

*2003 Rulemaking on "Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies", Docket No. RM 2002-4*

*Reply Comments by Consortium of College and University Media Centers (CCUMC)*

*Response to Comment number: 33*

- I., II. Classes of works exempted in the 2000 rulemaking (proposed in Comment 33):
- "Literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage, or obsolescence."
  - "Compilations consisting of lists of websites blocked by filtering software applications."

**Summary:**

The Consortium of College and University Media Centers (CCUMC) is in full agreement with the need to reaffirm the foregoing exemptions granted in three years ago.

**Argument:**

Although CCUMC represent organizations servicing media technology and software in higher education, many of our members are administratively part of libraries and many of our concerns regarding the copyrighted software that our educational clientele employ are much the same. We concur that the existing exemptions, "absent evidence that the problems which originally warranted [them] have been corrected by the marketplace" (Lutzker, Comment 33), should be renewed. CCUMC fully agrees with the rationale provided on behalf of this position.

- III. Class of works (proposed in Comment 33):
- "Literary works, including eBooks, which are protected by technological measures that fail to permit access, via a 'screen reader' or similar text-to-speech or text-to-braille device, by an otherwise authorized person with a visual or print disability."

**Summary:**

CCUMC supports the necessity of this new proposed exemption by the library associations in Comment 33, as it supports the Americans with Disabilities Act.

**Argument:**

As an organization of higher education services that supports its members' technological compliance with the Americans with Disabilities Act (ADA), CCUMC find this new exemption to be an important one. As above, we fully agree with the Comment 33 argument justifying it. The ADA is legislation securing important information rights vital to its constituency. We find that compliance with the letter and spirit of the ADA, through this proposed exemption, does not reach beyond "the outer limits of a permissible definition of 'class' under the approach adopted in the first rulemaking"

(Library of Congress, Copyright Office, "Notice of Inquiry," dated October 15, 2002, at: <http://www.copyright.gov/fedreg/2002/67fr63578.html>).

*Response to Comment number: 2*

IV. Class of Works (proposed in Comment 2):

- "Literary works, including computer programs and databases, protected by access control mechanisms in which the mechanism controls access both to copyrighted works and to works not under copyright."

Summary:

CCUMC concurs with the importance of works out of copyright and in the public domain, and with the proposed exemption where they appear within technologically protected works or collections of works.

Argument:

Although we would expect that works in the public domain would normally be available as well in non-access-controlled formats, for little or no expense, this exemption expresses an important principle and a potential need in at least some cases. The public's right to access such out-of-copyright material, *without permission*, must be insured even in the possibly infrequent cases where it is available exclusively in a digital, access-controlled form. For libraries, media support services and educational institutions in general, this is especially important because they are even more likely to acquire large collections of works in which public domain content may be present and which must be distributed by various technological means in the most effective way to their constituencies. The exemption above would allow them among all users to accomplish this end.

*Response to Comment number: 5*

V. Class of Works (proposed in Comment 5):

- "Any digital-format work, including but not limited to Compact Discs (CDs) and Digital Versatile Discs (DVDs) which contain material not available in a comparable analog format at a price no more than ten percent (10%) higher than the cost of the digital work."

Summary:

This proposed exemption is supported in part with stringent qualification that includes its relevance to the Technology, Education and Copyright Harmonization Act.

Argument:

There is merit in proposing this digital "class of works"—primarily audiovisual and musical, in our estimation—but only if the works are subject to the application of the Technology, Education and Copyright Harmonization Act of 2002, or TEACH, now integrated into 17 U.S.C. 110 and 17 U.S.C. 112. This law provides in part for the incorporation by nonprofit institutions of reasonable and limited portions of all classes of

works into digital networks for distance education. Where such works are available in digital form for such teaching modes they must be used instead of digitally copied analog versions (“except with respect to a work produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks,” [Public Law 107-273, 21st Century Department of Justice Appropriations Authorization Act, Sec. 13301: Educational Use Copyright Exemption]). But in the case of works *only* available in this digital form—and further, containing access control measures making them incompatible with digital network distribution compliant with TEACH—a conflict arises between the application of TEACH and the DMCA 1201(a)(1)(C) prohibition. Without bypass of access controls, such works could not be used for distance education. Since Congress passed TEACH only four years after the DMCA, it seems reasonable to us that the rights granted under TEACH would have been expected to result in an additional, narrow exemption to the DMCA 1201 anti-circumvention prohibition. While the application of TEACH is barely under way, CCUMC feel that given its great promise and its expected wholesale adoption by nonprofit higher education among other authorized parties, we cannot wait another three years to deal with the impact of this conflict after the fact. Thus we support Comment 5’s proposed class of works with the following modification: “Any digital-format work, including but not limited to Compact Discs (CDs) and Digital Versatile Discs (DVDs), which contains material not lawfully available in an analog or comparable version lacking technological access controls, and subject to the purposes and requirements of the Technology, Education and Copyright Harmonization Act for digital distance education.” We encourage the Copyright Office to consider this qualified class of works for an exemption, in a form of definition that the Librarian of Congress and Register of Copyrights deem appropriate.

Concluding reply comments:

In general, the Consortium of College and University Media Centers finds itself in agreement regarding the limitations and impact of this rulemaking’s narrow scope, as detailed by the library associations in Comment 33. We have serious concerns regarding the rulemaking’s efficacy to address lawful uses of protected copyrighted works, as well as concern over the role played by licensing conjoined with technological control measures. The erosion and even wholesale suspension of “fair use” and other legal provisions benefiting users, with regard to technologically access-controlled digital works--except where their exercise might coincide with a specific exemption granted--is problematic. Fair use involves well-established principles and legal provisions, and CCUMC has been a leader over the years in the promulgation of this right, having successfully coordinated the adoption of the Fair Use Guidelines for Educational Multimedia, available at: <http://www.indiana.edu/~ccumc/copyright/ccguides.html>. These troublesome issues challenge especially all higher education organizations, in complementary as well as identical ways, regardless of our service domains. However, we do acknowledge, having participated in the comments and hearings for the rulemaking in 2000, the prevailing interpretation by the Librarian of Congress and Register of Copyrights of the DMCA provision that occasions this rulemaking and limits the concerns that can be considered. Therefore, CCUMC offer at this time support for only the five exemptions outlined above. We also stress particularly a caution regarding an apparent conflict with the arrival of the recent TEACH legislation, the exercise of

which could be compromised by the DMCA 1201(a)(1)(C) provision under scrutiny in this rulemaking.

Respectfully submitted,

Jeff Clark, Chair  
Government Regulations & Public Policy Committee  
Consortium of College & University Media Centers  
Committee Chair phone: 540-568-6770  
CCUMC Executive Office  
Iowa State University  
1200 Communications Bldg  
Ames, IA 50011-3243  
Executive Office phone: 785-628-4194

Reply Comments dated: February 19, 2003