

February 20, 2003

United States Copyright Office
James Madison Memorial Building
101 Independence Avenue, SE
Washington, DC 20024
1201@loc.gov

Re: Rulemaking on Exemptions from Prohibition on Circumvention of
Technological Measures that Control Access to Copyrighted Works ---
Reply Comments in §1201(a)(1).

Dear Madams and Sirs:

Sony Computer Entertainment America Inc. (SCEA) submits this response to the Copyright Office's invitation to submit reply comments to proposals for adoption of exemptions for certain classes of works from the prohibition against circumvention of technological measures that control access to copyrighted works. SCEA thanks the office for providing SCEA with this opportunity. SCEA joins the response by the Interactive Digital Software Association (IDSA), of which SCEA is a member, and offers the following supplemental information in to the Copyright Office in opposing an exemption for interactive entertainment software.

Summary: Proponents of exemptions from §1201(a)(1)(A) for entertainment software products fail to address the real harm that illegal circumvention devices currently cause to the industry. The inconvenience and alleged additional expense incurred by the theoretical user as described by the proponents is minimal compared to the real world harms that currently affect the industry. Granting an exemption will allow these harms to grow exponentially.

Reply to Proposed Classes of Work For Exemption: SCEA is responding to and opposes the proposals to exempt:

1. *“Software and games that are played on video game machines”* as raised in Submission Number 15; and to the proposal to exempt,
2. *“Literary works (including computer software and databases, musical works and motion picture works which are region coded, and for which the nearly*

identical product except for being keyed for a region containing the United States does not exist for mass-market consumption within the United States,” as raised in Submission Number 32 item (6).

Summary of Arguments In Support of an Exemption:

Proponents argue that entertainment software should be exempt from the prohibition in § 1201 (a) because the regional access control measures prevent 1) the playing of foreign games (both submissions) and the playing of unauthorized software (submission 15). Both proponents contend that the consumers incur substantial expense to facilitate a means to play the foreign games that they have lawfully acquired.

Supplemental Arguments Opposing the Proposed Exemptions

SCEA supports and joins the IDSA in its written opposition to the proposed exemptions and wishes to reiterate that the proponents have failed to address the very real harms that circumvention devices have had on the entertainment software industry and will have if an exemption is granted. To this end, SCEA wishes to impress upon the Copyright Office the seriousness and magnitude of the fourth factor that the Copyright Office is to consider --- the effect of circumvention of technological measures on the market for or value of copyrighted works [17 U.S.C. § 1201(a)(1)(C)(iv)] -- that is objectively observable today.

The entirety of the proponents' remarks on the effect of circumvention on the market is as follows: "It is possible that allowing the playing of foreign DVDs would reduce the market for domestic DVDs, but the market for the foreign DVDs would increase by a corresponding amount. Overall, there would be no change." Submission 15. This statement completely ignores the salutary effect on piracy that allowing circumvention would create and also ignores the enormous detrimental effect piracy would have on the entertainment software market.

Currently, the entertainment software industry faces a serious and growing dilemma from the availability of so-called "mod chips," which allow pirated software to be played on video game consoles. It is estimated that the video game industry's annual worldwide loss to the sale of pirated software exceeds two billion dollars (Computer Edge, Sept. 20, 2002). To play a pirated game on a video game console, the user requires an anti-circumvention device known as a "mod chip." Mod chips are available for virtually all console game players. In addition to circumventing the security codes that are designed to keep pirated game discs (also referred to as "burns," "backups," "bootlegs" and "counterfeits") from playing on the console, mod chips also circumvent region coding. Although there have been several rulings holding that the use of mod chips for circumvention purposes violates §1201(a)(1) of the DMCA, the expansion of the Internet-based mod-chip marketplace continues unabated. A search conducted on February 18, 2003 through the Google search engine for "video game mod chips" produced over 40,000 hits, a 25% increase from an identical search the previous summer.

Most of these sites are selling and promoting the use of these devices. Even a casual viewer of these sites can readily determine that the sellers of mod chips seek to legitimize the mod chips' use by making them available to play foreign products and "back-up" discs which is short hand code for pirated software. The problem is very real, substantial, and very harmful to the industry. SCEA devotes valuable company resources to attacking these mod chip traffickers, as does our trade association, the Interactive Digital Software Association (IDSA).

The size and scope of the mod chip market cannot and is not justified by the consumers who wish to play legitimately acquired foreign games. The truth of this is borne out by the fact that the marketplace completely rejected a region code specific mod chip that did not last a year in the marketplace. [See, testimony of Howard C. Chen, defendant in SCEA v. Howard Chen, Case No. C02-03144, currently pending in the Northern District of California (excerpt attached). Mr. Chen modified original PlayStation® consoles with this region specific mod chip and his sales dropped dramatically. "So that's the mod chip I was using. But ... things dropped. Things dropped. I mean the mods reduced, people find out my mod chip didn't play the burn game, so they – they don't want it." 93:3-7, Depo. Testimony of Howard J. Chen, December 20, 2002.] Consumers simply would not buy it, underscoring the reality that mod chips exist for the purpose of playing pirated game discs. The harm that is occurring to the industry now and that will geometrically increase should circumvention be permitted more than offsets the inconvenience or insignificant cost that the few legitimate holders of foreign software incur if they desire to play foreign games.

Creating an exemption would make mod chips even more readily available and legitimize a growing misconception among consumers that making pirated copies of entertainment software is permissible. This will have a devastating impact on the entertainment software industry. An exemption is clearly not warranted.

Proponents of an exemption focus on theoretical arguments and put up examples of straw man consumers while completely ignoring the very real harms that exist today. Without acknowledging, or attempting to deal with these problems, the proponents of these exemptions should be viewed skeptically and should be held closely to their burden to show that all five factors militate strongly in favor of an exemption. In this case, an exemption should not be granted.

On behalf of SCEA, I greatly appreciate the opportunity to submit to the Copyright Office this supplemental response.

Very truly yours,

Riley R. Russell
Vice President Legal and Business Affairs, General Counsel

1 history. I'm sorry. PlayStation didn't come out till 2000,
2 we talking about '99.

3 So that's the mod chip I was using. But
4 yeah, the writing is on the wall, things dropped.
5 Things dropped. I mean the mods reduced, people
6 find out my mod chip didn't play the burn game, so
7 they -- they don't want it.

8 Q So how long did you sell -- well, you realized
9 your sales were plummeting?

10 A Uh-huh.

11 Q It must be because of piracy, so you started using
12 a mod chip that had an anti-piracy mod chip. How long did
13 you sell that chip?

14 A All the way to like end of '99, 2000. And then
15 they don't -- they don't even make that antipiracy chip
16 anymore. So we just order any mod chip, because they are so
17 cheap.

18 PlayStation 2 is coming out, so we pretty
19 much moved forward to the new thing. Yeah, '99, we
20 tried to use the antipiracy chip, but then they
21 don't even make it anymore.

22 Q When did you find it difficult to find the chip,
23 towards the end of '99?

24 A Yeah, yeah. They just -- several places say we
25 don't make it anymore.

