the prohibition on circumvention will not be applicable. Therefore, no exemption is needed.

In the DVD context, a proponent provided a series of lists of audiovisual works that it contended are in the public domain, some of which it alleged are distributed bundled with copyrighted material. However, opponents of the proposed exception indicated that many if not all the works named by the proponent are available in unencrypted (VHS) format, are not bundled with copyrighted material, are themselves still subject to copyright protection, or are not encrypted by the Content Scrambling System (“CSS”) or otherwise subject to an access control, effectively rebutting the proponent’s showing.

8. Proposed class: Musical works, sound recordings, and audiovisual works embodied in media that are or may become inaccessible by possessors of lawfully-made copies due to malfunction, damage, or obsolescence.

Supporters of this proposed class wanted to be able to transfer sound recordings and musical works from one medium to another. Some commenters also believe that they should be able to convert these works to new or different formats or to back up the works for archival purposes, e.g., to “refresh” the media from time to time to ensure that the works are available both for their use and for future generations. However, these proponents have not clearly stated or demonstrated that access controls are preventing these activities.

In the case of audiovisual works on DVDs, the proponents desire to make backup copies of their DVDs for a variety of purposes: they claim that DVDs are inherently fragile and subject to damage; they are concerned about loss or theft of the original during travel; they wish to duplicate collections to avoid the burdens and risks of transporting DVDs; they assert that some titles are out of print and cannot be replaced in case of damage; and they claim that the duration of a DVD’s lifespan is limited. The Register concludes that the proponents have not made the

case with respect to fragility of DVDs, nor have they shown that the making of backup copies of DVDs is a noninfringing use.

9. Proposed class: Audiovisual works released on DVD that contain access control measures that interfere with the ability to defeat technology that prevents users from skipping promotional materials.

As the proponent of this proposed class states the problem, “[m]ovie 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.” The technology which deactivates the fast-forward function of DVD players (UOP blocking) does not appear to be an access control. Nor does the record show that the “CSS, an access control used on motion pictures on DVDs, prevents the deactivation of UOP blocking. Therefore, an exemption does not appear warranted since it does not appear that access controls are preventing users from fast-forwarding on DVDs. Moreover, although the objections to DVDs which have the fast forwarding feature disabled with respect to advertising are understandable, the problem appears to be no more than *de minimis* and a mere inconvenience experienced with an unknown – but apparently small – quantity of available DVD titles.

10. Proposed class: Ancillary audiovisual works distributed on DVDs encrypted by CSS.

It is virtually uncontested that there are ancillary works on DVDs that are not available in another, unprotected format. Such ancillary material includes matter that is available along with the motion picture in DVD format but not available in videotape format, such as outtakes, interviews with actors and directors, additional language features, etc. The proponent of an “ancillary works” exemption asserts that the use of CSS on DVDs prevents “quotation [i.e., reproduction], for purposes of commentary and criticism, of ancillary audiovisual works.” While

there is little doubt that the desired use for comment and criticism by weblog critics can be within the fair use exception, such critics have a number of options available for such “quotation.” Because users have means of making analog copies of the material on DVDs without circumventing access controls (and of redigitizing those analog copies), there is no need to permit them to circumvent. The desire to make a digital-to-digital copy, while understandable, does not support an exemption in this case. Existing case law is clear that fair use does not guarantee copying by the optimum method or in the identical format of the original. On balance, an exemption, which would permit circumvention of CSS, could have an adverse effect on the availability of such works on DVDs to the public, since the motion picture industry’s willingness to make audiovisual works available in digital form on DVDs is based in part on the confidence it has that CSS will protect it against massive infringement.

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

Many motion pictures distributed on DVDs are “region coded.” A region coded DVD may only be played on a DVD player that is set to play DVDs bearing the code for a particular region of the world. Proponents of an exemption included individuals who had acquired DVDs from a region outside the U.S. and then encountered difficulty in playing those DVDs on devices purchased in the U.S. Because such consumers have a number of options that will permit them to view such region coded DVDs, the need for an exemption that would permit circumvention of region coding has not been demonstrated.

12. Proposed class: Video games stored on DVDs that are not available in Region 1 DVD format and access to which is prevented by technological measures.

A similar issue was raised with respect to region coding on video games. However, supporters came forward with virtually no evidence relating to problems with region coding of video games. In the previous rulemaking, the Register noted that there was not enough evidence to support an exemption. Thus, the proponents were on notice that they needed to supply more and better evidence in order to sustain the proposed exemption. Such evidence has not been produced in this rulemaking.

13. Proposed class: Audiovisual works embodied in DVDs encrypted by CSS.

The comments in support of this exemption sought to engage in a variety of sometimes unspecified claimed fair uses with respect to audiovisual works on DVDs that do not necessarily appear to fall within the scope of the proposed exemptions discussed above. However, they failed to provide evidence of actual or likely harm and, therefore, the Register cannot recommend such an exemption. While some commenters mentioned uses that may theoretically qualify as a fair use, specific facts were not provided and it was not shown that the works were unavailable in an unprotected format.

14. Proposed class: Software designed for use on dedicated video game players.

This proponent of this exemption provided almost no evidence in support of his proposal, failing to identify a technological measure that controls access to copyrighted works and failing sufficiently to identify what noninfringing activity is adversely affected.

15. Proposed class: Literary works (including ebooks), sound recordings, and audiovisual works protected by access controls that prevent post-sale uses of works; “tethered” works.

A number of commenters proposed exemptions for works that are tethered to particular devices, i.e., works that cannot be copied to and used on other devices. The purpose of limiting access to particular devices or hardware is to enable varying degrees of control over certain uses. Many of these commenters focused on ebooks. An exemption for tethered ebooks cannot be sustained. The consumer often has choices between various ebook formats as well as between ebook formats and alternative formats for books, e.g., hard copies or audio versions. Commenters who believe that users should be able to “space-shift” any work they purchase in order to access this work on any device of their choosing did not make a persuasive case that such “space-shifting,” involving reproduction of the work, is a noninfringing use. The purpose of tethering is to limit subsequent reproduction and distribution of the reproductions. While this may limit a user’s options, such user limitations would appear to represent only an inconvenience as long as alternative formats of the work are available for noninfringing uses.

Similar arguments were made with respect to tethering of motion pictures and of sound recordings of musical works. As with the space-shifting of ebooks, commenters seek to “platform-shift” their sound recordings or motion pictures. However, tethering and DRM policies serve a legitimate purpose for limiting access to certain devices in order to protect the copyright owners from digital redistribution of their works. Moreover, consumers have choices of formats and may decide whether their intended use is best served by a digital online version or by another available version of a work. While availability for use has been restricted in certain digital formats, the overall availability for use of these works has not been adversely affected. The effect of circumvention of the protection measures employed on these works would likely decrease the

digital offerings for these classes of works, reduce the options for users, and decrease the value of these works for copyright owners.

16. Proposed class: Audiovisual works, including motion pictures, the DVD copies of which are tethered to operating systems that prevent rendering on alternative operating systems.

A number of commenters sought exemption of a class of works consisting of motion pictures on DVDs playable on computers only when the computers have particular operating systems, e.g., Windows or Macintosh, and that cannot be played on alternative systems, such as Linux.

Because there are a variety of devices that will play DVDs, the inability to play a DVD on a particular device or with a particular operating system is simply a matter of preference and inconvenience. Persons wishing to play CSS-protected DVDs on computers with the Linux operating system have the same options that other consumers have. As a general proposition, the DVD medium has increased the availability of motion pictures for sale and rental by the general public, and the motion picture studios' willingness to distribute their works in this medium is due in part to the faith they have in the protection offered by CSS. The balancing of the incremental benefit of allowing circumvention for the purposes of watching a movie on a Linux-based computer is outweighed by the threat of increased piracy that underlies Congress' motivation for enacting section 1201.

17. Proposed class: Sound recordings, audiovisual works and literary works (including computer programs) protected by access control mechanisms that require assent to End-User License Agreements as a condition of gaining access. One commenter proposed an exemption for sound recordings, audiovisual works and literary works (including computer programs) protected by access control mechanisms employed by or at the request of the copyright holder which require, as a condition of gaining access, that

the prospective user agree to contractual terms which restrict or limit any of the limitations on the exclusive rights of the copyright holder. Little evidence was offered in support of this proposed class. The proponent's complaint appears to be with the practice of requiring users of certain works to enter into End User License Agreements (EULAs) rather than with access controls as such. While technological measures may prevent access unless a user signals assent to the terms of a contract, the prohibition on circumvention does not appear to enforce the terms of a contract.

18. Proposed class: published sound recordings of musical works on compact discs that use technological measures that prevent access on certain playback devices
One commenter proposed a class of "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." In part, this proposal relates to copy controls that malfunction and inadvertently restrict access to sound recordings on CDs. The proponent itself expressed doubt whether these are actually access controls subject to the prohibition in section 1201(a)(1); opponents said they are not and the Register agrees. However, in some cases the technologies in question are intended to deny access to particular copies of sound recordings under certain circumstances, e.g., CDs distributed with two sessions: a "first session" that is not accessible on certain devices and a compressed digital file of a "second session" that is accessible on those devices but which is protected from certain uses. The purpose of the second session is to permit playability on devices such as computers, but to hinder the ability of computer users to reproduce and disseminate the copies, e.g., in a peer-to-peer network. In those cases, users have access to the work. The comments provided insufficient information to conclude that access controls have caused users to be denied access to a sound recording. Moreover, thus far the deployment of CDs protected by any technological measures in the United States has been minimal. The record

does not support a conclusion that at present, access controls on CDs have had a substantial adverse effect on noninfringing uses of sound recordings on CDs.

19. Proposed class: Sound recordings on copy-protected Red Book Audio format compact discs.

The Digital Media Association (“DiMA”), on behalf of webcasters operating under a statutory license to transmit performances of sound recordings, sought an exemption that would permit circumvention of access controls in order to make ephemeral copies (as permitted in section 112 of the Copyright Act) of sound recordings on CDs protected by access controls. In particular, they wish to make server copies of the higher quality “first session” on CDs using the “second session” technology. Because section 112(e)(8) already provides licensed webcasters with a mechanism for circumventing access controls that prevent webcasters from making ephemeral copies, there is no need for an exemption here, especially when webcasters thus far do not appear to have experienced actual problems.

20. Proposed exemption: Broadcast news monitoring.

A group of broadcast monitors, businesses that tape television news programs off the air for their customers, sought an exemption that would “exempt news and public affairs programming from the scope of the broadcast flag.” This was a reference to a proposal pending before the Federal Communications Commission that would require certain consumer electronic devices to respond to a “broadcast flag” in television programming which would place certain limits on how digital broadcasts can be redistributed after receipt by a consumer. The broadcast monitors seek an exemption that would allow them to bypass the broadcast flag for the purpose of making copies of news segments for their customers.

The Register cannot recommend such an exemption. The “limited purpose” for which the broadcast monitors seek an exemption does not appear to constitute a noninfringing use.

Moreover, the broadcast monitors' fears relating to the broadcast flag, which at this point is simply a proposal before another federal agency, are speculative. Even if the speculative adverse effects were to become a reality, such adverse effects would only cause an inconvenience with respect to the intended use, since broadcast monitors have other means to go about their business.

21. Proposed exemption: Reverse engineering for interoperability and the Static Control proposals.

Static Control Components, Inc. proposed exemptions to permit circumvention of access controls on computer programs embedded in computer printers and toner cartridges and that control the interoperation and functions of the printer and toner cartridge. Static Control is in litigation with computer printer manufacturer Lexmark, which sells laser printer toner cartridges that cannot be refilled by third-party remanufacturers because a technological measure contained on a microchip in those cartridges renders those cartridges useless when they are refilled by third-party remanufacturers. The Register concludes that an existing exemption in section 1201(f) addresses the concerns of remanufacturers, making an exemption under section 1201(a)(1)(D) unnecessary.

22. Proposed exemption: Computer issues: encryption research, data file formats, recovery of passwords, personally identifying material.

A number of commenters raised issues relating to encryption and security research and to access controls that permit the privacy of users of works to be compromised. These proposals, in effect, sought broadening of statutory exemptions enacted as part of the DMCA such as section 1201(d)-(g) and (i)-(j). In some cases, the commenters failed to explain why the existing exemptions are insufficient. Most commenters also failed to provide specific examples of problems leading to the alleged need for an exemption and, therefore, the Register cannot recommend exemptions in these cases.

23. Proposed exemption: Conversion of data file formats and source code.

A few commenters submitted comments relating to source code or data file formats, but insufficient information was provided to understand the nature of the problem, or even whether the prohibition against circumvention contained in section 1201(a)(1) is implicated.

24. Proposed exemption: Privacy and personally identifying information.

Two comments addressed issues relating to privacy and the protection of personally identifying information. However, insufficient information was provided to ascertain the nature and extent of the problem, or the degree to which access controls were involved. To the extent that the concern relates to disclosure of personally identifying information, the commenters did not explain why the existing statutory exemption in section 1201(i) does not adequately address the problem.

25. Other comments beyond the scope of the rulemaking: Webcasting, Limitations of Liability for Online Service Providers and the Antitrafficking provisions of the DMCA.

A number of comments discussed issues unrelated to the anticircumvention provision that are beyond the scope of this rulemaking. Some of these comments consisted of criticisms of the DMCA generally, without citing any particular facts to support such criticism.⁶ Other comments attacked particular aspects of the DMCA, e.g., criticism of the rate established for the statutory license for the webcasting of sound recordings, alleged adverse effects of section 512 relating to limitations on liability for online service providers, and the antitrafficking provisions of section 1201(a)(2) and 1201(b).

⁶ See, e.g. C43 and C44.

IV. Conclusion

Having considered the evidence in the record, the contentions of the parties, and the statutory objectives, the Register of Copyrights recommends that the Librarian of Congress publish the four classes of copyrighted works designated above, so that the prohibition against circumvention of technological measures that effectively control access to copyrighted works shall not apply to persons who engage in noninfringing uses of those particular classes of works.

Dated: October 27, 2003

Marybeth Peters,
Register of Copyrights.

Determination of the Librarian of Congress

Having duly considered and accepted the recommendation of the Register of Copyrights that the prohibition against circumvention of technological measures that effectively control access to copyrighted works shall not apply to persons who engage in noninfringing uses of the four classes of copyrighted works designated above, the Librarian of Congress is exercising his authority under 17 U.S.C. 1201(a)(1)(C) and (D) and is publishing as a new rule the four classes of copyrighted works that shall be subject to the exemption found in 17 U.S.C. 1201(a)(1)(B) from the prohibition against circumvention of technological measures that effectively control access to copyrighted works set forth in 17 U.S.C. 1201(a)(1)(A) for the period from October 28, 2003 through October 27, 2006, as follows:

List of Subjects in 37 CFR 201

Copyright, Exemptions to prohibition against circumvention.

Final Regulations

For the reasons set forth in the preamble, 37 CFR part 201 is amended as follows:

1. The authority citation for part 201 continues to read as follows:

Authority: 17 U.S.C. 702

2. Section 201.40 is amended as follows:

(a) by revising paragraph (b); and

(b) by adding new paragraph (c).

The revisions and additions to § 201.40 read as follows:

§ 201.40 [Amended]

* * * * *

(b) Classes of copyrighted works. Pursuant to the authority set forth in 17 U.S.C. 1201(a)(1)(C) and (D), and upon the recommendation of the Register of Copyrights, the Librarian has determined that during the period from October 28, 2003, through October 27, 2006, the prohibition against circumvention of technological measures that effectively control access to copyrighted works set forth in 17 U.S.C. 1201(a)(1)(A) shall not apply to persons who engage in noninfringing uses of the following four classes of copyrighted works:

(1) Compilations consisting of lists of Internet locations blocked by commercially marketed filtering software applications that are intended to prevent access to domains, websites or portions of websites, but not including lists of Internet locations blocked by software applications that operate exclusively to protect against damage to a computer or computer network or lists of Internet locations blocked by software applications that operate exclusively to prevent receipt of email.

(2) Computer programs protected by dongles that prevent access due to malfunction or damage and which are obsolete.

(3) Computer programs and video games distributed in formats that have become obsolete and which require the original media or hardware as a condition of access. A format shall be considered obsolete if the machine or system necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.

(4) Literary works distributed in ebook format when all existing ebook editions of the work (including digital text editions made available by authorized entities) contain access controls that prevent the enabling of the ebook's read-aloud function and that prevent the enabling of screen readers to render the text into a specialized format.

(c) Definitions. (1) "Internet locations" are defined to include domains, uniform resource locators (URLs), numeric IP addresses or any combination thereof.

(2) "Obsolete" shall mean "no longer manufactured or reasonably available in the commercial marketplace."

(3) "Specialized format," "digital text" and "authorized entities" shall have the same meaning as in 17 U.S.C. 121.

Dated: October 28, 2003

James H. Billington,
The Librarian of Congress.