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CLASSES OF WORKS:

This is in support and amplification of the proposed exemptions for the following classes of works in comment 35 by the Electronic Frontier Foundation:

Class #1: Audiovisual works stored on DVDs that are not available in Region 1 DVD format and access to which is prevented by technological measures. (Originally class #2 in comment 35.)

Class #2: 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. (Originally class #3 in comment 35.)

This is also in support and correction of the proposed exemption of the following class of works in comment 16 by Darrin Cardani:

Class #3: Tools which existed before and happen to be able to circumvent newer products' access controls. (Originally class #1 in comment 16)

SUMMARY OF THE ARGUMENTS:

Class #1 (in support): I give examples of several non-region-1 DVDs I own where the inability to circumvent has caused me problems of the type described by the EFF.

Class #2 (in support): I give examples of several DVDs I own which restrict private performance, a restriction I can only get around by (purported) circumvention. These examples are of private performance other than skipping commercials, an area that the EFF did not cover well.

Class #3 (in support and correction): This is a comment in correction of the original comment. The example was factually incorrect and I suggest a better example, as well as a rewording of the class of works to properly fit the definition of "class of works".

SUPPORT FOR THE ARGUMENT:

Class #1:

I happen to be a fan of both Japanese animation and Hong Kong movies and can point to a number of cases where there is material in other regions that I want to watch that isn't available in a region 1 version. My own collection includes:

Marco (Japanese animation--R3)
Space Travelers (Japanese live action movie--R3)
Shinobi no Mono (Japanese live action movie--R3)
Neon Genesis Evangelion episode 21-24 extended edition (Japanese animation, R2)
Come Drink With Me (Hong Kong live action, R3)

The Heroic Ones (Hong Kong live action, R3)
The Teahouse (Hong Kong live action, R3)
Killer Clans (Hong Kong live action, R3)

It also includes several R2 preview DVDs from recent issues of the Japanese Newtype magazine. (There is an English version of the magazine, but its preview DVDs are completely different from the Japanese ones.)

While there is no way to know for certain that none of these DVDs will be released in the USA, it doesn't seem likely; several of these DVDs have already been available for years overseas and have never been licensed. There are also some special cases; for instance, the US licensor of Evangelion has already refused to license the extended edition of episodes 21-24, and it would make little sense for another company to release it.

Moreover, there are overseas DVDs that are just not released in good versions in the USA. I own R3 versions of Godzilla 2000, Godzilla vs. Megaguiras, and Godzilla/Mothra/King Ghidrah. It is likely that these will be licensed in the USA (Godzilla 2000 already is) but Toho refuses to license its Godzilla films with an original language track and subtitles. The *only* way I can watch these movies in their original language is to watch an import version. (In effect, there are two different works: a dubbed movie, and a subtitled, original-language movie, with only one of those works being available.)

Class #2:

While the EFF's comments supporting class #2 deal chiefly with unskippable advertising, the class itself includes DVDs with other kinds of limits on private performance. The EFF didn't give examples of these, but I will. I own the following three DVDs with such restrictions:

Jin-Roh R3 (DVD locks out 'reverse' button)
Godzilla 2000 R3 (DVD locks out use of subtitles with the original language track)
Dracula (1931) R1 (DVD locks out switching between the commentary and regular audio tracks)

Because the DVD companies refuse to license CSS to any player manufacturer who does not contractually agree to have their player obey these restrictions, my only way of avoiding them is to use an unlicensed player, a use which the studios claim to be circumvention.* (In the case of Godzilla 2000, I own a buggy player which allows the restricted use, but by the same reasoning which suggests that using an unlicensed player is circumvention, taking advantage of a bug in player software could be considered circumvention.)

* The EFF was unable to find any unlicensed players which ignore UOP controls, but unlicensed Linux software players, while not exactly common, do do so.

Class #3:

Adobe's encryption was not ROT-13. I still support this exemption because I believe the argument for it is otherwise valid. I suggest replacing the problematic example with Agfa-Monotype's DMCA threats over font-embedding software (see <http://www.politechbot.com/p-03473.html> and later articles such as <http://www.politechbot.com/p-03506.html> found by a search for agfa at <http://www.politechbot.com/cgi-bin/politech.cgi>). In this case, a

user wrote a program in 1997 which resets the flag that prohibits a font from being embedded in a document. Agfa claimed that using this program is a 1201(a) violation and an act of circumvention even though he wrote the program five years previously (prior to the DMCA) for use on fonts created by himself, not Agfa.

I also suggest that the class in this comment be corrected to "Software protected by access controls which can be circumvented by tools which legally existed prior to the creation of the software", creating a valid class of works (since the class as proposed is not a valid class).

The noninfringing activity prevented by the DMCA for this class of works would be any noninfringing use that the tool could previously enable. In this case, using the tool on one's own fonts would be such a use. It might seem that this use is already permitted, but among Agfa's DMCA claims is a 1201(a)(1)(A) claim. While Agfa's reasoning in applying 1201(a)(1)(A) is unclear, the only act that this claim could possibly be referring to is Tom 7's use of the tool on his own fonts, since he did not use it in any other way.