



Rulemaking on Exemptions from Prohibition on Circumvention of Technological Measures that Control Access to Copyrighted Works

Reply Comments of the Interactive Digital Software Association

February 19, 2003

The Interactive Digital Software Association (IDSA), in addition to subscribing to the arguments set forth in the Joint Copyright Owners' response, provides the following supplemental information in opposition to the creation of exemptions for entertainment software – whether in the form of game programs played on personal computers, video games played on dedicated video game consoles, or products produced for the growing array of handheld devices (including cell phones and personal digital assistants) for which entertainment software is made available.

Summary Statement

We believe that there is insufficient evidence to merit any exemption from Section 1201(a)(1) with respect to entertainment software products. Proponents simply have not met their burden of demonstrating that the prohibition has had, or is likely to have, a substantial adverse effect on non-infringing uses of this particular class of works, i.e., entertainment software. The adverse effects alleged in these submissions amount at most to the very sorts of mere inconveniences that are incapable of satisfying the requisite showing.

As was the case at the conclusion of the previous rulemaking cycle, the practices and conventions assailed by proponents of exemptions in this rulemaking represent long-standing practices of video game and computer game publishers, as well as features commonly built into industry products. These practices and features are an integral part of the successful development and distribution of the industry's products, and they have not changed in the three years since the last rulemaking cycle. They have also greatly contributed to the dynamic and rapid growth of this sector of the copyright industries, in particular, the ability of the entertainment software industry to make more games available not only through traditional delivery channels, but also through the Internet.

We accordingly believe it warranted for the Copyright Office and the Librarian to reach a conclusion identical to that which was reached in the 2000 rulemaking, i.e., that “[t]he paucity of evidence supporting an exemption on the basis of region coding similarly precludes a recommendation for an exemption. The few comments that mentioned this issue do not rise to the level of substantial adverse affect that would warrant an exemption for video games.” Exemption to Prohibition on Circumvention of

Copyright Protection Systems for Access Control Technologies, 65 Fed. Reg. 64556, 64570 (2000) (hereinafter Final Rule).

Proposed Class of Works: Literary works, including computer software, which are region coded

Initial Round Submissions

- 1) Submission 15: “Software and games that are played on video game machines.”
- 2) Submission 32(6): “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.”

The IDSA opposes the proposed exemptions for the reasons stated above and those set forth below.

Summary of Arguments

Proponents argue that software and games that are played on video game machines (referring to dedicated video game “consoles”) should be exempt from the prohibition in Section 1201(a)(1) as the regional access control measures (“region codes”) that protect entertainment software purportedly prevent two non-infringing activities: (1) playing foreign games on domestic players (Submissions 15 and 32(6)); and (2) playing unauthorized software (Submission 15 only). They also argue that consumers incur substantial costs when they are required to purchase the appropriate region-keyed console to facilitate the play of foreign games they have lawfully acquired.

Arguments Opposing Proposed Exemption

None of the submissions has provided the requisite factual support to demonstrate that the use of region access codes on entertainment software has had a “substantial adverse effect” on the non-infringing uses of video games. Proponents have not shown that the use of region codes has diminished the ability of the public at large to acquire and play video games, even foreign ones. As will be later discussed in greater detail, there are consoles available in the market that will allow the play of foreign games for gamers with a real interest in acquiring and playing such games.

Industry uses of region coding

Publishers of video game products for dedicated video game consoles employ region coding for a variety of purposes. Although region coding can be used, in a manner akin to that of the motion picture industry, to control day-and-date release of video game

products, this is not its primary purpose or application.¹ Instead, region coding serves a number of other significant purposes for facilitating the release of product in specific target markets:

- Region coding facilitates compliance with licensing agreements under which a game publisher's use of a third party's intellectual property, contained in or made part of the game, may be governed. This may include, for example, products or advertising appearing within a game, characters represented in a game, or music included within a game which has been regionalized to satisfy market tastes. In such instances, a video game publisher may have been authorized to use a third party's intellectual property only within a specific region. Region coding allows the publisher to avoid the inappropriate appearance of marketing, advertising or intellectual property in a market for which it does not have the appropriate licenses or authorizations. The technology affords publishers the means by which to abide by such agreements and make available in certain regions that which it might not be possible or affordable to make available in all.
- Region coding allows a game publisher to match content to the cultural sensibilities and tastes of a particular market. It affords a mechanism for controlling content distribution and make it more likely than not that the games destined for or marketed for a certain country will not violate content restrictions or the cultural sensibilities of that country. It is possible that the content or subject matter of a video game, while appropriate for the market for which it was specifically developed, may be less appropriate for consumers in other markets. For example, certain video games developed for the Japanese market may contain graphic sexual content which might not be as appealing or marketable to the general gaming population of the United States.
- Region coding also enhances marketability and user enjoyment by making it likely that a game marketed to a given region or country has been translated into a language most generally appropriate for that region.

Although a general complaint has been leveled that a foreign work, when it finally reaches the U.S. market, may have become so diluted as to lose its cultural "flavor,"² the argument appears to address individual preference or taste. Although certain individuals may want the foreign work undiluted by adaptation to suit "the average U.S. audience," their discontent is at best isolated, constituting an inconvenience to these individuals alone. Their dissatisfaction, however, does not rise to the level of substantial adverse

¹ We refer the Register to the argument propounded in the Joint Copyright Owner's response, at Section IV, that "(e)ven though DVD is used as the carrier for many videogames as well as for movies, and even though the consoles that play videogames on DVD also play movie DVDs that employ CSS, the issues are conceptually and practically distinct, and any exemption for circumvention of videogame regional coding would require an independent basis in the record."

² Submission 32(6) [unpaginated]: "When a work is imported into this country for mass sale, whether it is a video game, motion picture, or otherwise, it is typically adapted for the average U.S. audience. ... By the time a foreign work is sold especially to the United States' market, it typically has been edited so much that much of the original meaning of the work has been lost."

impact on the general public's ability to make non-infringing uses of entertainment software as to warrant the grant of an exemption.

Neither have proponents presented facts to show that there are a significant number of entertainment software gamers dissatisfied with the current availability of foreign-marketed games, nor that these gamers are prevented from playing these games solely because of region codes. One proponent himself concedes that foreign games may be played by acquiring the appropriate region-keyed video game console. Arromdee, Submission 15(2) (unpaginated). For true enthusiasts who do wish to play games developed for and sold in foreign markets, acquiring the appropriate console to allow the play of such games is not a significant obstacle. It is our sense in fact that the Internet and global auction sites have made alternative region products more readily available than ever before.³ It remains the case, however, that for the vast majority of U.S. video game players and console owners, the ability to play a game developed or localized for, and sold into the U.S., on a console keyed to the U.S., has proven an adequate, sufficient, and enjoyable experience.

It is also true that the region coding function is closely integrated into other access control functions of video game consoles such that it would be difficult to separate the two functions to facilitate the circumvention of one but not the other. To require otherwise would impose a significant burden upon console manufacturers to change their design specifications, at great cost, merely to accommodate a very small segment of the gaming population.

Still another powerful reason for declining to create an exemption is because of the likely negative effect such an exemption would have on the availability of video game products in the market. It has been our experience (as is the case with pirates' pre-textual assertions concerning the scope and operation of Section 117 of the Copyright Act) that much piracy is facilitated under the guise of engaging in otherwise legal behavior – in this case the play of "import" games.⁴ This can occur because, at least for some producers of video game hardware, the access controls used to enforce region coding are tightly coupled with additional and often inseparable access controls that distinguish genuine from pirated copies of games.

Thus, it has been our experience and that of our member companies that products marketed to defeat region coding to allow play of imported games are – far more often

³ We observe that over the past several years, the practice of importing games and hardware from alternative regions has become more entrenched. Whether through auction sites or independent U.S. importers, game aficionados are able to avail themselves of thousands of Japanese consoles, games and accessories to satisfy their curiosity or impatience pending U.S. release.

⁴ A full explanation will require that we delve briefly into a discussion of those hardware and software devices that can be used and are often sold for the purpose of bypassing region coding and other forms of access controls on video game consoles and handheld devices. While such devices, whether in the nature of "mod chips," "game enhancers," "game copiers," or other hardware or software used to circumvent access or copy controls remain governed by Section 1201(a)(2) and (b) and are thus outside the scope of any possible exemptions resulting from this rulemaking, their discussion is merited here due to the likely impact that any exemption would have on public perception regarding the legality of such devices.

than not – actually more nefarious devices that circumvent the intended operation of all access control measures normally negotiated between game software and hardware. These devices are prized by pirates for the single and sole reason that they enable the play of pirated games downloaded from the Internet and burned onto CDs or DVDs. Without such devices installed in video game consoles, the play of such pirated games is not possible due to highly effective and successful implementations of access control measures.

In our hardened experience the argument for allowing circumvention of video game region codes purportedly to allow the play of foreign games is often a ruse. The underlying reason is often to enable the play of pirated games. Proponent Arrondee acknowledges as much in his own submission when stating that “the easiest way to make a machine capable of playing imports and unauthorized software involves making it play everything, which would include pirated games.” Submission 15(2) (unpaginated).

Even if an exemption permitting the circumvention of access controls in video games or software that controls region coding were granted, this would still not enable the play of imported video games on U.S. video game consoles, as corresponding modifications must also be made to console hardware. These modifications are most often made by devices that Congress intended remain illegal to manufacture, import, offer to the public, provide, or traffic in under Section 1201(a)(2). Such an exemption would, however, create the misleading impression that circumvention of the underlying hardware is permissible, though the only practically available means of doing so would be through the use of a prohibited circumvention device.

Serious consequences would flow from lifting or relaxing existing prohibitions on making available these circumvention or modification devices. Although it does appear possible to produce a circumvention device capable of defeating only region coding and not other prohibited protection technologies (at least for some video game consoles), a rule based on such a distinction would be unenforceable as a practical matter as it would be exceptionally difficult to distinguish devices that only defeat region coding from those that defeat other measures put in place to ensure the non-playability of pirate product. This would present an extremely difficult enforcement challenge for entertainment software companies and enforcement authorities as the difference between a device that facilitates the play of a pirated game by circumventing its access control measures versus a device that defeats only the region codes to allow the play of foreign games is one that is not readily perceived. Rigorous electronic testing of each device would be required as a visual inspection would not be at all indicative of whether these devices only allow the circumvention of region access controls, or the entire protection system of the console.

Additionally, if devices that only circumvent region coding were to be made available, it is our understanding that such devices could easily be reprogrammed by the user by following instructions that accompany the device, are found on leading “cracker” websites or that are otherwise generally known within the pirate community.⁵ An

⁵ Restoring such a device to full functionality, i.e., enabling it to circumvent the full range of access controls implemented between hardware and software, could be done readily by virtually any consumer by

increase in piracy would inevitably follow. We will discuss this matter further in our analysis of the factors to be considered under §1201(a)(1)(C).

It continues to be our experience that in the U.S. only a very small percentage of the gaming population has a true interest in being able to play foreign games. The vast majority of gamers are content to play U.S.-released video game offerings on an appropriate console. As stated by the Copyright Office in its previous ruling, the class of works exempted should be based on the characteristics of the work whose use by the public is severely impeded by technological measures. It would be a stretch indeed to suggest that since 2000, U.S. consumers have been severely impeded in their ability to make use of video games. Since late 2000, the industry has launched an entirely new generation of game consoles and has published approximately 1,800 new titles for play on those consoles and handheld devices in the U.S. market. Any residual demand that may exist for imported games is that of collectors and aficionados, and does not present a case for the creation of a rule that could jeopardize availability for the consuming public.

Exemptions cannot be granted based on the users of particular class of works, in this case, those who wish to play foreign entertainment software on consoles keyed to the North American region. See Final Rule, 65 Fed. Reg. at 64560. Proponents have not shown that the prohibition on circumvention of region codes on this class of works (video games) has caused a substantial adverse impact on the ability of the general public to make non-infringing uses of them. Indeed, one concedes that foreign games can be played by acquiring the appropriate region-keyed console. Another proponent (though only in passing) argues that there may be additional costs incurred for acquiring the appropriate equipment for playing foreign games, but he does not discount that the machines with which to play foreign games are in fact readily available. Neither is it necessarily true that non-U.S. region consoles cost substantially more than those sold in the U.S. The fact is that consoles sold in Europe and Japan (the only other markets to which consoles and games are “keyed”) are priced at about the same prices as U.S. consoles.

A publisher’s decision to release video games only to specific markets is a business decision well within a copyright owner’s right, having to do more with where it is likely to be a viable or marketable product than through any attempt to segregate markets. Certainly a consumer wishing to obtain a video game sold into a different market is not prevented from doing so. Again, as has already been pointed out, the appropriate machine is available to these consumers. If the consumer has gone to the trouble of purchasing the video game intended for a foreign market, it is unclear why he would not also acquire the device that would allow him to play the foreign game. As it is more often the case that the same title will become available in the U.S. market within a few months of release in another market, allowing circumvention merely to satisfy a few eager consumers cannot justify such a sweeping exemption.

It is instructive to recite the reasoning the Librarian employed with respect to DVD region coding in the Final Rule issued in the 2000 rulemaking cycle. As found by the Librarian:

While the use of region coding may restrict unqualified access to all movies, the comments and testimony presented on this issue did not demonstrate that this restriction rises to the level of a substantial adverse effect. The problem appears to be confined to a relatively small number of users. The region coding also seems to result in inconvenience rather than actual or likely harm, because there are numerous options available to individuals seeking access to this foreign content. . . . Since the region coding of audiovisual works on DVDs serves legitimate purposes as an access control, and since this coding encourages the distribution and availability of digital audiovisual works, on balance, the benefit to the public exceeds the *de minimis* harm alleged at this time.

Final Rule, 65 Fed. Reg. at 64569 (footnote omitted).

We believe the above analysis and conclusion is also directly applicable to the entertainment software industry's use of region coding in products intended for play on dedicated video game consoles. Although the industry's use of region coding may restrict unqualified access to console games, proponents have not demonstrated that this restriction rises to the level of a substantial adverse effect. Potential effects are confined to a small number of users for whom region coding results in a mere inconvenience rather than actual or likely harm, because there remains the ability to acquire a regionally appropriate console. Region coding employed in entertainment software also serves a number of legitimate purposes as an access control⁶ by allowing the game publisher to comply with licensing agreements and by facilitating the directed release of games to the intended market while taking into account the market's cultural sensibilities and tastes.

Discussion of the 1201 (a)(1)(C) factors

Section 1201 outlines several factors that must be considered by the Librarian in arriving at a conclusion as to whether exemptions should be granted. We discuss the criteria relevant to entertainment software in relation to several of them.

1) The availability for use of copyrighted works

It has not been shown that the use of region codes on entertainment software products has diminished the availability of video games in the U.S. market. Indeed, region coding supports a model that benefits the public at large by allowing the distribution of games that are appropriate to the market with respect to the characters, language and features used in the games. It is also quite true that in the years since the last rule making cycle, the industry has launched an entirely new generation of video

⁶ For motion picture DVDs, among the recognized legitimate purposes was preventing the marketing of DVDs of a motion picture in a region of the world where the motion picture has not yet been released in theatres, or is still being exhibited in theatres. Final Rule, 65 Fed. Reg. at 64569 note 15.

game consoles, published roughly 1800 titles for play on them, and continues to improve the technical quality and depth of experience in these new games – all to enhance the playing experience of gamers and to increase the value of entertainment software products as an alternative form of entertainment. The use of region codes has not impeded gamers in their non-infringing uses of the games, nor has there been a dearth of available games.

- 2) The impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, news reporting, teaching, scholarship or research

There have been many opportunities for interested parties to comment on, criticize as well as report on entertainment software products. In many instances, review copies (or even the beta-test versions) of a game yet to be released are provided to reporters from game publications and other media outlets with an interest in this sector. Indeed, the advancements in the technology used in the game has generated greater media interest and it should be self-evident, owing to the considerable coverage afforded the industry, that news and trade publications have not been hampered in their ability to review and report on the games in the market or soon coming to the market.

- 3) The effect of circumvention of technological measures on the market for or value of copyrighted works

The use of region coding has not had an adverse effect on the availability video games for these purposes. Region coding has been, as stated earlier, implemented in ways that are use-facilitating and that enhance the value of these products for consumers in regions for which they are intended. Conversely, an exemption permitting circumvention is bound to carry a significant harmful impact on the availability of these products as, in our experience, it would inevitably be used as an enticement to piracy.

Although the access controls to which a proposed exemption would apply are only those governing regional coding, as elaborated on in the preceding paragraphs, granting such an exemption will in all likelihood foster in the public the false sense that such circumvention devices are legitimate. To grant the exemption would implicitly grant license to consumers to circumvent their consoles because merely circumventing the region coding technology on video games alone will not render them playable. It is reasonably foreseeable that piracy would increase in the U.S., thus affecting the quality and variety of entertainment software likely to be made available on the market.

The fact remains that the entertainment software industry's use of leading technologies has contributed mightily to the success and growth of the industry. As was the case in 2000, we believe that the inevitable conclusion of the rulemaking should be that "[t]he factors set forth in section 1201(a)(1)(C) do not support an exemption. There is no reason to believe that there has been any reduction in the availability of video games for use despite the fact that video games have incorporated access controls and dedicated platforms for many years." Final Rule, 65 Fed. Reg. at 64570.

Conclusion

Publishers of entertainment software continue to integrate technology in ways proven to satisfy expanding customer demands and expectations. The willingness of video game publishers to continue creating, developing and publishing new games is attributable to the fact that they are able to protect their creations through effective implementation of access controls. Indeed, should circumvention of access controls for video games, including circumvention of region codes, be an allowed exemption, it is quite possible that this will result in a decrease in the amount of new products becoming available on the market. Allowing circumvention of access controls will greatly increase piracy of video games, diminishing the return on investment that is necessary to allow game publishers to continue research and development into new games, new formats and even new modes of delivery. We again urge the Register and Librarian to conclude, as was done at the close of the 2000 rulemaking, that the paucity of evidence supporting an exemption and the failure to convincingly demonstrate a substantial adverse effect lead to the inevitable conclusion that an exemption for video games is simply not warranted.

Finally, although we have addressed our submission in reply only to those submissions that speak to the issue of region coding, we note that there are other submissions which are so broadly formulated as to potentially implicate entertainment software within their ambit. Rather than address in detail each submission that could possibly extend to implicate entertainment software as some subset of literary or audiovisual works, we choose only to request that if the Register or Librarian were to find that other sought-for exemptions directly implicate entertainment software, the IDSA should be permitted to file more targeted supplemental comments.⁷

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⁷ Submission 20(1) by the Internet Archive, for example, proposes an exemption for: “Literary works restricted by access controls that tether the work to a specific device or platform, thereby preventing a lawful possessor from using the work on an unsupported system in a non-infringing way.” We submit that the proposed exemption is overly broad and should not be read to extend to classes of literary works not explicitly named and for which proponent has not adduced evidence.