

**Before the United States Copyright Office
Library of Congress
Washington, D.C.**

In the Matter of)	
Exemption to Prohibition on)	
Circumvention of Copyright Protection)	Docket No. RM 2002-4
Systems of Access Control Technologies)	
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Reply Comments of AOL Time Warner Inc.

Classes of Works Addressed¹

Works for which those filing comments seek exemptions limiting a copyright owner’s ability to control conditions of access to the work once a consumer has obtained initial lawful access or purchased a physical copy, including:

- (1) works for which those filing comments seek exemptions to allow the work to be used on platforms other than those designed for the format in which the consumer chose to purchase the work;²

¹ AOL Time Warner’s categorization of the classes of works addressed for purposes of these reply comments does not imply concession or agreement that any of the groupings of works identified in the comments constitute an adequate identification of a “particular class of works” within the meaning of the statute and the Librarian’s Final Rule. Nor does our addressing of only a subset of the classes of works as to which exemptions are sought imply acceptance of the arguments made in the comments as to other classes.

² Including, but not limited to, the following comments: 1 (audiovisual works presented in digital format, when used by a participant in the original creation of such work in the assembly of a brief compilation of excerpts for purposes of soliciting business or employment, commonly known as a “portfolio” or “demo reel”); 5 (any work to which the user has had lawful initial access); 6 (music of all types used for personal medium transfers or backup archival copies); 8 (all classes: literary works, musical works, dramatic works, pantomimes and choreographic works, pictorial, graphic and sculptural works, motion pictures and other audiovisual works, sound recordings, and architectural works); 9 (literary and educational text contained in e-books); 10 (motion pictures on DVD); 11 (music CDs, video DVDs, electronic printed media); 13 (electronic books); 15 (audiovisual works on DVD protected by the Content Scrambling System); 20 (literary works, sound recordings, motion pictures and other audiovisual works restricted by access controls that tether the work to a specific device or platform or that limit access to and post sale use of the work); 30 (sound recordings and audiovisual works which require the use of a computer operating system, media player, codec or digital rights management system specified by the copyright owner to gain access to the work or which tether lawfully made copies to a particular digital playback device); 34 (sound recordings and audiovisual works (including motion pictures) embodied in copies and phonorecords, protected by access control mechanisms which require the use of a computer operating system, media player, codec or digital rights system specified by the copyright holder in order to gain lawful access); 39 (audio and video); 42 (musical, literary and cinematographical [sic] works in digital formats).

- (2) works for which those filing comments seek exemptions to allow circumvention in order to gain access to bonus content available only in a particular format or to circumvent regional coding.³

Summary of Arguments/ Introduction

The fundamental purpose of the Digital Millennium Copyright Act (DMCA) was to enable the development of a vibrant digital marketplace for copyrighted works, unleashing the full potential of new digital technologies. Since the DMCA's enactment in 1998, this goal has already begun to be realized: consumers today have available a growing range of legitimate options for enjoying content, offering a variety of formats, platforms, and prices pegged to convenience, quality and duration. This trend toward more diverse and more flexible business models will continue, if it is not stunted by cut-backs to the DMCA's vital protections.⁴

A common theme runs through many of the comments seeking exemptions: an unwillingness to accept any limitations on how purchased content may be used, even reasonable limitations that make it economically feasible for copyright owners to offer a range of options in ways that are appealing to the vast majority of mainstream consumers. In part, these comments express nostalgia for an analog world without such perceived limitations. But this perception is revisionist and largely inaccurate; the analog world imposed inherent limitations of its own, often more disabling than those on which copyright owners seek to rely in establishing digital markets. These limitations were backed and enforced by various legal protections against unauthorized access and use which continue in place today, unchanged by the DMCA. Even more fundamentally, however, it is simply not possible to move forward to capture the remarkable benefits that can be delivered through new technology while retaining entirely unchanged the familiar models of use from the past.

As a large and multi-faceted media company, AOL Time Warner is sensitive to the importance of maintaining a proper balance between the rights of copyright owners and the ability of others to make fair use of their works. Indeed, the ability to build on existing works in creative ways, and to use them for purposes such as commentary and reporting, is vital to our entertainment and news reporting businesses. And in developing new formats and product offerings, one of our central goals has been to maximize

³ Including, but not limited to, the following comments: 5 (any digital format work, including but not limited to compact discs and DVDs which contain material not available in a comparable analog format at a price no more than 10% higher than the cost of the digital work); 15 (audiovisual works on DVD protected by the Content Scrambling System, software and games that are played on video game machines); 17 (foreign forms of entertainment such as anime); 21 (ancillary audiovisual works distributed on DVD using the CSS method of access control); 32 (literary works, musical works, and motion pictures which are region coded for use outside the United States and for which a Region 1 or multi-region coded work does not exist in the United States); 35 (audiovisual works stored on DVD that are not available in Region 1 format); 36 (foreign language audiovisual works not available for sale in the United States but available for sale outside the United States on DVDs region encoded to prevent playback in the United States).

⁴ The market success of these legitimate options will depend in part on the ability to check the spread of online piracy.

consumer convenience to the greatest extent possible while still being able to offer the value of differentiated products. We believe that the anti-circumvention provisions of the DMCA, including the oversight provided through the Library of Congress rulemaking procedure, strike a healthy balance of interests and contain appropriate safeguards for the important public interest in a thriving fair use doctrine. We submit these reply comments to communicate our concern that some of the comments seeking exemptions reflect a misguided view of the interrelationship between the function of access control measures and users' interests, which if accepted could undermine the use-facilitating balance struck in the DMCA, to the detriment of users and copyright owners alike.

Factual Support/Legal Argument

The comments seeking exemptions for the above-identified classes of works assert that they wish to preserve the ability to make lawful uses of copyrighted works. There is no evidence, however, that lawful uses are being precluded. To the contrary, with the advent of protected digital formats, copyright owners are enabling numerous new uses that were unimaginable in the analog world. Moreover, most copyrighted works can still be enjoyed in analog formats.

The underlying assumption of many of the comments seems to be that copyright owners are exerting greater control over access to their works than was possible in the analog world, and are denying, or will deny, consumers the ability to access and use copyrighted works in non-infringing ways. The comments offer no real evidence to support this assumption, which is not surprising since it is inconsistent with the realities of digital delivery.

First, copyright owners are not overall exerting greater control over access to digital works than to analog works. Rather, their control has become less of a blunt instrument, no longer imposing the choice of "all or nothing." In the analog world, because the Copyright Act grants copyright owners the right to control the distribution of copies of their works, they have largely been able to control unauthorized access to a work through the practical ability to control its material embodiment. For instance, in movie theaters copyright owners control the gate – no one can enter without a ticket. Motion pictures could not easily be copied before the advent of video recording devices in the 1980's. With respect to broadcasts of copyrighted works, copyright owners can control the geographic area of the communication. Product offerings such as Pay TV are enabled by using access controls such as signal scrambling. When works are distributed in physical copies, the copyright owner controls initial access to those copies. Content cannot be experienced without someone first purchasing a copy of the work.

Although some instances of access in the analog world cannot be controlled by controlling the work's material embodiment (e.g., certain subsequent uses of the physical copy of a work after initial sale, or the making of analog copies of a work delivered via broadcast TV using a VCR), the risk from such activities to copyright owners' interests is relatively small. Among the reasons for this: analog copies degrade over time; the transfer of such copies involves inconvenience; additional copies are inferior in quality

and not easy or quick to make and disseminate widely; and prices for the material embodiments can be set to take account of subsequent re-use.

The same inherent limitations do not exist in the digital world. Digital copies can be easily made almost instantaneously, in virtually unlimited quantities, at essentially no cost. They are pristine – the millionth copy is as good as the original. Digital copies can be quickly and cheaply disseminated throughout the world, including to countries without adequate copyright protection. Without the ability to rely on effective access control measures, pricing to compensate for the risk of re-use of content would be largely infeasible in the digital environment if the copyright owner wants to be responsive to consumer demands for greater variety in services. Unless technologies can be used to control the conditions under which an individual may access a work, copyright owners will be forced to make their works available only at the full price of a permanent copy.

It was in recognition of these changed circumstances and increased risks that Congress granted copyright owners the ability to protect against uncontrolled use of their works in digital form by enacting the DMCA's provisions barring circumvention of technological protection measures. See, e.g., Senate Judiciary Committee Report, S. Rep. No. 105-190 (1998) ("Due to the ease with which digital works can be copied and distributed worldwide virtually instantaneously, copyright owners will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy. [The DMCA] provides this protection and creates the legal platform for launching the global on-line marketplace for copyrighted works. It will facilitate making available quickly and conveniently via the Internet the movies, music, software, and literary works that are the fruit of American creative genius").⁵ In essence, these provisions of the DMCA were intended to maintain the copyright balance that had become threatened by the loss of traditional physical limitations.

Congress' wisdom has been borne out. With the availability of conditional access control measures, and the ability to prevent circumvention of such measures, copyright owners are already making digital content available to consumers in new, compelling ways. More compelling offerings are on the horizon if they are not stymied by erosion of the protections provided in the DMCA.

At bottom, many of the comments seeking exemptions belie a misunderstanding of the business imperatives facing the copyright industries. Indeed, they rest upon and promote a false conflict between the interests of copyright owners and the interests of consumers. Copyright owners are not interested in "locking up" their copyrighted works and denying consumers access; their businesses thrive only when their works are widely disseminated to the public in lawful ways. For this reason, copyright owners have already embraced digital delivery of content on prerecorded media such as DVD and DVD Audio, and through Internet-delivered services such as MusicNet and Movielink. In championing

⁵ Nor was this the first time Congress has enacted a law protecting the ability to protect content through access control technologies. Similar judgments have been made in the context of scrambling of cable and satellite signals, prohibiting descrambling (including the manufacture and sale of black boxes) to gain unauthorized access. See 47 U.S.C. §553.

these formats and services, they have sought to find ways to encourage consumers to migrate to these legitimate digital delivery options by offering new features and additional content. Beyond the obvious benefits in terms of higher audio and video quality made possible by digital formats such as DVD and DVD Audio, copyright owners are offering additional purchasing incentives such as bonus content (e.g., directors' cuts, interviews, and photo galleries) when content is delivered in protected high storage capacity formats such as DVD. More interactive enjoyment of content (e.g., language features, ability to easily navigate through scenes in a movie, links to artist websites) is also being enabled. Finally, consumers are benefiting from a greater variety of selections of how and when to enjoy content -- each of which is offered at differentiated prices (e.g., in the range of \$4 for Video On Demand v. \$20 for a permanent physical copy on DVD).

We address in turn the two principal arguments raised by the comments advocating exemptions for the identified "classes" of works:

1. **Circumvention of access controls in order to allow a work to be used on platforms other than those designed for the format in which the consumer chose to purchase the work**

These comments argue that once a consumer has obtained lawful access to a work the copyright owner should not be able to control the conditions of its further use.

Alternatively, some argue that once a consumer has purchased a physical copy of a copyrighted work (e.g., a motion picture on a DVD) the consumer should be entitled to have an "unfettered right to access (make use of) the work embodied on the DVD."⁶

They suggest that consumers should be able to remove access control features to allow works to be used where, when and how the consumer wishes -- regardless of the price and other terms pursuant to which access to the work was obtained.⁷

⁶ LawMeme comments, p. 25. While LawMeme concedes that it would be improper to create an exemption which allows a perpetual right to continue to view content once an authorized viewing window has expired, by equating a right to access a copy acquired under particular terms with a right to make "perpetual and unencumbered" use of the work, LawMeme advocates an equally troubling exemption which would allow individuals to unilaterally alter the terms under which the consumer has purchased access from the copyright owner.

⁷ Whether intentionally or not, many of the comments blur the line between conditional access controls and copy controls. For example, the activities which the exemption seekers wish to engage in typically involve the need not only to circumvent an access control measure, but to make a copy (e.g., make a copy in a different format to facilitate viewing/playing on a different device). The encryption technologies used by copyright owners to protect their works are nevertheless properly considered access control technologies because they grant access conditioned upon compliance with the terms of the bargain struck when the copy is purchased. (e.g., type and number of devices on which a work can be accessed, length of time a work may be used, whether or not it is permissible to make a recording, etc.). Courts have affirmed that technologies such as CSS, the encryption technology used to protect content on DVD video discs, are access control technologies. See, e.g., *Universal City Studios v. Reimerdes*, 111 F.Supp. 2d 294 (S.D.N.Y. 2000) ("CSS effectively controls access to copyrighted works"). To the extent that a separate technology is used to control use after access is gained, there is no need to address it in this rulemaking.

We note first that this is not a new issue, nor does it present any new facts not before Congress when it enacted the DMCA or the Librarian of Congress when he rejected similar requests for exemptions during the first rulemaking. Congress was well aware that DVDs, for example, could only be played on DVD players and drives, and did not see the need to provide an exemption for their use in other devices (as it did for other uses it determined to involve a public policy need).

The comments focus largely on the ability of consumers to use copyrighted works in formats other than the one in which the consumer has elected to purchase the work. But copyright owners have always had the right to determine how and even whether to distribute their works to the public. In providing legal protection for the technologies used to protect copyrighted works, the DMCA did not alter these basic legal principles.

In seeking to justify the requested exemptions, the comments distort the doctrine of fair use – a defense to infringement – by treating it as an entitlement to receive content in multiple formats of the purchaser’s choosing. There is no legal support for this proposition. See, e.g., Universal Studios, Inc. v. Corley, 273 F.3d 429, 459 (2d Cir. 2001) (“We know of no authority for the proposition that fair use, as protected by the Copyright Act, much less the Constitution, guarantees copying by the optimum method or in the identical format of the original... Fair use has never been held a guarantee of access to copyrighted material in order to copy it by the fair user’s preferred technique or in the format of the original.”); United States v. Elcom, 203 F. Supp.3d 1111, 1131 (N.D. Cal. 2002) (“Nothing in the DMCA prevents anyone from quoting from a work or comparing texts for the purpose of study or criticism. It may be that from a technological perspective, the fair user may find it more difficult to do so – quoting may have to occur the old fashioned way, by hand or by re-typing, rather than ‘cutting and pasting’ from existing digital media. Nevertheless, the fair use [sic] is still available... [N]o authority... guarantees a fair user the right to the most technologically convenient way to engage in fair use. The existing authorities have rejected that argument.”).

Moreover, the arguments advanced in the comments go too far. Copyrighted works are readily available at affordable prices in multiple formats – consumers may select for themselves the format that is most suited to their needs and lifestyle.⁸ There is no reason why, for example, a consumer should purchase a DVD and expect to be able to play it in a VCR or a PC without a DVD drive. Just as it would be unreasonable for a consumer to purchase an 8-track tape of her favorite album in the 1970’s and expect the copyright owner to provide (free) upgrades of recordings of the work in the latest technology in perpetuity, it is equally unreasonable for a consumer to purchase a recording in the latest available format when he cannot or does not wish to use that format under the conditions

⁸ Although some of the comments presume that if the copy of the motion picture were purchased in analog form it would be freely copyable into other formats (or that numerous copies of the prerecorded motion picture could be made for personal use from that analog copy without the need to defeat any technological obstacles), this is not true. Section 1201(k) of the DMCA requires analog VCRs to implement and respond to the Macrovision copy protection system and entitles copyright owners to use the Macrovision technology to indicate that prerecorded copies of a copyrighted work are not copyable. This is another example of a way in which the perceived complete freedom to copy in the analog world is illusory.

offered, and expect the copyright owner to provide free facilities to play the recording or to translate it into a format more to his liking.⁹

Some comments additionally accuse copyright holders of engaging in “tying” by using access controls that limit the use of a work to a particular format or device.¹⁰ The complaints raised in these comments are beyond the scope of this rulemaking and have nothing to do with tying as the term is understood in antitrust law. In any event, the cases cited are entirely inapposite, and the accusations are baseless.¹¹ There is no difference between releasing a work only as a vinyl LP and releasing a work that can only be played on particular software players. Copyright owners have always been free to choose the formats in which they distribute their works – whether they do so for artistic or security reasons, or simply because that is the best available format at a given time. Nor is there any legal or economic basis for the assertions of “copyright misuse” made by some of the comments. To the extent that they seek support in Lasercomb America, Inc. v. Reynolds, 911 F. 2d 970 (4th Cir. 1990), which involved a license that restricted licensees from creating any of their own software that would compete with plaintiff’s software, nothing like this anti-competitive restriction exists here. With respect to DVDs, for example, there are no restrictions imposed by the DVDFLLC license on the development of competing copy protection technologies. Moreover, a review of the marketplace demonstrates that even with respect to implementations of the CSS technology used to protect DVDs there exists robust competition between manufacturers – dozens of competing brands around the world implement the technology in innovative products pursuant to the terms of the DVDFLLC license, and there is no restriction on the number of competitors that can be licensed.

⁹With respect to the comments seeking exemptions for particular, highly-specialized uses, even less evidence has been presented to demonstrate actual or likely harm if the exemption is not granted. See, e.g., Comments of Mark Wilkins (exemption for making a compilation of clips of one’s own work to use on demo reels). Wilkins speculates that employers may wish to limit access to source material in order to prevent their former employees from marketing their skills to competitors. To the contrary, it is a long-standing practice in the entertainment industry to make source materials available for use in demo reels at cost. Thus there is no need to circumvent commercially-distributed DVDs to obtain access to clips of one’s own work.

¹⁰ See, e.g., Comments of the Computer and Communications Industry Association; Comments of John T. Mitchell.

¹¹ Some comments go so far as to fabricate facts, asserting, for instance, that “Hollywood enforce[s] anti-competitive practices, such as requiring a substantial cash bond upfront to build a software DVD player.” Comments of IP Justice, p.5. The DVD format and logo are licensed by the DVD Format Logo Licensing Corporation (“DVDFLLC”), a Tokyo-based organization. The DVDFLLC licenses the format and logo for \$10,000 per license category regardless of the license category. No upfront bonds are necessary from any product manufacturer. No running royalties are charged. For more information on DVDFLLC, visit <http://www.dvdfllc.co.jp>. The CSS technology used to control access to content on DVD video discs is licensed by the DVDFLLC. The DVDFLLC is a not-for-profit corporation composed of representatives of the consumer electronics, information technology and motion picture industries. It is not necessary to become a DVDFLLC licensee in order to build a DVD player, but, a license for the CSS technology is needed if a manufacturer wishes to build products that are able to decrypt encrypted data on DVDs. The license is available for an administrative fee of \$15,500 per functional license category. No upfront cash bonds are required for any license category. No running royalties are charged. For more information on the DVDFLLC, visit <http://www.dvdfllc.org>.

2. *Circumvention of access controls in order to access content intended only for limited distribution (e.g., “bonus” content on access controlled DVDs, or content encoded with regional controls intended for release in a particular region during a particular time window)*

A number of comments argue that an exemption should be granted in order to allow consumers to gain access to bonus content included with certain digital recordings because such content is not available in other formats. The premise of these arguments is inconsistent with the intent of Congress in establishing the triennial review proceeding, as well as the Librarian’s prior determinations with respect to the need (or lack thereof) for exemptions. The legislative history anticipates the granting of exemptions in exceptional circumstances as a *failsafe mechanism* to guard against a *diminution* in the availability of a particular class of copyrighted works.¹² Here, instead of providing evidence of a diminution in the availability of a particular class of works, the comments seek an exemption on the grounds that copyright owners have made *additional content* available in digital formats—the very result the DMCA sought to encourage. Congress did not authorize an exemption under such circumstances, and the Librarian of Congress properly declined to grant one when this issue was raised in the last rulemaking proceeding.

By including additional “bonus” content with certain releases of DVDs, copyright owners are benefiting rather than harming consumers. This practice is entirely consistent with those of other industries that sell goods and services in various packages and formats to consumers, and set prices that reflect that variety. The toy at McDonald’s is available only with the “Happy Meal,” not the plain hamburger purchased separately; the consumer who wishes to have leather seats in his new automobile will purchase the package that includes that feature, and will not expect the government to require the auto manufacturer to give him leather seats because they are available in the package purchased at a higher price by his neighbor.

The ability to include (and protect) additional content on DVDs serves several important, use-facilitating functions. In order for copyright owners to be able to compete with unauthorized sources for their copyrighted works it is important to have “carrots” at the copyright owner’s disposal. One way of convincing consumers to choose legitimately-distributed content over content that has been copied and redistributed without authorization is by including enticements such as bonus content. If it were possible to gain access to such bonus content in order to transfer it into another format or to reproduce portions (or all) of the work, the ability of copyright owners to compete with the unauthorized distribution of their works by offering additional content only in

¹² Report of the House Committee on Commerce on the DMCA, H.R. Rep. No. 105-551 at 36 (“a failsafe mechanism is required . . . [T]his mechanism 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”). See also Staff of House Committee on the Judiciary, 105th Cong., Section-by-section analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4, 1998 at 6.

particular, legitimate, formats would be compromised, and the value proposition for including such content would be largely eliminated.

It is also significant that although access to the content may be limited to particular formats, the vast majority of fair uses are nevertheless enabled even in those formats. For instance, it is possible to quote, parody, or critique the work, or to show a clip of content in a classroom setting, whether the content is bonus content or the main copyrighted work. It is also possible to make a clip of content on a DVD for fair use purposes by making a camcorder copy or a “screen shot” of the DVD as it is played back.¹³ Indeed, some fair uses, such as showing scenes from a movie, or portions of the bonus content, are far more easily accomplished in DVD formats using advanced navigational tools than in analog form.¹⁴

Delivery of additional material can also be format driven. For instance, the DVD format is particularly well suited for the delivery of multi-media content because of its large storage capacity. Copyright owners should not be penalized for taking advantage of the natural capacities of new digital technologies, nor should they be forced to expend resources to make the same content available in formats where it is not commercially desirable to do so. If the requested exemption is granted, copyright owners will be forced to release identical content in all formats simultaneously (whether technologically practical or not) or face the risk that the first format released will be fair game for hackers (on the grounds that the precise content is not available in the format the user purportedly wishes to use). This will not only eliminate copyright owners’ ability to provide consumers with incentives to move to new formats, but will inevitably lead to substantial delay in releasing copyrighted works in any digital format.

In a similar vein, exemption seekers argue that an exemption should be granted to allow users to circumvent regional coding. These arguments were also considered and rejected by the Copyright Office in the last section 1201(a)(1) rulemaking. The Copyright Office should again reject the requested exemption because the individuals seeking exemptions have offered no new evidence justifying such an exemption.

¹³ While the fair user may prefer to make a direct copy, as noted above, the courts have rejected this argument. See, e.g., Universal Studios, Inc. v. Corley, 273 F. 3d 429, 459 (2d Cir. 2001).

¹⁴ Notably, those individuals seeking the ability to circumvent access control methods that limit access to ancillary materials on DVDs describe their interest in circumventing such access controls as driven at least in part by commercial considerations. See, e.g., LawMeme Comments p. 11 (“if Eric Olsen were to circumvent CSS in order to add short clips to his reviews of ancillary materials on DVDs, his actions would make the website more attractive, increasing traffic (and therefore revenues)” LawMeme’s comments do not assert that Olsen or other web-based reviewers are unable to review or criticize or quote from motion pictures or ancillary materials contained on DVDs, but rather note that “commentary on ancillary audiovisual materials is widespread” and that such special features are “widely discussed and critiqued on special internet chat sites.” Id. p. 12. The comments instead express concern that Olson and others are unable to increase their website revenues by including clips of copyrighted works protected by CSS on those sites. Promoting the commercial interests of third parties through the exploitation of another’s copyrighted work has never been one of the goals of fair use.

As Time Warner Inc. testified in the last Section 1201 rulemaking proceeding, many business and legal reasons underlie the regional coding system.¹⁵ Region coding is used (1) to accommodate staggered release windows of exploitation (e.g., theatrical, video, pay-per-view, etc.) that vary in timing from territory to territory around the world; (2) because rights to different means of exploitation of a given film may be granted to different third parties in different countries around the world; (3) because it is necessary to facilitate compliance with certain local censorship and other requirements; (4) to facilitate soundtrack language groupings and subtitle groupings; and (5) to accommodate variations in television formats (e.g., NTSC and PAL/SECAM) and television viewing aspect ratios (e.g., 4:3 entire screen image filled or 16:9 letterbox format).

If copyright owners are unable to rely on regional coding to control the release of their content to accommodate these concerns, it will adversely impact legitimate and long standing business models and may restrict the availability of content in the various distribution channels and markets. Moreover, because of differences in video formats used throughout the world, there is no guarantee that a foreign disc on which region control access control measures have been circumvented would play properly on a Region 1 player (the type of player commonly used in the United States). This is because it is up to the player manufacturer to determine whether a Region 1 player (the designation for North America – an NTSC territory) will also be able to convert a PAL signal (used throughout Europe and in many releases of Indian films) for display on an NTSC television set.¹⁶ Accordingly, an exemption to allow circumvention of regional coding is not only unjustified, but could very well prove fruitless. Finally, if consumers are interested in being able to view discs encoded for other region settings, there is no legal impediment to purchasing equipment intended to play back the discs encoded for those regions. There are no prohibitions in the DVDCCA license against making such equipment available in the United States.¹⁷

¹⁵ See testimony of Dean Marks, Senior Counsel, Time Warner Inc. (now AOL Time Warner).

¹⁶ The NTSC and PAL/SECAM television format distinctions long predate the introduction of both VHS and DVD formats for prerecorded media. These formats are not themselves access control measures used by content owners.

¹⁷ In fact, software-based players can be switched to accommodate different region discs a limited number of times to accommodate changes in residence/viewing preferences.

Because the comments described above do not provide evidence of the type of actual or likely adverse effect on non-infringing uses that is cognizable under section 1201(a)(1)(C) of the DMCA, the Librarian of Congress should deny the requested exemptions.

Respectfully submitted,

/s/

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