

Before the United States Copyright Office,

Library of Congress

In the Matter of Rulemaking)
from Prohibition on) Docket No. RM 2002-04
Circumvention of Technological Measures)
That Control Access to Copyrighted Works)

321 Studios, LLC Reply Comments

Introduction

Class No. 1: Literary and audiovisual works, including motion pictures, embodied in Digital Versatile Disks (DVDs) that are or may become inaccessible by possessors of lawfully-obtained copies due to malfunction, damage, or obsolescence of either the access control mechanism or the material object in which the work is embodied.

Class No. 2: Literary and audiovisual works, including motion pictures, embodied in Digital Versatile Disks (DVDs) whose access control systems prohibit the creation of or access to replicas of the works.

Summary of argument applicable to both Classes: In ever increasing numbers, lawful purchasers of DVDs that are subject to technological measures that control access are being denied access and use of their DVDs. DVDs are by their nature a fragile medium, which makes them very susceptible to malfunctioning and damage. Scores of declarations and affidavits attached to 321's reply comments dramatically document this problem. Consumer efforts to protect and preserve their investment in DVDs are rebuffed by distributors who claim that copying of DVDs is illegal under the DMCA. Unlike the history of the 2000 exemption proceeding, evidence exists that many titles are only available in DVD and increasingly studios and distributors will be phasing out VHS or analog alternatives. While consumers may fairly record VHS tapes for private viewing purposes, they are being denied this entitlement with respect to DVDs by the nature of the access and use controls. Without a clear exemption permitting those who have lawfully acquired such DVDs to circumvent in order to make a private, backup use copies, consumers will be adversely affected in the enjoyment of their fair use and other non-infringing uses under copyright law.

Comments to Which Replies are Primarily Addressed

These Reply Comments are submitted by 321 Studios, LLC, a Chesterfield, Missouri-based company ("321") that sells software titles, which enable consumers to

copy lawfully-obtained Digital Versatile Disks (“DVDs”) for fair use purposes, including private backup use and recovery of data from DVDs that have been scratched or damaged.¹ The Reply Comments address the need of consumers to have a clear Section 1201(a)(1) exemption related to DVDs.

While supporting numerous filings filed with the Copyright Office pursuant to the Notice of Inquiry dated October 15, 2002 (the “Notice of Inquiry”), the thrust of these Reply Comments concern three in particular: the requests of James McNamee (No. 47) regarding motion pictures and other audiovisual works, The Internet Archive (No. 25) regarding literary and audiovisual works, and the Library Associations (No. 33) regarding continuation of the current exemption associated with literary works whose access control mechanisms fail because of malfunction, damage or obsolescence.

FACTUAL SUPPORT FOR THE REQUESTED EXEMPTIONS

I. An Exemption to Ensure Backup Use Copies of Lawfully Acquired DVDs is Urgently Needed

321 is a leading advocate of consumer entitlement to make fair use of DVDs. As discussed below, 321’s Reply Comments present the voices of a broad cross-section of the DVD purchasing public, people who expressed their personal need for making backup copies of lawfully acquired DVDs. In connection with its pending litigation,² 321

¹ 321 markets two software products: 1) DVD Copy Plus consists of an electronic guide explaining how to create backup copies of DVDs, bundled with four pieces of free, publicly available software. DVD Copy Plus does not create a copy of the DVD itself; it merely copies the video and sound contents of the DVD into a different storage medium. The quality of the video CDs created by DVD Copy Plus is lower than the original DVD video. 2) DVD-X Copy is software that allows a DVD owner to make an archival backup copy of a DVD, including original menus and special features. In addition to being able to create backup copies of DVDs, DVD-X Copy also has the ability to recover the data from DVDs that have been scratched or damaged. Thus, if DVD-X Copy is able to create a backup from a DVD, the backup copy will be able to play, even if the damaged original DVD is unplayable.

² 321 is currently defending itself against allegations by the motion picture industry that 321 software violates Section 1201 of the 1998 Digital Millennium Copyright Act (“DMCA”) by helping consumers to backup their purchased DVDs. *321 STUDIOS, aka 321 Studio, LLC v. Metro-Goldwyn-Mayer Studios, et al*,

has received hundreds of testimonials from owners of DVDs, representative samples of which are attached hereto as Exhibit 1, regarding their need for 321 products and how they are used. In these emails (many of which will be filed as more formal affidavits in connection with the 321 litigation), 321 customers explain that in the last few years, DVDs have become the primary medium for home movies. (Some of the formal affidavits will be filed today with the Copyright Office in hard copy format, as no electronic version of the signed documents is available. These submissions constitute Exhibit 2 of these Reply Comments.) Consumers are now encouraged to build DVD movie libraries and, as a result, thousands of individuals are spending substantial sums on DVD purchases. However, as related in the Exhibits, consumer experience has demonstrated that DVDs are a fragile medium. They are susceptible to being scratched, chipped and broken, as well as damaged by light and heat, rendering them partially if not completely unusable.

If their DVDs are damaged and inaccessible, consumers are out of pocket the money they spent and must forgo watching the DVD. Parents are most especially harmed by the fragility of the medium when their children handle DVDs as youngsters typically do – as a plaything, not an expensive, encoded, laminated disk. In common chorus, 321 customers explain that no DVD distributor offers a practical alternative for replacing damaged DVDs, and merchants routinely advise consumers that they have no authority to take back damaged copies. Public frustration and distress has been mounting, especially in the past few years, as more and more people discover that

filed April 23, 2002 (N.D.Ca., Case No. C 02-1955 SI). The lawsuit was actually initiated by 321 after learning that a MPAA representative publicly claimed that 321's DVD Copy Plus and DVD-X Copy are primarily intended to facilitate the making of unlawful copies of DVDs and thus are illegal devices under Section 1201 of the DMCA. Contrary to that assertion, 321 believes that when consumers use 321 software products, they are engaging in fair practices under the copyright law, including Sections 107, 108 and 117.

DVDs, which they spent significant sums to acquire quickly and easily can become unplayable. These consumers are honest people, not pirates. They have no problem paying for the product once; however, they are rebelling against the suggestion that they should pay multiple times for the same disk because of the medium's inherent flaws and fervently believe they are entitled to protect their investment by making a backup use copy.

Importantly for Copyright Office consideration, based on public pronouncements of movie company representatives, DVD owners are told that film companies strictly interpret Section 1201(a)(1) and claim that making a backup use copy of a DVDs subject to Content Scrambling System ("CSS") access controls is not fair use; rather, these companies believe it is a crime.³ As a result, many lawful owners of DVDs are now uncertain of the appropriateness of their backup activities. Hence, an exemption from Section 1201(a)(1) is urgently needed and the Copyright Office should adopt such an exemption in this proceeding.

II. 321 Educates Consumers About Fair Use through Anti-Piracy Efforts

321 does not sell its software in a vacuum. Aware of legitimate content owner concerns about digital piracy, 321 urges responsible fair use practices and has adopted an unambiguous anti-piracy policy in connection with the sale of DVD-X Copy. 321's primary measures are these:

1. Inserted into all backup use copies made with DVD-X Copy is an indelible visible disclaimer. The disclaimer states:

DVD BACKUP
You are viewing an archival backup copy of a DVD, created solely for the

³ According to the LA Times, MPAA spokesperson, Marta Grutka claimed, "Any use of 321's products on a copy-protected DVD is illegal." Los Angeles Times, February 12, 2003 at Business Part 3, P. 3. This is concrete evidence of the urgent need for an exemption: MPAA is declaring 321 and all its public consumers are violating Section 1201.

private and personal use of the owner of the DVD from which it was made. Federal copyright laws prohibit the unauthorized reproduction, distribution, or exhibition of copyrighted materials, if any, contained in this archival backup copy. The resale, reproduction, distribution, or commercial exploitation of this archival backup copy is strictly forbidden. We ask you to respect the rights of copyright holders.

This disclaimer cannot be skipped and is displayed each time the DVD is played in a DVD player. The disclaimer appears on the screen for approximately eight seconds, and appears in addition to any other material or warnings placed on the original DVD.

2. DVD-X Copy places a digital semaphore in each and every copy of a DVD it creates. That digital semaphore prevents DVD-X Copy from making further copies of the backup copy of the DVD. Thus, a user of DVD-X Copy must have an original DVD in order to make a copy and cannot make serial copies of a DVD.
3. The data on a copy of a DVD created using DVD-X Copy is digitally watermarked so that 321 can trace any particular copy back to the computer that was used to create it, based on the license that is required to activate the software. If 321 determines that a particular copy of its software is being misused, 321 can remotely disable that copy of the software.

Further, 321 literature clearly explains to potential customers that the backups are for private, personal use only, and may not be sold or given to others. The Internet websites operated by 321, as well as the materials and instructions included with DVD Copy Plus and DVD-X Copy, explain to users that the instructions and software must be used only to create legitimate copies of the contents of DVDs in a manner consistent with the copyright laws.⁴

⁴ 321 actively discourages anyone from using these products to create pirated copies of copyrighted DVDs. Despite its pending litigation, 321 has offered to assist the major studios in tracking down persons who have used 321 products to create pirated copies of DVDs. Recently, 321 publicly announced that it will assist in the discovery and apprehension of people that may attempt to use 321's products to illegally copy DVDs, and announced a \$10,000 reward for information leading to the arrest and conviction of any person that uses 321's products to illegally pirate DVDs. To date, no one has come forward with any evidence that DVD Copy Plus or DVD-X Copy have been used for illegal purposes.

III. DVDs Are a Fragile Medium

DVDs are fragile and are easily damaged. Problems with DVDs are starting to receive widespread attention in news reports.⁵ The DVD is comprised of one or two layers of reflective material that holds digital information, encased in clear plastic. The plastic disk is very sensitive to scratches and cracks on the playing surface and, because of the high density of the data stored on the DVD, even a slight scratch or imperfection in the plastic surface can lead to problems playing the disk. Similarly, exposing the DVD to heat or light can damage the reflective surface or the plastic coating, leading to problems with the DVD ranging from lost video frames to skipping to the complete inability to play the DVD. DVDs are also susceptible to “DVD rot” or “de-lamination,” the deterioration over time of an original DVD, in which the plastic and one or more of the reflective coatings begin to separate, rendering the DVD unplayable.

IV. 321 Customer Declarations and the Need for a New Exemption

In connection with the California litigation, 321 asked purchasers of its software to describe their need for 321 products and how they are used. 321 collected e-mail declarations from hundreds of customers. A representative sampling of these declarations is attached to these Reply Comments as Exhibit 1. (To respect privacy, the street address, phone number and email address of senders have been deleted from the

⁵ See, e.g. “A Bad Case of DVD Rot Eats into Movie Collections,” Sue Lowe, Sydney Morning Herald (Feb. 1, 2003, p. 8); “DVD Damage could be more than wear,” Elizabeth Grekso, Oshkosh Northwestern (Feb. 18, 2003, P. 1B) (Council on Library and Information Resources reported, “Though regarded as an advancement in distribution and access, the DVD ... is subject to deterioration from oxidation, humidity, and physical damage.”); “What’s so great about DVD?” Video Business (Aug. 12, 2002, p. 48) (“DVDs are the worst medium for rental. The average DVD lasts three rentals. ... DVDs are a disaster. They are way too fragile.”); “Soapbox,” Video Business (July 23, 2001 p. 38) (“My customers are always complaining about my DVDs skipping back to the beginning, freezing up and jumping forward to the next scene. ... why can’t manufacturers come up with a protective coating to put on discs to prevent scratches?”)

exhibit.) Many of these declarations have been converted into formal affidavits and will be filed in connection with 321's California litigation. Exhibit 2.

In impressive numbers, consumers express views like the following:

- "... The label side of a DVD is very easy to damage. Once the label side gets scratched, the DVD is no good. I make a backup copy to use, while my original is kept safe. Since the manufacturer does not make the label side more protected, I feel justified in doing it this way. ..." Steve Griffith, Glen Burnie, MD.
- "... With kids, DVD's are always getting lost, dropped, scratched, or otherwise abused. Also, it's almost impossible for anyone to keep one of the double-sided DVD's (Regular Screen format on one side and Wide Screen format on the other) in playable condition for very long. ... I have the fair use right to make backup copies of my computer software, audio CD's, audio cassettes, and VHS tapes; so why not my video DVD's? Recently, I was holding the just-purchased movie 'Independence Day' by inserting my index finger through the center hole in the DVD. The DVD slipped off my finger and skidded across the flagstone hearth of my fireplace. This scratched the DVD's playing surface badly. The next day, I carried it back to the store where I had purchased it, and told them my sob story. I was basically told, 'That's just too bad, but all we can do is sell you another one.' ..." Morris L. Hutto, Fort Gaines, GA.
- "I use this product [DVD Copy Plus] to repair or protect my DVDs. I was able to recover three out of three damaged DVDs that I had not thrown out in disgust yet. This program allows my DVD burner to take its time and read through the scratches that caused regular DVD players to 'crap out' and hang up or load the next disk. I truly wish this program had been around sooner, for I have probably thrown out about a dozen or more DVDs that I had purchased over the years and damaged them to the point where they would not play right anymore. Kids as well as myself sometimes misload the DVDs and that usually puts a lot of scratches on the DVD. The result is the movie never plays the same, if at all." Steven Lang, Auburn, AL.
- "Backup copies of my children's favorite DVDs travel with us in our video system equipped minivan. Copies that get destroyed during a long trip can be replaced because my original DVD is safe at home." Jim McGettrick, Las Cruces, NM.
- "I acquired this product [DVD X Copy] to protect my investment of several thousand dollars against things such as the 'DVD Rot' which appeared in Tom's Hardware Guide on 2/6/03: '[DVD Rot Appears To Be An Issue](#) ... Unofficial estimates put the number of effected discs as high as 10%. ... DVD Rot is best described as combination of corrosion and de-lamination, which causes the layers of the disc separate, in many cases making the DVD unplayable. These problems are seen by the owner as picture break-up and freezing at a specific points on the DVD' ..." John Keating, Aurora, CO.

- “My wife is handicaped so she watches a lot of movies in turn she has to handle both sides of the disk to put it in the player this keeps my original movie in new conditon.” James Fitzpatrick, Millbury, OH.
- “I only copy for my own use dvds that I have bought legitimately so that i can have a copy for my bedroom. Being disabled I can have days where I am in severe pain and need to stay in bed. I live on my own so no-one can bring dvds from downstairs for me. The cost of a single dvd makes it rare the ammount I can buy, my reason for copying is to allow me to keep my originals in mint condition. I cannot readily afford to purchase replacements. I do agree that copyright theft is a serious infringement of the makers rights of ownership, but if copies are made for reasons like mine that are none profitable I see no harm. In fact I know that a certain amount paid for my blanc media goes to the different industries so therefore they are being paid twice by me and everyone else.” Christopher Pinnock, Manchester, ENG.
- “My grandson is understandably rough on ‘his’ DVDs. I use DVDXCopy to back up the DVDs I purchase for him so that he can handle and load his own. When these become too scratched or covered with finger prints, I toss them and make another copy. This ensures he's always got something good to watch and so will his sibling that's on the way. With today's technology, it doesn't make sense not to be able to sustain the life of an item I've purchased, that can become damaged over time, by making copies for my own use.” Billy Brassell, Arlington, TX.
- “I am Nana to 11 grandchildren ranging in age from 2 to 19 years. They spend a lot of time with me and I am teaching them all (even 2 tear olds) how to use the computer, DVD and tape players, etc. I feel that it is important for all children to learn technology before they start school so they will be ready to learn in todays tech. heavy world. Children are not carefull with CD's or DVD's. Since the issue is learning they use copies of all CD and DVD material. This way they can learn without fear of destroying the original disc's. Since I received my DVDX copy in Nov. all of my grandchildren have learned to use a DVD in a computer and a DVD player. There are many uses for this software, this is mine. When my 6 year old grandson went to school he helped the teacher with the other students when it came time to teach computer use because he already knew all about it. She was gratefull for his help. I feel it is my job to impower the next generation with the skills needed to live in todays world. DVDXcopy is just one of the many tools I use to achieve this goal.” Margaret Brisboe, Kegley, WV.
- “I have at least 10 DVD's that have been scatched through use and are unwatchable. I do not feel I should have to repurchase these. DVD X Copy allows me to make a backup copy of the movie, use that copy for daily use, and if it fails I have the original in great condition.” Robert Feezor, Oklahoma City, OK.
- “I am in the United States Air Force and frequently deploy overseas. I have a laptop with a DVD-Rom and use it for watching movies during my off time. I went to the desert in 2002 and took approximately 60 DVDs with me in a cd case. Several of them will no longer play in my laptop. I bought DVD Copy Plus to make copies of my DVDs so I would not damage any more of them than I already have. Several of my friends also use this product for the same reasons. I would much rather damage a

ten cent CD than a twenty dollar DVD. Thanks to 321 Studios, I have a resource that allows me the freedom to take movies with me on deployment without worrying about damaging expensive DVDs.” Stacy Goad, Ft. Worth, TX.

As these comments suggest, the common thread of comments by DVD owners is that they paid good money for DVDs, which are fragile products. If damaged, they perform poorly, if at all. Given that owners let children handle DVDs, take them on travel, make them available for handicapped relatives at their bedside, and expose them to the elements, and given that the DVD distributors have been fully compensated by the original purchase, the core issue is facing the Library whether users may circumvent technological measures controlling access and duplication.

In the 2000 proceeding, the Copyright Office concluded that “problems with malfunctioning, damages or obsolete technological protection measures ... appear to be a genuine problem that the market has not adequately addressed.” Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 65 Fed. Reg. 64556, 64565. Among the rationales cited by the Copyright Office for that particular exemption are the following factors that are relevant to 321’s proposed classes:

1. *Legitimate users denied access.* “In cases where legitimate users are unable to access works because of damaged, malfunctioning or obsolete access controls, the access controls are not furthering the purpose of protecting the work from unauthorized use. Rather they are preventing authorized users from getting the access to which they are entitled.” *Id.* In the current situation, legitimate DVD owners are being denied access to lawfully purchased works because of the fragility of the medium. For this reason, access controls are not working.
2. *Denial of access does not serve copyright owner interests.* “Not only does such a result have an adverse impact on noninfringing uses, but it also does not serve the interests of copyright owners that 1201(a)(1) was meant to protect.” *Id.* It cannot be in the interests of copyright owners to have lawful purchasers of DVDs routinely denied access to purchased works.

3. *Copyright owners already compensated for use.* “In almost all cases where this exemption will apply, the copyright owner will already have been compensated for access to the work.” *Id.* The particular class of works 321 proposes should be covered are lawfully acquired DVDs. Like the 2000 exemption, the copyright owners have already been paid by the consumer for the copy. Where adverse impact occurs is when a user of a lawfully acquired work cannot access it at all, or accesses only a materially damaged work.
4. *Lawful users have been denied relief by copyright owners.* “Moreover, authorized users are unlikely to circumvent the access controls unless they have first sought but failed to receive assistance from the copyright owner...” *Id.* 321 declarations are testament to the fact that people are not getting satisfaction from copyright owners selling DVDs. While the proposal of 321 would allow private, backup copying prior to damage actually occurring in certain cases, that result is dictated by the copyright owner’s decision to sell their content via a fragile medium.

The Copyright Office limited the 2000 exemption to literary works, but acknowledged that problems adversely affecting users could apply to other classes of works. Since DVDs may be classes as literary works because of their software elements and audiovisual works, 321 believes the current limitation should be expanded to cover audiovisual works.

Also in the 2000 proceeding, the Copyright Office considered problems associated with DVDs, but declined to provide for a specific exemption. 321 believes conditions have changed and now that conclusion must be revisited.

1. *Analog alternative.* “From the comments and testimony presented, it is clear that, at present, most works available in DVD format are also available in analog format (VHS tape) as well.” 65 Fed. Reg. at 64568. That is no longer true, and will be even less true in the coming three years. According to the *New York Times*, the Studios are "abandoning VHS." Effective immediately, MGM says VHS versions of “Never on Sunday,” “Two for the Seesaw” and “World of Henry Orient” will only be available on DVD. *New York Times*, Jan 17, 2003 Section E, Part 1, P. 38. According to *USA Today*, “Hollywood studios are gearing up for the death knell of the VHS cassette.” Columbia Tri-Star is phasing out VHS catalog titles once they are released on DVD, MGM Home Entertainment has slashed its VHS library from more than 1800 titles to 200 and Circuit City and Barnes and Noble will no longer carry VHS. *USA Today*, Jan. 14, 2003, p. 6D.

2. *Evidence of harm.* While the Copyright Office concluded that in the 2000 proceeding that “no proponent of this argument for an exemption have come forward with evidence of any substantial or concrete harm,” 65 Fed. Reg. at 65458, in this proceeding, the 321 declarations clearly indicate that consumers are being adversely affected in their ability to view lawfully acquired DVDs. With millions of lawfully purchased DVDs in circulation, the extent of harm to consumers cannot be ignored.
3. *Necessity circumvent access controls in order to circumvent copy controls.* In the 2000 proceeding, “no explanation has been offered of the technological necessity for circumventing access controls associated with DVDs in order to circumvent the copy controls.” *Id.* In the current proceeding, the answer lies in the demonstrable fragility of the medium. While copy controls may be circumvented without violating Section 1201(a)(1), for consumers to fully protect and preserve their investment in DVDs, they must take pro-active measures before the damage renders the DVDs completely unusable, when access and use controls are both fully operational. Even though products like 321 can salvage undamaged portions of the DVD, the pristine version acquired by the consumer no longer exists once damage occurs. Therefore, the copying must be done early enough to preserve the lawfully acquired DVD.

In short, when owners of DVDs cannot access the works they purchased, they cannot tell whether the scratches that prevent viewing relate solely to damage to access control measures or other data encrypted in the disk. As a practical matter, that distinction should not prevent a user from engaging the perfectly legitimate practice of protecting an investment made in the DVD. If a consumer spends on average between \$15-30 for a single DVD, and hundreds if not thousands of dollars for an extensive private library of DVDs, then that consumer should be able to view the contents of the DVD without the obligation to repurchase if damage renders the DVD inferior or unusable. 321’s customer declarations make the point over and over again. Many declarations may clear that people have engaged in such private preservation practices with other media, such as audio tapes, CDs and video (VHS and Betamax) works. They are irrefutable testimony to the need for a clear exemption to permit the making of archival backup use copies of purchased DVDs.

The making of backup copies of purchased DVDs is consistent with a number of the requests of commentators in the December filings. These will now be discussed.

V. Public Comments Support a Variety of Reasoned and Focused Exemptions

The Notice of Inquiry requested written comments from interested parties in order to elicit evidence on whether noninfringing uses of certain classes of works are, or are likely to be, adversely affected by section 1201(a)(1) of the Copyright Act, which prohibits the circumvention of measures that effectively control access to copyrighted works. Among the 50 filings received by the Copyright Office are several that indicate that strict application of Section 1201(a) of the DMCA has adversely affected or is likely to adversely affect the ability of institutions and individual consumers to make noninfringing uses of copyrighted works, and particularly audiovisual and literary works stored on DVDs.

A. Comments That Support Reproduction, Distribution or Use of a Work that is not Subject to Copyright

Eric Eldred (2)—proposing an exemption for literary works protected by access control mechanisms that control access both to copyrighted works and works not under copyright; **Michael A. Rolenz** (14)—asserting that section 1201(a) does not prohibit circumvention of technological controls on access to public domain works; and **The Electronic Frontier Foundation and Public Knowledge** (35)—proposing exemptions to permit circumvention of technological controls that interfere with access to audiovisual works that are in the public domain in the U.S.

321 understands that Section 1201 only applies to works protected under the Copyright Act, and that works in the public domain are not subject to limitation. However, since a DVD can contain much data, not only may it incorporate a variety of works (literary, photographic, musical, audiovisual works, etc.), but also it may contain copyrighted and uncopyrighted (public domain) works. For example, recent movies such as Pearl Harbor and Apollo 13 contained footage originated by the U.S. Government, which portions are thus not subject to copyright protection. Individuals should be entitled to bypass control mechanisms that restrict access to and copying of unprotectable

elements of a DVD, and to enable other fair or exempt uses of such works or portions of works. 321's software provides a tool to accomplish this task responsibly.

B. Comments That Support “Space-Shifting” of Lawfully-Obtained Copies, as Privileged under the Fair Use Doctrine

IP Justice (20)—proposing exemptions for 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; **Matthew T. Russotto** (13)—proposing an exemption to permit circumvention of access controls which tether electronic books to a particular machine, thereby rendering the works inaccessible upon upgrade to new computer hardware.

Tethering prevents (1) noninfringing uses of work in event of hardware upgrade, and (2) noninfringing uses on multiple playback devices that may be located in different places, such as one's home, car, boat or office. Among the declarations collected by 321, the principle of space shifting is particularly critical with respect to works that are released to the public solely on DVD. People want to be able to take copies of DVDs with them on travel and for use in a car, boat or second home. Given the fragility of the medium, creating and using a backup copy for travel and space shifting purposes, and on other devices owned by the DVD owner, should be cognizable without any claim of violation of law. Other commentators support this position as well, to wit:

The Electronic Frontier Foundation and Public Knowledge (35)—proposing exemptions to permit circumvention of technological controls for works that are released solely on DVD; **Ernest Miller on behalf of LawMeme** (21)—proposing an exemption for ancillary audiovisual works distributed on CSS-controlled Digital Versatile Discs (DVDs); and **Alik Widge** (5)—proposing an exemption for any digital-format work which contains 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.

Regarding Comment 5, it bears noting that in addition to the rapid phasing out of VHS cassettes noted above, many companies are releasing movies in “collectors’ editions” or only on DVD, so there is no analog alternative reasonably available at any price. Some film companies, like Disney, have the practice of limiting DVD releases to particular time periods and then taking titles out of circulation for many years. As noted

in some of the 321 declarations, if a limited edition DVD is damaged and unplayable, and the window for purchase has closed, the DVD owner cannot access the work at all.

C. Comments That Support Creation of and Access to a Replica or Backup Copy of a Lawfully-Obtained Copyrighted Work

Brewster Kahle and Alexander Macgillivray on behalf of **The Internet Archive; Lawrence Lessig, Professor, Stanford Law School and Chairman, Creative Commons; Wendy Seltzer, Fellow, Berkman Center for Internet and Society** (25) —proposing an exemption for literary and audiovisual works embodied in software whose access control systems prohibit access to replicas of the works; **Barry Klawans** (4) proposing an exemption to permit fair use reproduction to prevent loss of access to works that are no longer commercially successful; **Samuel Greenfeld** (32)--proposing exemptions for works protected by access control mechanisms that fail to permit access because the copyright owner or agent fail to provide the necessary access support, or that are at high risk of failure in the near-term because of malfunction, damage or obsolescence; and **James McNamee** (47)—proposing an exemption to permit “refreshing” of audiovisual works from one medium to another, to prevent loss of access due to the limited life span of the physical object in which a work is fixed.

Along with the commentators, there is a settled expectation of purchasers of DVDs, based on the long-standing application of copyright law in connection with all other media (books, tapes, LPs, VHS tapes, broadcast programs, software, etc.), that owners may backup their investment. The ability of consumers who have lawfully acquired DVDs that are subject to access controls to make and use personal backup copies to protect against loss of their investment in work as a result of deterioration of physical medium, malfunctioning or obsolescence of TPMs, is an urgent and continuing need, amply supported by the 321 customer declarations.

Despite the uniformly favorable reaction to the 321 products, the 321 litigation demonstrates that without a clear legal ruling by the Librarian, DVD distributors will continue to claim that no reproduction of CSS-manufactured DVDs is allowable. See Note 3, above. The allegation – that “any use of 321’s products on a copy-protected DVD is illegal” – renders every person who wishes to back up copies of lawfully-acquired DVDs a potential Section 1201 infringer, and every distributor of software tools like DVD-X Copy a Section 1201 violator, as well. The declarations are an eloquent

expression of the urgent need for the Copyright Office to reestablish a fair balance in the DMCA by granting a focused exemption for circumvention of access controls in order to make a private backup use copy of a lawfully acquired DVD.

D. Comments That Support the Ordinary Use of a Copyrighted Work in Conjunction with a Playback Device of One’s Own Choosing.

IP Justice (20)—proposing exemptions for 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; or that limit access to and post-sale uses of the work; **John T. Mitchell** (30)—proposing exemptions to permit circumvention of access controls that tether lawfully-made copies and phonorecords to a particular digital playback device; **Jason M. Mahler on behalf of the Computer & Communications Industry Association** (32)—proposing an exemption to permit circumvention of certain classes of works protected by access control mechanisms that require use in conjunction with an operating system specified by the copyright holder; **The Electronic Frontier Foundation and Public Knowledge** (35)—proposing exemptions to permit circumvention of technological controls that interfere with the ability of consumers to control private performance, including the ability to skip promotional materials.

Section 1201 should not bar circumvention of an access control measure to expand the ways in which DVD owners who lawfully acquired the DVD may access and view the content. Copyright law confers no exclusive right to control the device selected by a consumer to facilitate a private performance or display of a work; therefore, any suggestion that consumers have no right to use a work in conjunction with the playback device of their own choice extends the rights of owners beyond those enumerated in Section 106. 321 software enables a consumer to privately perform or privately display the DVD on a device of his or her own choosing.

E. Comments That Support Making Noninfringing Use of a Copyrighted Work Imported from Any Region in the World

The Electronic Frontier Foundation and Public Knowledge (35)—proposing exemptions to permit circumvention of technological controls that block access to region-coded audiovisual works on DVD where the work is not available in Region 1 DVD format; **Greg Trouw** (17)—

proposing an exemption to permit circumvention of technological controls on access to foreign forms of entertainment such as Japanese anime; **David B. Carroll** (35)—proposing an exemption to permit circumvention of region-coding systems to permit noninfringing use of foreign-language audiovisual works that are not available for sale in the U.S.

321 supports those who seek an exemption to circumvent technological measures designed to implement international region codes. As a technical matter, circumvention under these circumstances may not be barred by Section 1201 because such TPMs do not “effectively” protect copyrighted work; rather, they enforce contract terms. Enforcement of region coding inhibits noninfringing uses of foreign works that are unavailable in the United States or fair uses for comment or criticism of works available in different versions in different regions of the world. Among other things, educators and critics should be allowed the ability to compare DVDs that are released in different versions in order to appeal to differing national tastes. Individuals who lawfully acquired DVDs in other regions should be able to play them in the United States.

F. Comments That Urge the Copyright Office To Restore the Section 1201 Rulemaking to the Fail-safe Mechanism that it was Intended to Be.

Among the commentators are those that ask the Copyright Office to revisit its narrow interpretation of the Section 1201 mandate. For example,

Association of American Universities (28)—urging the Copyright Office to reconsider its determination that “classes of works” cannot be defined according to attributes of the users or context of use, and proposing the exemption of classes of works based on the “fair” nature of the use that the circumventing individual is likely to make of the underlying work, and **The American Association of Law Libraries, the American Library Association, the Association of Research Libraries, the Medical Library Association, and the Special Libraries Association** (33)—describing flaws in the structure and operation of the section 1201 rulemaking proceeding, as narrowly implemented by the Copyright Office.

321 supports the principles set forth in these comments. This tri-annual proceeding should give the public a real opportunity to explain how the DMCA has failed to meet their genuine needs and the Librarian should fashion responsible exemptions tailored to these realities.

VII. Conclusion

Since the implementation of the DMCA and the action of the Copyright Office in the 2000 proceeding, DVDs have become the common medium for distribution of motion pictures. Many companies are exclusively releasing new titles for sale only in DVD, which will be subject to CSS or other technological measures designed to control access. With this practice the new marketplace reality, consumers are being asked to purchase fragile DVDs almost exclusively. Thus, the necessity of consumers and other users to make backups of their works is now essential. Otherwise, as the declarations in the Exhibits make clear, consumers will be denied access to the movies they paid money to see.

Therefore, 321 supports the conclusion that the Librarian should find that owners of lawfully-acquired DVDs are or are likely to be adversely affected in making non-infringing uses of their DVDs (i.e. the making of archival, backup use copies), and they should be exempt from the prohibition in Section 1201(a)(1). The classes of works so affected are:

1. Literary and audiovisual works, including motion pictures, embodied in Digital Versatile Disks (DVDs) that are or may become inaccessible by possessors of lawfully-obtained copies due to malfunction, damage, or obsolescence of either the access control mechanism or the material object in which the work is embodied.
2. Literary and audiovisual works, including motion pictures, embodied in Digital Versatile Disks (DVDs) whose access control systems prohibit the creation of or access to replicas of the works.

For the reasons set forth above, 321 also believes that the current exemption for literary works, including programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage or obsolescence, should be continued, as requested by the Library Associations (33). Particularly to the extent such exemption has applicability to concerns 321 has expressed about DVDs that are subject to access controls, its renewal would offer consumers an opportunity to make further fair use of fragile DVDs.

Respectfully submitted,

321 Studios, LLC

By _____

Arnold P. Lutzker

Susan Lutzker

Maureen Cohen Harrington

Lutzker & Lutzker LLP

Suite 450

1000 Vermont Avenue, N.W.

Washington, DC 20005

Phone: 202-408-7600

Fax: 202-408-7677

Their Attorneys

Date: February 20, 2003

Exhibit 1

Customer E-mail Declarations to 321 Studios, LLC

From: B&P Computers
Sent: Tuesday, January 28, 2003 9:27 PM
To: tellyourstory@protectfairuse.org
Subject: dvd x copy

My name is Wiilliam Terry and I reside at Friendswood, Texas 77546
I am employed as a Flight planner for Corporate Jets.
I create and file flight plans for corporate jets traveling the globe. and the company I work at is in Houston, Texas.

I purchased DVD X Copy and purchased it January 2003.

I use this product to make copies of the DVD's that I have purchased and put the originals up and use the copies as I have grandchildren that watch many of them and when they get ruined I then can easily make a copy to replace the bad one.

I am sending this email from my home in Friendswood, Texas.

Thank you.

From: ijstone2
Sent: Tuesday, January 28, 2003 1:44 PM
To: tellyourstory@protectfairuse.org
Subject: Fair Rights

There are DVD's that I have purchased, some I play once or twice, other many times. The surfaces are very delicate and subject to serious playability. I want to be able to make a back-up copy for my personal protection.

Sent: Thursday, February 06, 2003 12:14 AM
Subject: Fair Use - Adams

FULL INFO:

Name: Dennis Adams

Address:
Yukon, OK 73099

Phone Number:

E-mail:

Job Title: Supervisor

Job Descript: Supervisor of Distributed Computing

Job City: Oklahoma City

Job State: OK

Product(s): DVD X Copy

Purchase Date:11/21/02

Reason: I purchased this software to make backup copies of some of my 250+ movies.

Use Descript: I don't want to take my real discs when I travel. I also want to make backups that my young daughter can play and I don't have to worry about her scratching them. I only make backups of movies that will be watched again and again. I will always buy the original DVD's.

Sent: Thursday, February 06, 2003 9:07 PM
Subject: Fair Use - Adkison

FULL INFO:

Name: Anthony Adkison

Address: Manassas, VA 20109

Phone Number:

E-mail:

Job Title: Special Agent

Job Descript: Police Officer - Federal

Job City: Rosslyn

Job State: VA

Product(s): DVD X Copy

Purchase Date:12/01/02

Reason: Backup DVDs that I own.

Use Descript: I travel quite frequently. I take movies with me to watch during my trips. I don't like to take the originals with me in case of loss. I can take a backup with me, and no matter what happens, I still have the original at home. I also have children who watch the movies in our vehicle. Same thing, I don't want to take the originals with me, I would rather take an inexpensive backup copy and leave the original at home.

Sent: Wednesday, February 05, 2003 5:52 PM
Subject: Fair Use - Alfonso

I, Arnaldo Alfonso, hereby declare and state as follows:

1. I make the following statements of my personal knowledge and, if called as a witness, could testify competently thereto.

2. I am a Senior Consultant - Supply Chain Specialist, in Miami, FL.

3. I acquired a copy of 321 Studios' product(s), DVD X Copy, on or about 12/26/02. I acquired the product because Needed to copy a DVD to give my bedridden father. He is old and sometimes he scratches them..

4. Use my laptop to copy the movie.

5. I have not used DVD X Copy for any improper purpose. I have only used it to make backup copies of DVDs legally owned by me

6. It would be a hardship for me if DVD X Copy were not available.

Arnaldo Alfonso

Sent: Thursday, February 06, 2003 10:42 PM
Subject: Fair Use - Aung

FULL INFO:

Name: Ye Aung

Address: San Diego, CA 92129

Phone Number:

E-mail:

Job Title: Engineer

Job Descript: Computer Engineer

Job City: San Diego

Job State: CA

Product(s): DVD X Copy

Purchase Date:11/01/02

Reason: Make Backup copies of DVD's for use in the car.

Use Descript: Make Backup copies of DVD's for use in the car.

Sent: Thursday, February 06, 2003 8:00 PM
Subject: Fair Use - Austin

FULL INFO:

Name: Bill Austin

Address:

McLoud, OK 74851

Phone Number:

E-mail:

Job Title: retired

Job Descript: retired

Job City: McLoud

Job State: OK

Product(s): DVD Copy Plus, DVD X Copy

Purchase Date: 08/15/02

Reason: To make vcd's of my dvd's.

Use Descript: I use it to make backup copies of my DVD so I will still have the movie should my original be damaged or destroyed. I do this in order to maintain my movie collection and doing this is much less expensive than buying another copy (if you can find one) or buying blank DVD's which is much more expensive. I live on a fixed income so this help me keep my collection in tact at a price I can afford.

Sent: Friday, February 07, 2003 9:24 AM
Subject: Fair Use - Barsch

FULL INFO:

Name: David Barsch
Address: Ann Arbor, MI 48103
Phone Number:
E-mail:
Job Title: Accountant
Job Descript: Budget Accounting
Job City: Ann Arbor
Job State: MI
Product(s): DVD X Copy
Purchase Date:10/14/02

Reason: To back up my kids DVD's. Kids can destroy anything. Therefore it is cheaper for me to back up my copy so I do not have to rebuy the movie.

Use Descript: Back up my kids movies. It is cheaper for me to make a copy of the movie than to rebuy it.

Sent: Thursday, February 06, 2003 3:52 PM
Subject: Fair Use - Barton

FULL INFO:

Name: Gordon Barton

Address: Twin Falls, ID 83301

Phone Number:

E-mail:

Job Title: Field Service Technician

Job Descript: Repair and Service Lottery Equipment for the State of Idaho.

Job City: Twin Falls

Job State: ID

Product(s): DVD X Copy

Purchase Date:11/11/02

Reason: Backup DVD Movie Collection.

Use Descript: Hello,

I use DVDXCOPY to backup my purchased movie collection. It is an extensive collection, and I spent well over \$800 thus far on it. Having a backup copy of ANYTHING is only smart. Data is a volitile thing that can be whisked away with one careless act of a child...or adult for that matter.

I feel it is my right to have a backup of media that I have paid for. "Fair Use" of my purchase is all I want. As long as it is not for profit, or infringing on any data that I do not own, it is my right.

Nuff said.

Gordon Barton

Sent: Thursday, February 06, 2003 12:27 PM
Subject: Fair Use - Bishop

FULL INFO:

Name: Robert Bishop

Address: North Salt Lake, UT 84054

Phone Number:

E-mail:

Job Title: Executive Director

Job Descript: Awareness and fundraising to find a cure for a genetic terminal brain disorder.

Job City: North Salt Lake

Job State: UT

Product(s): DVD X Copy

Purchase Date:10/02

Reason: Backup DVD's

Use Descript: We backup the CD's and DVD's that we purchase and use the backup copy. When a backup CD or DVD is dropped or mishandled to the point that it affects playback, we can use the stored original to create another backup. I have six children. Even when children are careful, it's not reasonable to expect that a CD or DVD will not be dropped or mishandled. CD and DVD manufacturers would have us re-purchase that which we have already purchased (i.e., they offer no media exchange for a nominal charge). This is not acceptable to me as we have purchased over 250 DVD movies, over 200 VHS movies, and over 400 music CD's.

Sent: Thursday, February 06, 2003 11:50 AM
Subject: Fair Use - brisboe

FULL INFO:

Name: margaret brisboe

Address: kegley, wv 24731

Phone Number:

E-mail:

Job Title: retired

Job Descript: none

Job City: nine

Job State: wv

Product(s): DVD X Copy

Purchase Date:11/27/02

Reason: Backup DVD collection.

Use Descript: I am Nana to 11 grandchildren ranging in age from 2 to 19 years. They spend a lot of time with me and I am teaching them all (even 2 year olds) how to use the computer, DVD and tape players, etc. I feel that it is important for all children to learn technology before they start school so they will be ready to learn in todays tech. heavy world. Children are not carefull with CD's or DVD's. Since the issue is learning they use copies of all CD and DVD material. This way they can learn without fear of destroying the original disc's. Since I received my DVDX copy in Nov. all of my grandchildren have learned to use a DVD in a computer and a DVD player. There are many uses for this software, this is mine. When my 6 year old grandson went to school he helped the teacher with the other students when it came time to teach computer use because he already knew all about it. She was gratefull for his help. I feel it is my job to empower the next generation with the skills needed to live in todays world.

DVDCopy is just one of the many tools I use to achieve this goal.

Nana

Sent: Friday, February 07, 2003 2:29 PM
Subject: Fair Use - Briscoe

FULL INFO:

Name: Louis Briscoe
Address: St. Louis, MO 63146
Phone Number:
E-mail:
Job Title: Information Technology Manager
Job Descript: manage information technology resources
for a large corporation
Job City: St. Louis
Job State: MO
Product(s): DVD Copy Plus
Purchase Date:04/24/02
Reason: To back up DVD's I own.

Use Descript: To back up DVD's I own. If a DVD is scratched or otherwise damaged making the video unviewable the manufactures or retailers do not allow for the replacement for a media-replacement fee - they require the full cost of the purchase - which they claim is a small media cost and mostly a license fee. I also use the product to download a movie to my laptop for later viewing. I also make copies that my children can handle since they frequently accidentally damage the media. I usually make a copy of the DVD and use the copy until it becomes damaged, and then make a new copy from my original.

Sent: Wednesday, February 05, 2003 3:57 PM
Subject: Fair Use - Buccinna

I, Kevin Buccinna, hereby declare and state as follows:

1. I make the following statements of my personal knowledge and, if called as a witness, could testify competently thereto.

2. I am a Canine Handler - Explosive Detection Canine Handler, in New York, NY.

3. I acquired a copy of 321 Studios' product(s), DVD X Copy, on or about 01/01/02. I acquired the product because Back up my DVD collection to view at another location. .

4. I keep my back up copies at a second location so that when I visit that location the DVDS are available for viewing. I don't have to transport the originals back and forth each time I visit. Both locations are for personal viewing.

5. I have not used DVD X Copy for any improper purpose. I have only used it to make backup copies of DVDs legally owned by me

6. It would be a hardship for me if DVD X Copy were not available.

Kevin Buccinna

Sent: Wednesday, February 05, 2003 6:09 PM
Subject: Fair Use - Buchholz

FULL INFO:

Name: William Buchholz

Address:

Omaha, NE 68104

Phone Number:

E-mail:

Job Title: Delivery Driver

Job Descript: Deliver Auto Parts

Job City: Omaha

Job State: NE

Product(s): DVD X Copy

Purchase Date:12/15/02

Reason: To Make copies of dvd,s and cd's

Use Descript: I use dvdx to copy my dvd & cd's that I have bought and payed for so i can keep them loke new and play the copies because some time they get scratched and then won't play.

So if i don,t make copies and one gets scratched and won't play i would then have to go out and buy the same dvd or cd again so that i could watch it.

Sent: Thursday, February 06, 2003 9:49 AM
Subject: Fair Use - Burkitt

FULL INFO:

Name: John Burkitt

Address: Nashville, TN 37217-2338

Phone Number:

E-mail:

Job Title: Director

Job Descript: Nonprofit Animal Welfare Charity

Job City: Nashville

Job State: TN

Product(s): DVD X Copy

Purchase Date:01/15/03

Reason: I purchased the product to make DVD Copies I could trust in the hands of my kids.

Use Descript: I have many out of print titles that I plan to keep till they turn to sand..or till I do..whichever comes first. However not wanting to appear a control freak, and wanting my kids to be technically literate, I supply them with disks that are copies. Nonetheless I demand that they treat the disks with the care they would originals...no double standard here. But if they screw up by forgetting or misinterpreting, it's not the end of the world.

Sent: Wednesday, February 05, 2003 6:02 PM
Subject: Fair Use - Burklow

FULL INFO:

Name: Marvin Burklow

Address:

Rescue, CA 95672

Phone Number:

E-mail:

Job Title: Engineering Manager

Job Descript: Retired

Job City: Rescue

Job State: Ca

Product(s): DVD Copy Plus, DVD X Copy

Purchase Date: 1/15/03

Reason: personal backup of my legal CDs.

Use Descript: I learned early on the importance of backup copies of legal CD's. I have had to repurchase music and software and DVD movies because of breakage, which happens a lot taking them out of some of these cases, especially when they get older. I have also scratched them accidentally to the point of no repair. I started making copies of everything I can and placing the original in a safe place, while I use the copy. I believe this is my right, and I should not have my rights violated because of the industries large lobby bankroll. I remember when the movie industry cried that VCR's would destroy them. They were so wrong.

Sent: Thursday, February 06, 2003 10:17 PM
Subject: Fair Use - casillas

FULL INFO:

Name: steven casillas

Address: vacaville, ca 95688

Phone Number:

E-mail:

Job Title: mechanic

Job Descript: aircraft support equipment mechanic

Job City: travis A.F.B.

Job State: ca

Product(s): DVD X Copy

Purchase Date:11/11/02

Reason: i wanted to be able to make copies of movies that i purchased.

Use Descript: i watch movies on stand alone dvd players and on my computer. they were getting deep scratches and starting to skip or freeze. i invested a great deal of money in legitimate movie purchases. i do not desire to keep buying movies that i really enjoy.

Sent: Thursday, February 06, 2003 8:34 AM
Subject: Fair Use - Cass

FULL INFO:

Name: Jason Cass

Address:

Centralia, IL 62801

Phone Number:

E-mail:

Job Title: Insurance Consultant

Job Descript: Agent

Job City: Mt. Vernon

Job State: IL

Product(s): DVD Copy Plus

Purchase Date:9-01-02

Reason: My son loves to watch his favorite movies. He loves DVDs. Since most of you have children you know that DVDs can be scratched and that with these great products it gives me the opportunity to make more than one copy so that if he scratches it there will be another that I will not have to pay for. The first one I always buy to support the economy and the movie companies, but to have to buy one every time he scratches one I would be in debt.

Use Descript: To make copies of the original that I purchased for my son.

Sent: Wednesday, February 05, 2003 3:27 PM
Subject: Fair Use - Coffman

I, Kent Coffman, hereby declare and state as follows:

1. I make the following statements of my personal knowledge and, if called as a witness, could testify competently thereto.

2. I am a funeral director - exactly what it sounds like, in Kennewick, WA.

3. I acquired a copy of 321 Studios' product(s), DVD X Copy, on or about 12/12/02. I acquired the product because To avoid repurchasing DVD's!.

4. I have been copying my older dvds. My player sometimes will scratch up the discs, which would force me to have to go out and buy another one. With the DVD X copy software, I can now keep my original, just that--original. I use the copies without fear of damage because the blank discs are now getting so cheap. The program saves me money. It also allows me to exercise my right to copy the media without having to downgrade to a VHS quality or lower.

5. I have not used DVD X Copy for any improper purpose. I have only used it to make backup copies of DVDs legally owned by me

6. It would be a hardship for me if DVD X Copy were not available.

Kent Coffman

Sent: Wednesday, February 05, 2003 10:22 PM
Subject: Fair Use - Cogan

FULL INFO:

Name: Clark Cogan
Address: Great Falls, Va 22066
Phone Number:
E-mail:
Job Title: Airline Industry
Job Descript: Management
Job City: Dulles
Job State: Va
Product(s): DVD X Copy
Purchase Date:11/31/02
Reason: To copy my existing DVDs

Use Descript: To backup the movie titles I have purchased. I work for an airline and therefore fly a lot. I have a laptop that I use to watch movies while in flight. Why should I have to pay twice for a movie? I purchased each title once, and I keep that at home. To watch DVDs inflight I would have to risk getting my original discs scratched without DVDXCOPY. You can legally back up copies of CDs for such purposes, why in the heck is it even questionable to do so with DVDs????

Sent: Wednesday, February 05, 2003 6:03 PM
Subject: Fair Use - Czeck

FULL INFO:

Name: Kathi Czeck

Address:

Mentor, OH 44060

Phone Number:

E-mail:

Job Title: mom

Job Descript: mom

Job City: Mentor

Job State: oh

Product(s): DVD X Copy

Purchase Date:10/02

Reason: I purchased this to make backup copies of DVD's I have purchased. I have small children that cannot keep their hands off of them. I even purchased them a CHEAP DVD player so if it gets destroyed I caould easliy get another. My children had all our CD's scratched, so I knew I needed to make back up copies before all the DVD's were also destroyed. Would the movie industry send me another copy for about \$1.00. That is about what it costs me to make the copy. We all know a copy from them would cost much more. Then I'd say forget it!!!

Use Descript: See under reason for purchase!

Sent: Wednesday, February 05, 2003 7:06 PM
Subject: Fair Use - DiJulio

FULL INFO:

Name: Henry DiJulio

Address:

Trumbull, CT 06611

Phone Number:

E-mail:

Job Title: Retired Police Lieutenant

Job Descript: Responsible for the operation of Police

Job City: Trumbull

Job State: CT

Product(s): DVD Copy Plus

Purchase Date:01/10/01

Reason: So I can back up my DVD's and not worry about them becomming unusable from Grandchildren handeling them or accidents.

Use Descript: After I buy a DVD for anywhere from 16 to 29 dollars I will watch it for the first time and then I copy it to VCD and when I want to watch it in the future I watch the copy. I am retired and these are expensive for me so I try to protect them as much as possible.

Sent: Wednesday, February 05, 2003 3:40 PM
Subject: Fair Use - Duke

I, Michael Duke, hereby declare and state as follows:

1. I make the following statements of my personal knowledge and, if called as a witness, could testify competently thereto.

2. I am a MIS - Manager of Information Services for textile manufacturer, in Jackson, TN.

3. I acquired a copy of 321 Studios' product(s), DVD X Copy, on or about 11/15/02. I acquired the product because To back up my DVDs.

4. I use this product to make backup copies of my DVDs. These DVDs are fairly expensive, and, currently, if something happens to one of them, I'm out the money I paid for it to start with, plus the money I'll have to shell out if I decide to replace it. Hollywood should recognize that I have every bit as much a right to protect *my* investment as they do theirs.

5. I have not used DVD X Copy for any improper purpose. I have only used it to make backup copies of DVDs legally owned by me

6. It would be a hardship for me if DVD X Copy were not available.

Michael Duke

Sent: Wednesday, February 05, 2003 8:41 PM
Subject: Fair Use - Earnest

FULL INFO:

Name: Kenneth Earnest

Address:

Vidalia, GA 30474

Phone Number:

E-mail:

Job Title: Engineering Manager

Job Descript: Lead a group of Mechanical Engineers in a large manufacturing plant

Job City: Vidalia

Job State: GA

Product(s): DVD X Copy

Purchase Date:10/01/20

Reason: Personal use

Use Descript: I use DVD X Copy to copy my own personal (purchased) DVD's. I do not copy rental DVD's. I do not copy friends DVD's. I do not rent, sell, or even loan the copies I make. The movie companies are losing NOTHING by my owning and using DVD X Copy. In fact they are gaining, because now I am more inclined to buy a DVD than to just rent one.

Sent: Thursday, February 06, 2003 8:06 PM
Subject: Fair Use - Eason

FULL INFO:

Name: Thomas Eason

Address: Tyler, TX 75703

Phone Number:

E-mail:

Job Title: Retired

Job Descript: Retired

Job City: Tyler

Job State: TX

Product(s): DVD Copy Plus, DVD X Copy

Purchase Date: 8/12/02

Reason: To backup my Audio and Video CDs

Use Descript: Disks are fragile and easily get permanently wiped out. I don't want to pay for them twice.

Sent: Thursday, February 06, 2003 11:28 AM
Subject: Fair Use - Engelbrecht

FULL INFO:

Name: Steve Engelbrecht

Address:

Danbury, CT 06811

Phone Number:

E-mail:

Job Title: Account Manager

Job Descript: Sales & Marketing

Job City: Danbury

Job State: CT

Product(s): DVD X Copy

Purchase Date:10/01/02

Reason: Backup of purchased DVDs.

Use Descript: I regularly purchase DVDs for both myself and my kids entertainment. My kids handle the disks directly putting them in and out of the player, and inevitably they will scratch them and render them unreadable. (Same issue with software disks.) DVDXCopy allows me to keep the original safe and let them handle the copy only, which protects my original investment. If I were unable to backup these disks I would certainly not buy as many DVD disks knowing they would eventually need to be replaced again.

Sent: Wednesday, February 05, 2003 10:39 PM
Subject: Fair Use - Ensley

FULL INFO:

Name: James Ensley

Address:

Las Vegas, NV 89109-2233

Phone Number:

E-mail:

Job Title: School Bus Driver

Job Descript: Drive Sport Teams and Field trips in a
90 passenger Thomas Heavy School Bus.

Job City: Las Vegas

Job State: NV

Product(s): DVD Copy Plus,DVD X Copy

Purchase Date:10/05/02

Reason: I PURCHASED BOTH MY DVDCOPY PLUS AND MY
DVDCOPY PROGRAMS BECAUSE I TRAVEL ALOT AND I AM ABLE TO
BRING COPIES ALONG WITH ME SO THAT I CAN WATCH MY MOVIES
FROM MY PERSONAL COLLECTION,MY COLLECTION NUMBERS OVER 250
AND THEY COST ME ANYWHERE FROM \$14.95 TO \$35.00 PER DVD.I
am able to burn a VCD copy for about \$.30 or a DVD copy for
\$5.00,if I lose or misplace my copies I am only out from
\$.30 to \$5.00 and this is my reason for purchasing both my
DVDcopyPlus and my DVDCopy.

Use Descript: I PURCHASED BOTH MY DVDCOPY PLUS AND MY
DVDCOPY PROGRAMS BECAUSE I TRAVEL ALOT AND I AM ABLE TO
BRING COPIES ALONG WITH ME SO THAT I CAN WATCH MY MOVIES
FROM MY PERSONAL COLLECTION,MY COLLECTION NUMBERS OVER 250
AND THEY COST ME ANYWHERE FROM \$14.95 TO \$35.00 PER DVD.I
am able to burn a VCD copy for about \$.30 or a DVD copy for

\$5.00,if I lose or misplace my copies I am only out from \$.30 to \$5.00 and this is my reason for making my personal copies.I don't give or sell any copies to anyone,I use them for my own personal use and convience and I will continue using my copy programs no matter what some multibillion dollar studio says about it. I could and I did copy my movies on VHS nad that was perfectly legal and in my opinion it should be perfectly legal for me to copy my DVD movies in the same manner.

Sent: Thursday, February 06, 2003 12:46 PM
Subject: Fair Use - Lohmuller

FULL INFO:

Name: Keith Lohmuller

Address:

Duluth, GA 30096

Phone Number:

E-mail:

Job Title: Retired

Job Descript: Retired

Job City: Duluth

Job State: GA

Product(s): DVD Copy Plus

Purchase Date:6/1/02

Reason: To make backup copies of DVD's

Use Descript: Used primarily to copy the "special features" so that I can browse them while at my computer. I use this program on DVD's almost exactly like I use my video tape recorder except that I can have access to it on the computer.

Sent: Wednesday, February 05, 2003 11:21 PM
Subject: Fair Use - Lopez

FULL INFO:

Name: Eric Lopez

Address:

San Francisco , ca 94124

Phone Number:

E-mail:

Job Title: none

Job Descript: none

Job City: san Francisco

Job State: ca

Product(s): DVD X Copy

Purchase Date:05/10/02

Reason: i need it because my dvds are all
scratch

Use Descript: i back up my damage dvds. DVds are to
high (20.00-80.00) i'm not rich to go and buy a new dvd
every time it gets damage. i need this so i can have a back
up

Sent: Wednesday, February 05, 2003 4:58 PM
Subject: Fair Use - Mortimer

I, Michael Mortimer, hereby declare and state as follows:

1. I make the following statements of my personal knowledge and, if called as a witness, could testify competently thereto.

2. I am a Consultant - Consultant, in San Francisco, CA.

3. I acquired a copy of 321 Studios' product(s), DVD Copy Plus and DVD X Copy, on or about 02/03/03. I acquired the product because Many CD's I own have become defective, but I had backup copies. Some of my DVD's suffer the same damages, scratches, etc. I paid avg. \$20 for them. I should NOT have to pay another \$20 for a replacement. The movie producers should NOT be able to get this extra profit on an item they know does not last in the long run. In a sense the DVD is a defective medium. I also use the DVD to archive on a format larger than 700MB CD. Backup DVD movies that I own [about 150]..

4. Backup movies against damage. For example, I have the movie Bullit that plays midway, then it stops working. Should I have to spend another \$20 to replace it? So far it would take too long to back up all my movies, so I am doing just one or two a week, if that. Ask me in one year how I am doing with the project.

5. I have not used DVD Copy Plus or DVD X Copy for any improper purpose. I have only used it to make backup copies of DVDs legally owned by me

6. It would be a hardship for me if DVD Copy Plus, DVD X Copy were not available.

Michael Mortimer

Sent: Wednesday, February 05, 2003 10:26 PM
Subject: Fair Use - Norris

FULL INFO:

Name: George Norris
Address: Duluth, Mn 55803
Phone Number:
E-mail:
Job Title: Dr.
Job Descript: Radiologist
Job City: Duluth
Job State: Mn
Product(s): DVD X Copy
Purchase Date:10/01/02
Reason: Curiosity

Use Descript: Rarely use. I own approx. 800 DVD's and purchase 2-5 new ones per week. I love the medium and will continue to buy rather than rent as long as purchase prices remain reasonable. A small percentage of the discs I own are classics and I'm interested in preserving a "perfect" copy.

I own audiophile gear and am a stickler for quality recording and am in the process of preserving copies of my classics. I don't feel I should be required to purchase new to preserve pristine versions of my favorites. As the video/recording industry is well aware, buying a brand-spanking new copy is no guarantee you are "getting a good one" as production standards aren't always that great. They should put their efforts into providing superbit versions for those of us who are interested in high quality and drop the price on their dime-a-dozen versions. They need to get real. The explosion of home video media has done nothing but put billions in their pockets.

They whined about fear of VCR copy pirates and look what happened. Rather than kill the industry they are in a "golden age" far beyond their wildest fantasies. When they stop producing software, I'll believe that they are hurting.

Interest in archiving copies does nothing but increase the interest in their original product.

Put on the brakes on consumer interest and we'll go back to audio only or better yet, start taking long and memorable walks and turn our Plasma sets into art exhibits.

Sent: Friday, February 07, 2003 7:55 AM
Subject: Fair Use - O'Connor

FULL INFO:

Name: Timothy O'Connor

Address:

Port Douglas, QL 4871

Phone Number:

E-mail:

Job Title: Contractor

Job Descript: Meter Reader

Job City: Port Douglas

Job State: QL

Product(s): DVD Copy Plus

Purchase Date:03/12/02

Reason: To back up my original purchase of my
DVD's

Use Descript: I live in Far North Queensland in
Australia, we have an overwhelming heat & humidity which
has disasterous efects on on all things. DVD'S are not
cheap over here so i use DVD Copy Plus to back up all my
DVD originals & then store my investments in a drybox to
keep them safe. This is a great product & has saved me a
lot of heartache & should be commended, NOT CONDEMNED.
Yours, Timothy O'Connor

Sent: Wednesday, February 05, 2003 7:35 PM
Subject: Fair Use - Orme

FULL INFO:

Name: Neil Orme

Address:

Riverside, CA 92504

Phone Number:

E-mail:

Job Title: Retired

Job Descript: Retired

Job City: Riverside

Job State: CA

Product(s): DVD X Copy

Purchase Date:11/9/02

Reason: Protect my DVD investment of both money
or out-of-print DVD's.

Use Descript: I am a DVD collector with a large
collection (1000+), some of which are out of print or
otherwise unavailable. If a movie is watched for any
reason, DVD XCopy is used to create a "viewing" copy. The
copy is then numbered and filed for future use. This
procedure helps insure that irreplaceable or valuable disks
are not damaged, mislaid or stolen. Without DVD XCopy, my
DVD's would seldom be watched, but relegated to the display
case permanently.

I consider it my right to backup my legally purchased
DVD's. Any objection to this concept can only be considered
"planned obsolescence" to mandate that I buy another DVD if
my legally purchased DVD becomes impaired in any way, i.e.
GREED on the part of whomever derives profit from the sale
of DVD's.

THANK YOU, 321 Studios, for producing this fine product.

Sent: Friday, February 07, 2003 10:33 AM
Subject: Fair Use - pinnock

FULL INFO:

Name: christopher pinnock

Address:

Manchester, x bl2 6es

Phone Number: 01204 480 598

E-mail:

Job Title: Disabled

Job Descript: On state benefits

Job City: n/a

Job State: x

Product(s): DVD Copy Plus

Purchase Date:12/12/02

Reason: to copy dvds i have in my home

Use Descript: I only copy for my own use dvds that I have bought legitimately so that i can have a copy for my bedroom. Being disabled I can have days where I am in severe pain and need to stay in bed. I live on my own so no-one can bring dvds from downstairs for me. The cost of a single dvd makes it rare the ammount I can buy, my reason for copying is to allow me to keep my originals in mint condition. I cannot readily afford to purchase replacements. I do agree that copyright theft is a serious infringement of the makers rights of ownership, but if copies are made for reasons like mine that are none profitable I see no harm. In fact I know that a certain amount paid for my blanc media goes to the different

industries so therefore they are being paid twice by me and everyone else.

Sent: Friday, February 07, 2003 1:20 PM
Subject: Fair Use - Rassam

FULL INFO:

Name: Sina Rassam

Address:

Fitchburg, WI 53711

Phone Number:

E-mail:

Job Title: Artist

Job Descript: Graphic Artist Painting and Electronic
Media

Job City: Madison

Job State: WI

Product(s): DVD X Copy

Purchase Date:02-07-03

Reason: Need reliable program to back up DVD's
as well as for burning my own work, and home movies

Use Descript: Well I just bought it and haven't
installed it yet but the first thing I'm going to do with
the program, is make copies of all my favorite dvd's, since
they're both very scratched.

Look I wouldn't waste my time copying DVD's especially not
for distribution, First of all it takes too much damn time
as it is, second, the dvd discs are too expensive..

Sent: Wednesday, February 05, 2003 11:45 PM
Subject: Fair Use - Robichaux

FULL INFO:

Name: Julius Robichaux

Address:

Metairie, LA 70033

Phone Number:

E-mail:

Job Title: City Carrier

Job Descript: Mail Delivery

Job City: Kenner

Job State: LA

Product(s): DVD Copy Plus, DVD X Copy

Purchase Date: 01/15/03

Reason: Backup my DVDs to DVD and CD formats

Use Descript: I have an extensive library of DVDs that I have purchased and created. I burn to DVD from my JVC DV recorder. I have had occasions where DVDs and CDs have gotten jammed in players. I choose to view this media on copied discs so as to not ruin my originals.

Sent: Thursday, February 06, 2003 11:42 PM
Subject: Fair Use - Fisher

FULL INFO:

Name: Allen Fisher

Address:

Pottstown, PA 19464

Phone Number:

E-mail:

Job Title: none

Job Descript: none

Job City: none

Job State: pa

Product(s): DVD X Copy

Purchase Date:10/20/02

Reason: To Use this Program to protect my DVD
Library For reasons of Damage.

Use Descript: I backup a lot of the movies that I
purchase. The reason is that I have spent a lot of money on
previewed movies from a video store, some could be damaged
after my first use since they have been used many times by
many different people (DVD Players) Like anything else
these have a better chance of damage then a new one so I
back up my movie collection

Sent: Wednesday, February 05, 2003 9:37 PM
Subject: Fair Use - fitzpatrick

FULL INFO:

Name: james fitzpatrick

Address:

millbury, oh 43447

Phone Number:

E-mail:

Job Title: millwright

Job Descript: repair machinery

Job City: walbridge

Job State: oh

Product(s): DVD X Copy

Purchase Date:11/09/02

Reason: my wife is handicaped so she watches a lot of movies in turn she has to handle both sides of the disk to put it in the player this keeps my original movie in new conditon

Use Descript: it is used to backup my own private collection

Sent: Thursday, February 06, 2003 12:56 AM
Subject: Fair Use - Gage

FULL INFO:

Name: Stan Gage

Address:

Portola Valley, CA 94028

Phone Number:

E-mail:

Job Title: Homeowner

Job Descript: Woodworker

Job City: Portola Valley

Job State: CA

Product(s): DVD X Copy

Purchase Date:01/04/03

Reason: Copy DVDs so they would play in both my TV and computer DVD players

Use Descript: Instructional DVD's would not play on TV DVD player but would play on computer DVD. When re-recorded using DVD xcopy the DVDs would play on both. I have 2 sets but only can use 1 at a time.

Sent: Wednesday, February 05, 2003 8:36 PM
Subject: Fair Use - Gain

FULL INFO:

Name: Ron Gain

Address:

Dallas, TX 75219

Phone Number:

E-mail:

Job Title: Underwriting Liaison

Job Descript: Regional Liaison for medical
underwriting

Job City: Arlington

Job State: TX

Product(s): DVD X Copy

Purchase Date:02/10/03

Reason: To make a backup copy of expensive DVD titles in order to take entertainment with me on business trips and avoid losing or breaking the original copy.

Use Descript: The product as of yet, has not worked for me. I am hopeful that one day it will. Intentions would be to make a backup copy of a DVD to throw in my carry on luggage and use to entertain myself on an airplane, and in my hotel room on my many business trips across the country. I've spent hundreds of dollars on replacement DVD titles due to their inability to survive the rough handling of airports. I do not resell, loan, or trade these disks. When I am tired of a copy, I fully intend on destroying the copy and replace it with another item. I feel there is a big infringement on my rights to make a duplicate of something I own for personal use within the bounds of the copyright agreement. I have done this to video tapes in the past (for personal use and backup

copies) and do not understand what the issue is with infringement of the copyright laws when used in this manner. I do not purchase 'bootlegged' copies of anything, and I do not mind spending the money on a new DVD to add to my collection - as long as I have a way of keeping it in my collection.

If we take away the DVD X-Copy (even though I can't get it to work), the movie makers need to start providing extended warranties on their DVDs as their quality has diminished greatly in the past few years and normal wear and tear makes them faulty. If we cannot back them up, the video industry should replace them free of charge!

Sent: Wednesday, February 05, 2003 6:43 PM
Subject: Fair Use - Goad

FULL INFO:

Name: Stacy Goad

Address:

Midlothian, TX 76065

Phone Number:

E-mail:

Job Title: Security Forces Supervisor

Job Descript: USAF Law Enforcement and Priority
Resource Protection

Job City: Ft. Worth

Job State: TX

Product(s): DVD Copy Plus

Purchase Date:12/01/02

Reason: To make copies of my purchased DVDs.

Use Descript: I am in the United States Air Force and frequently deploy overseas. I have a laptop with a DVD-Rom and use it for watching movies during my off time. I went to the desert in 2002 and took approximately 60 DVDs with me in a cd case. Several of them will no longer play in my laptop. I bought DVD Copy Plus to make copies of my DVDs so I would not damage any more of them than I already have. Several of my friends also use this product for the same reasons. I would much rather damage a ten cent CD than a twenty dollar DVD. Thanks to 321 Studios, I have a resource that allows me the freedom to take movies with me on deployment without worrying about damaging expensive DVDs.

Sent: Wednesday, February 05, 2003 11:51 PM
Subject: Fair Use - Gotsch

FULL INFO:

Name: Robert D Gotsch

Address:

Imperial, MO 63052

Phone Number:

E-mail:

Job Title: Household Management

Job Descript: Head of Household

Job City: Imperial

Job State: MO

Product(s): DVD Copy Plus

Purchase Date:07/15/02

Reason: Backing up of PURCHASED DVD's

Use Descript: I use Copy Plus to make copies of my DVD's for my own personal use. Having a 14 year old also using my DVD's tends to add to the wear and tear on those disc's. There are some discs that are now out of circulation due to the unfair marketing practices of some of the major studios(DISNEY) that pull titles off the market and are unable to be re-purchased if later damaged. I purchase several discs a month and will not allow my investment to be un-protected. Where were the studios when Laserdiscs were around? There was no copy protection available on these discs and that did not 'HURT' the movie industry and I think that they will not be hurt by these products. The 'pirates' should be dealt with severely but honest people making back-up copies should be allowed to do so.

Sent: Wednesday, February 05, 2003 6:38 PM
Subject: Fair Use - Groves

FULL INFO:

Name: Doc Groves

Address:

Arlington, MA 02474

Phone Number:

E-mail:

Job Title: Engineer

Job Descript: Embedded Systems Developer

Job City: Arlington

Job State: MA

Product(s): DVD Copy Plus

Purchase Date:07/01/02

Reason: To be able to back up our DVDs and to be able to compile previews.

Use Descript: We're going to compile together the previews of the DVDs we buy. This way on family movie night we can play a long string of coming attractions just like in the theater. Without DVD Copy Plus this would be hard to impossible to do. Trying to do this by changing the original DVD disks is too tedious and discontinuous while having to wait for various menus to load & search for the preview. After watching we'll decide by voting which movie to watch!

Also we may use DVD Copy Plus to make backups & only let the kids play copies on their own - DVDs are so expensive we can't afford to replace a DVD stepped on and scratched by one of the kids (or we clumsy adults). This seems to be the only way to protect our investment and I doubt we'd

risk buying as many DVDs in the future without knowing we can do this to protect them against wear & handling.

Sent: Friday, February 07, 2003 9:15 AM
Subject: Fair Use - Haupt

FULL INFO:

Name: Peter Haupt

Address:

Sarasota, fl 34237

Phone Number:

E-mail:

Job Title: Systems Administrator

Job Descript: Network Systems Administrator

Job City: Sarasota

Job State: Fl

Product(s): DVD X Copy

Purchase Date:11/15/02

Reason: To make traveling copies of the DVD's that I own.

Use Descript: I make backup copies of movies that I own. I travel quite a bit and do not want to risk damaging the DVD's that I've purchased so I copy them on a rewritable disk. Hollywood is not willing to replace a damaged disk so I have no choice. I have purchased more than 700 DVD's and I feel that I have the right to protect my \$10,000.00 investment. Hollywood seems to be consumed with the piracy issue when the real issue is the studios not understanding how to run a business in the digital age. It's about choice and Hollywood refuses to give consumers a choice on how to use or view their products and until they begin to understand that consumers are demanding to be given this choice, piracy will more than likely continue and they won't be able to stop it. DVD X COPY is the product that finally allows consumers to exercise their FAIR USE right that was decided on by the court system.

Hollywood has been able to circumvent this law and are now upset that DVD X Copy threatens thier ability to do that. The rights of consumers is what is really being threatened and the courts must once again step in to protect thier FAIR USE RIGHTS.

Sent: Thursday, February 06, 2003 2:38 PM
Subject: Fair Use - Kobaly

FULL INFO:

Name: Martin Kobaly

Address:

Dove Canyon, ca 92679

Phone Number:

E-mail:

Job Title: CEO

Job Descript: Engineering Consultant/Owner

Job City: Dove Canyon

Job State: CA

Product(s): DVD X Copy

Purchase Date:11/01/02

Reason: Our SUV has a DVD player in it to keep our children occupied while on long trips. As we live in a very hot area, on three occasions we have had our DVDs melted and runined. Children just don't take car of DVD/CDs as they don't pay for them. We have also had several of our DVDs which we purchased stepped on and scratched so they don't play. As I don't know of any replacement policy that exists for damaged media, I use DVD X copy to make a DVD for use in our SUV as the probability of them being damaged in the car is very high. I just wish DVD Xcopy would also allow us to make a backup copy of the playstation/x box media which we also use in our SUV.

Use Descript: To make backup copies for use in our SUV.

Exhibit 2

Affidavits Supporting 321 Studios, LLC

(Submitted by Hand Delivery)