

UNITED STATES COPYRIGHT OFFICE

**Exemption to Prohibition on Circumvention of
Copyright Protection Systems for Access Control Technologies**

Docket No. RM 2002-4

JOINT REPLY COMMENTS

of

**AFMA (formerly AMERICAN FILM MARKETING ASSOCIATION)
AMERICAN SOCIETY OF COMPOSERS, AUTHORS, AND PUBLISHERS (ASCAP)
AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS (ASMP)
ASSOCIATION OF AMERICAN PUBLISHERS (AAP)
ASSOCIATION OF AMERICAN UNIVERSITY PRESSES (AAUP)
THE AUTHORS GUILD, INC.
BROADCAST MUSIC, INC. (BMI)
BUSINESS SOFTWARE ALLIANCE (BSA)
DIRECTORS GUILD OF AMERICA (DGA)
INTERACTIVE DIGITAL SOFTWARE ASSOCIATION (IDSA)
MOTION PICTURE ASSOCIATION OF AMERICA (MPAA)
NATIONAL MUSIC PUBLISHERS' ASSOCIATION (NMPA)
PROFESSIONAL PHOTOGRAPHERS OF AMERICA (PPA)
RECORDING INDUSTRY ASSOCIATION OF AMERICA (RIAA)
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INTRODUCTORY OVERVIEW OF JOINT REPLY COMMENTS

The undersigned organizations, representing copyright owners and creators, and most of the U.S. copyright industries, appreciate this opportunity to submit reply comments in this proceeding.¹ This is the second in the triennial series of rulemaking proceedings that Congress called for when it enacted the Digital Millennium Copyright Act in 1998. This introductory overview of our Joint Reply Comments summarizes our perspective on the purpose for which Congress created these proceedings; identifies some of the major relevant developments since the last rulemaking proceeding concluded in October 2000; and explains the organization of our specific comments in the appended sections.

The Purpose of this Proceeding

Before plunging into the details of this proceeding, it is worth recalling why Congress enacted Title I of the DMCA, and why it established these triennial rulemaking proceedings. The Copyright Office correctly points out that one of the major reasons for Congressional action in 1998 was implementation of two global copyright treaties which had been signed just two years previously. Notice of Inquiry, 67 Fed. Reg. 63,578 (October 15, 2002) (hereafter “NOI”). But in seeking to implement these treaties, Congress had another overarching goal: to encourage copyright owners to use the Internet and other new digital dissemination to make their creative works available to the public. Congress recognized that because of the ease of carrying out copyright infringement in the digital environment, technological measures, such as encryption, scrambling, and the like, were essential to control access to copyrighted materials in this environment, and that without their use the Congressional goal was unlikely to be achieved. Accordingly, Congress enacted legal protections against the circumvention of these measures, for the express purpose of encouraging copyright owners to use these tools and hence develop these new digital markets for the benefit of all Americans.²

However, Congress was also aware of the danger that creating these new legal protections could have the effect of “unjustifiably diminish[ing]” public access to copyrighted materials, and thus created this triennial rulemaking proceeding as a “fail-safe mechanism” to protect against that possibility “in exceptional cases.” Final Rule, 65 Fed. Reg. at 64,558 (Oct. 27, 2000) (hereafter “2000 Final Rule”), *quoting*, the Report of the House Committee on Commerce on the Digital Millennium Copyright Act of 1998, H.R. Rep. No. 105-551, pt. 2, at 36 (1998) (hereafter “Commerce Comm. Report”), 64,563, *citing*, Commerce Comm. Report, at 36,

¹ A list and brief description of Joint Reply Commenters is attached to this submission. In addition to these Joint Reply Comments, some of the Joint Reply Commenters are also filing individual reply comments in this proceeding. ASCAP and BMI license only the right of non-dramatic public performance of their respective writer and publisher member and affiliates’ copyrighted musical compositions. As ASCAP and BMI do not license rights of reproduction and distribution of copies, ASCAP and BMI are not directly involved in questions relating to those rights. Nevertheless, to the extent the positions set forth in these Comments discuss those rights, ASCAP and BMI support such positions as a matter of sound copyright policy.

² *See, e.g.*, Staff of House Committee on the Judiciary, 105th Cong., Section-By-Section Analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4, 1998 2 (Comm. Print 1998) (hereafter “House Manager’s Report”) (“the law must adapt in order to make digital networks safe places to disseminate and exploit material in which American citizens have rights in an unregulated and beneficial environment”); S. Rep. No. 105-190, at 8, 11 (1998) (“Title I encourages technological solutions, in general by enforcing private parties’ use of technological protection measures with legal sanctions for circumvention.”).

House Manager's Report, at 8. Through this proceeding, Congress provided a means for making the necessary corrective adjustments, without the need to enact new legislation. Congress also recognized the dynamic and fast-changing nature of the digital environment, and that consequently adjustments that are needed today might soon become unnecessary or irrelevant as the problems to which they respond are resolved. Thus, the two key features of this proceeding: an administrative mechanism to recognize exemptions when circumstances merit them, and an automatic expiration of the exemptions with triennial review to ensure that the law keeps up with changing conditions.

The copyright sector organizations participating in the Joint Reply Comments strongly support the DMCA, and believe that, so far, it is working. The DMCA struck a balance between copyright owners and users, with the goal of fostering new markets in which broad segments of the public could access copyrighted material in digital forms. The triennial rulemaking proceeding was intended to review this balance, and, if demonstrably needed for limited classes of works, to modestly recalibrate it for the ensuing three years. The DMCA has succeeded in fostering these new markets, and we are pleased to participate in this proceeding to determine whether any recalibration is needed.

Today, less than five years after enactment of the DMCA, more copyrighted materials – computer programs, entertainment software, music, sound recordings, audio-visual works, textual material and databases – are available to more members of the public, in digital as well as analog formats, than ever before in our history. The expanded availability in digital formats is due in great part to the use of technological protection measures, including particularly the access control mechanisms that are the focus of this proceeding. We welcome this proceeding as an opportunity to tell this story, and also support it as the right means for identifying any areas in which it is necessary to invoke the fail-safe mechanism created by Congress. In our view, the problems for which Congress created the fail-safe mechanism have not generally materialized. Based on the record compiled to date, it has not been demonstrated that the law against circumvention of access controls has caused any substantial adverse impact on the public's ability to make noninfringing uses of copyrighted materials. We recognize, however, that we are much closer to the beginning of this triennial process than to its conclusion, and that with further development of the record, it may be possible for proponents of some carefully crafted exemptions to fulfill the burden of persuasion which the statute assigns to them. We look forward to participating in further phases of this proceeding and to helping to develop that record.

The Ground Rules

The first rulemaking, held in 2000, was a learning experience for all concerned. The Copyright Office ("Office") has distilled that experience into a set of clear and concise ground rules for this proceeding, which are set out in the Notice of Inquiry published on October 15, 2002. Notice of Inquiry, 67 Fed. Reg. 63,578 (hereafter "NOI"). Most importantly, these ground rules underscore the "narrow focus" of this proceeding, which deals only with whether the prohibition on the act of circumvention of access control technologies (contained in 17 USC § 1201(a)(1)(A)) has created a substantial adverse impact on the availability of particular classes of works for non-infringing use. NOI, at 63,579. The Joint Reply Commenters commend the

Office for setting these ground rules, which we believe are generally a faithful reflection of Congressional intent, and which should go far toward reducing the “great deal of confusion” that engulfed some participants in the 2000 rulemaking. NOI, at 63,579.

The success of the ground rules contained in the NOI has already been demonstrated in the initial round of comments in this proceeding. By comparison to the experience of 2000, far fewer of the 50 initial round submissions address issues falling wholly outside the scope of these proceedings. Furthermore, of the 86 specific “classes of works” proposed, a far higher proportion than in the 2000 initial round might, with some adjustment and proper evidentiary support, meet the statutory parameters for recognition of an exemption to the applicability of Section 1201(a)(1)(A) during the 2003-06 period. However, for the reasons set out in our Joint Reply Comments, we believe that these proposals as they currently stand generally do not meet the burden of persuasion established by Congress for recognizing such exemptions “in exceptional cases.”

Because the submissions in the initial round are generally more respectful of the narrow focus of this proceeding than in 2000, so too do our reply comments differ from those we submitted then.³ A substantial proportion of our 2000 reply comments focused on the need to clarify ground rules, and on why so many of the initial round submissions were out of scope. The issuance of the Office’s ground rules in the NOI, and the greater degree of compliance with them in the initial round submissions, make it unnecessary to repeat much of that analysis. At the same time, we feel compelled to comment specifically on a far greater percentage of initial round submissions than we did in 2000.⁴ Unavoidably, this has made our Joint Reply Comments this year somewhat lengthier than they were in 2000.

Key Developments Since the 2000 Rulemaking

Before summarizing the structure of our reply comments, we wish to offer a few overarching observations that we hope will help place these proceedings in context. Nearly two and one-half years have passed since the Librarian accepted the recommendations of the Office and issued his Final Rule, delaying the effective date of the access control circumvention prohibition for two particular classes of works. During that time, there have been three important developments which we urge the Office to take into account in this proceeding.

1. Judicial Decisions Have Validated Key Conclusions of the 2000 Rulemaking

First, the federal courts, in several cases, have implicitly validated the approach taken in the first rulemaking proceeding on some key issues. We are well aware that neither the prohibition on circumvention of access control measures in Section 1201(a)(1)(A), nor the decision of the Librarian in the previous rulemaking proceeding to exempt two classes of works from that prohibition until October 2003, have been directly tested in the courts, much less

³ Note that the following organizations that did not join in the Joint Reply Comments in 2000 do so this year: Writers Guild of America, west, and Screen Actors Guild.

⁴ Our omission of comments directed specifically to every submission should not be interpreted as acceptance of the class or works proposed in any submission. As noted in the text, we do not believe that any of the proposed classes should be recognized, based on the record as it now stands.

received an authoritative judicial interpretation.⁵ However, other related provisions of the DMCA have been upheld against constitutional attack in at least two cases, each of which discussed at some length the impact of Section 1201 on a critical aspect of non-infringing use: fair use under Section 107 of the Copyright Act. In one of these cases, in which the civil enforcement of Section 1201(a)(2) of the DMCA was at issue, the Second Circuit Court of Appeals declared:

We know of no authority for the proposition that fair use, as protected by the Copyright Act, much less the Constitution, guarantees copying by the optimum method or in the identical format of the original.... Fair use has never been held to be a guarantee of access to copyrighted material in order to copy it by the fair user's preferred technique or in the format of the original.

Universal Studios, Inc. v. Corley, 273 F.2d 429, 459 (2d Cir. 2001). In a separate criminal case, a U.S. District Court reached the same conclusion:

Nothing in the DMCA prevents anyone from quoting a work or comparing texts for the purpose of study or criticism.... Defendant has cited no authority which guarantees a fair user the right to the most technologically convenient way to engage in fair use. The existing authorities have rejected that argument.

U.S. v. Elcom, 203 F. Supp.3d 1111, 1131 (N.D. Cal. 2002).

These court rulings emphatically support the conclusion reached by the Register of Copyrights in her 2000 recommendation, and adopted by the Librarian, that “there is no unqualified right to access works on any particular machine or device of the user's choosing.” 2000 Final Rule, at 64,569. That conclusion is reflected in the statement in the NOI that the ability of “the public to make noninfringing uses of the work even if ... not [in] the preferred or optimal format for use,” is sufficient to satisfy the statutory criterion of “availability for use” under Section 1201(a)(1)(C). NOI, at 63,580. This judicial validation of the interpretive position consistently taken by the Office and the Librarian should be taken into account in evaluating submissions that rely upon a diametrically opposed view of what fair use means. These precedents strongly indicate that this rulemaking proceeding is not the right forum to vindicate a supposed right to make fair use of works in a “preferred or optimal format.”

Nothing in either the DMCA or the fair use doctrine is intended to ensure that every work in every format is available to every user who seeks access. Nor is that the goal that Congress intended to achieve by establishing this rulemaking proceeding, or more generally by enacting the DMCA to encourage copyright owners to enter digital markets.

⁵ The lack of any reported cases – nor to our knowledge any unreported cases – seeking to enforce Section 1201(a)(1)(A) either criminally or civilly is certainly a relevant consideration in determining whether, during the past 2 ½ years, the applicability of that provision has had a substantial adverse impact on the ability of users to make non-infringing uses of any particular class of works.

2. Section 1201(a)(1)(A) Has Gone Into Force: The Implications

The 2000 rulemaking took place entirely before the statutory prohibition came into force on October 28, 2000. This put proponents in the admittedly difficult position of having to base their case solely on adverse impacts that were “likely to occur,” rather than those that had occurred already and were in existence at the time of the rulemaking. This is no longer the case. In this rulemaking, and presumably in all future triennial rulemakings under this statute, the focus needs to be upon “evidence ... that actual harm exists.” NOI, at 63,579. As the Office correctly noted in the NOI, “actual instances of verifiable problems occurring in the marketplace are necessary to satisfy the burden with respect to actual harm.” *Id.* Some submissions in the initial round of this proceeding attempt to provide the needed evidence to satisfy this criterion, either by statistical data or by “first-hand knowledge of such problems,” *id.*, and where this is the case the Joint Reply Comments respond to this evidence. In a surprisingly large number of submissions, however, the evidence of “actual instances of verifiable problems” is sorely lacking, despite the Office’s clear signal in the NOI that this is what is needed to carry the burden of persuasion for an exemption.

It is true that a proponent of an exemption can argue that a substantial adverse impact on the ability to make non-infringing uses, even one that cannot be shown to exist today, is “likely to occur” within the next three years, and that thus an exemption should be recognized for the affected “class of copyrighted works.” 17 U.S.C. § 1201(a)(1)(C). However, as the NOI points out, Congress intended that exemptions based on likely future impacts would be appropriate only “in extraordinary circumstances in which the evidence of likelihood is highly specific, strong, and persuasive.” NOI, at 63,579, *quoting*, House Manager’s Report, at 6. In the view of the Joint Reply Commenters, the Office and the Librarian did not rigorously apply this standard in the 2000 rulemaking, choosing instead to err on the side of caution in light of the uncertain impact of a statute which had not yet come into force. The result was the recognition of two exemptions that were not, in our view, fully justified by the record compiled in that rulemaking.⁶ Since the prohibition is now in force, the circumstances that could justify such a relaxation no longer apply. Thus, we urge the Office in its recommendation, and the Librarian in his decision, to carefully evaluate whether the proponent of any exemption (whether or not identical to one that expires in October 2003) has demonstrated the existence of an “extraordinary circumstance” and carried “the burden of proving that the expected adverse effect is more likely than other possible outcomes.” NOI, at 63,579, and to deny such claims if this burden is not met.⁷

3. The Digital Cornucopia

The third development of the past thirty months, and perhaps the most significant for this proceeding, is the rapid increase in the public availability of all kinds of copyrighted material in digital formats, including through online dissemination. This is perhaps the most critical of

⁶ The basis for this view is explained more fully in Sections I and II of this Joint Reply Comment, which deal with proposals that these two expiring exemptions should be recognized again for the next three years. Of course, nothing could be clearer than that this determination must be made de novo and that the burden of persuasion on such a proposal, like one for any other class of works, rests entirely upon the proponent. NOI, at 63,579.

⁷ Of course, as the Office pointed out in its 2000 Recommendation, “Congress anticipated that exemptions would be made only in exceptional cases.” 2000 Final Rule, at 64563. This observation applies both to exemptions based on actual harm and to those based on “likely” future harm.

factors that “must ... be balanced with any adverse effects attributable to” section 1201(a)(1)(A). NOI, at 63,580. The Joint Reply Commenters believe that if this factor is properly weighed it will tip the balance strongly against recognition of an exemption for any particular “class of works” that has witnessed this dramatic expansion in availability. To cite just a few examples, some of which are explored in more detail in response to specific proposed exemptions:

- The availability of audio-visual materials in DVD format: The Digital Versatile Disc has proven to be the fastest-growing new medium for copyrighted material in history. Currently, 40 million American households have DVD players (a number that is expected to rise to 60 million over the next few years)⁸, and there are over 95 million DVD capable playback devices in American homes and offices, including DVD-ROM drives and videogame consoles.⁹ Over 33,000 audio-visual titles, old and new, are already available on DVD.¹⁰ As the Office and the Librarian concluded in the 2000 rulemaking, “the motion picture industry relied on CSS [access controls] in order to make motion pictures available in digital format,” and thus “technological measures on DVDs have increased the availability of audio-visual works to the general public.” 2000 Final Rule, at 64569. The evidence underlying that conclusion is far more compelling today even than when it was made in October 2000.
- The availability of legitimate online music downloads. At the time of the October 2000 Final Rule, the noninfringing dissemination of music and sound recordings over the Internet to the general public was extremely limited. Today, that is no longer the case. A number of services offer vast catalogs of recordings for authorized download by virtually any Internet user with a wide array of pricing choices and features. For instance, some 250,000 different tracks are currently available on pressplay.com, while Rhapsody, from Listen.com, offers over 20,000 albums from over 9,000 artists.¹¹ While in some instances (such as for promotional purposes) downloads are made available without the use of technological controls, the long-term viability of legitimate online distribution of music and sound recordings depends upon these controls to manage subscriptions and enable tiered pricing structures. The accelerating trend is toward greater flexibility for subscribers to permanently download tracks, transfer them to other media, and use them in portable devices, capabilities whose management depends upon technological controls.
- The availability of entertainment software on a variety of platforms. In this fast-growing sector of the copyright industries, the past thirty months have witnessed the debut of a major new videogame console platform, the

⁸ See *DVD to Rule U.S. Home Video Sales/Rentals Market by End of '03 According to PricewaterhouseCoopers*, available at

<http://www.pwcglobal.com/extweb/ncpressrelease.nsf/DocID/20C97B91BCED345C85256C48005AF8CC>

⁹ See Greg Hernandez, *DVD Players Surge in Popularity Nationwide, Figures Show*, Daily News, Los Angeles, Jan. 10, 2003, at <http://www.harbus.org/main.cfm/include/smdetail/synid/73080.html>.

¹⁰ See All Video Guide Statistics as of 2/12/2003 available at http://www.allmovie.com/mov_stats.html.

¹¹ See http://www.pressplay.com/pressroom/pr_20030210.html; <http://www.listen.com/music.jsp?sect=main>.

growth of handheld platforms for gaming, and the launch of major franchise titles into the online gaming environment. For example, since October 2000, approximately 1800 titles have been released in the United States for play on videogame consoles, including handheld consoles (NPDFunworld). In addition, since that time, approximately 2200 computer game titles have been released in the United States (NPDTechworld).¹² In addition, some have predicted that online game play will achieve U.S. sales of more than \$1 billion by 2005.¹³ Access controls are an integral and indispensable part of this proliferation of ways in which access to entertainment software and game products has become nearly ubiquitous in American society.

- The availability of business software applications through a range of delivery mechanisms. Many publishers of business software applications have more fully incorporated online distribution and access options in their business operations since 2000. A survey conducted by the Business Software Alliance indicates that by 2005, two-thirds of software is expected to be distributed over the Internet, up from 12% in 2001.¹⁴ Whether delivered through remote access to applications, downloading, or distribution of computer programs in optical media formats, access control measures are a key feature of the distribution options that have made applications available to American businesses and institutions large and small. Access control technologies are also critical to the ongoing task of upgrading the security of computer networks and resources and reducing their vulnerability to viruses and other attacks.
- The availability of text and database products in digital formats. The fledging e-book sector is only part of a much larger universe of digital and online delivery that is making more copyrightable databases and text more available to a broader range of students, researchers, businesses, consumers and citizens than ever before. Although unprecedented volumes of this material are available online today without charge, access control technologies are clearly critical to developing viable businesses in this sector with the resources to update, maintain and expand these offerings.

These examples (and others that could be provided) clearly demonstrate the “use-facilitating” characteristics of many applications of access control technologies. They strongly suggest that “the digital information marketplace is developing in the manner which [Congress believed to be] most likely to occur, with the availability of copyrighted materials for lawful uses being enhanced, not diminished, by the implementation of technological measures and the establishment of carefully targeted legal prohibitions against acts of circumvention.” House Manager’s Report, at 8, *cited at* 2000 Final Rule, at 64,563.

¹² NPDFunworld and NPDTechworld are part of the NPD Group, Inc., a global market information company that measures product movement and consumer behavior across a broad range of industries.

¹³ See, e.g., Dustin Goot, *Online Gaming Thinks Inside Xbox*, Wired.com, Nov. 15, 2002, at <http://www.wired.com/news/games/0,2101,56407,00.html>.

¹⁴ See Business Software Alliance, *Opportunities and Growth: A Vision for the Future, 2000-2005 2* (2000).

At the conclusion of the 2000 rulemaking, the Recommendation of the Register of Copyrights, adopted by the Librarian of Congress, summed up the goal of the proceeding in words fully applicable to this proceeding as well:

Ultimately, the task in this rulemaking proceeding is to balance the benefits of technological measures that control access to copyrighted works against the harm caused to users of those works, and to determine, with respect to any particular class of works, whether an exemption is warranted, because users of that class of works have suffered significant harm in their ability to engage in noninfringing uses.

2000 Final Rule, at 64,563. The record of increased availability of copyrighted works for noninfringing uses (including licensed and permitted uses) since the prohibition on circumvention of access controls came into effect at the end of the 2000 proceeding should weigh heavily in the balancing that is this proceeding's "ultimate task."

Organization of the Joint Reply Comments

In providing our responses to the majority of the 86 "classes of works" proposed by the 50 submissions in the initial round, these Joint Reply Comments are organized into a number of categories, based upon what we believe to be common themes among disparate submissions that sometimes used different words to characterize the class of works for which it should be allowable to circumvent access controls during the next three years. These categories are necessarily somewhat arbitrary in their delineation, but such an approach seemed to be the best way to respond comprehensively to the range of potentially viable proposals without undue repetition or overlap. These categories are listed below. Of course, we would be glad to provide further detail about our views or to answer any questions that may arise from this submission. Thank you in advance for your consideration of our views.

Respectfully submitted,

AFMA (formerly American Film Marketing Association)
American Society of Composers, Authors, and Publishers
(ASCAP)
American Society of Media Photographers (ASMP)
Association of American Publishers (AAP)
Association of American University Presses (AAUP)
The Authors Guild, Inc.
Broadcast Music, Inc. (BMI)
Business Software Alliance (BSA)
Directors Guild of America (DGA)
Interactive Digital Software Association (IDSA)
Motion Picture Association of America (MPAA)
National Music Publishers' Association (NMPA)
Professional Photographers of America (PPA)
Recording Industry Association of America (RIAA)

Screen Actors Guild (SAG)
SESAC, Inc.
Writers Guild of America, west (WGAW)

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Categories for Joint Reply Comments

- Section I. Compilations Consisting of Lists of Websites Blocked by Filtering Software
- Section II. Works Protected by Malfunctioning, Damaged, or Obsolete Access Controls
- Section III. Public Domain Works
- Section IV. Regional Encoding of Audio-visual Works on DVD
- Section V. Works in Formats Linked to a Particular Device, A Limited Number of Devices, or Devices with Particular Access or Playback Technologies
- Section VI. Circumvention for the Purpose of Non-Infringing Use
- Section VII. Works Sought to be Used for Archival, Preservation, and Migration Purposes
- Section VIII. Works in E-Book Format Sought to be Accessed by Disabled Persons.
- Section IX. Works Protected by Access Controls Whose Circumvention is Needed to Carry Out Security Research and/or Remediation
- Section X. Other Submissions

Section I.

Proposed Class: Compilations consisting of lists of websites blocked by filtering software applications.

Initial Round Submissions:

29(3)
31
32(1)
33(2)

Summary of Argument:

These submissions call for recognition in 2003 of one of the exemptions created in the 2000 rulemaking. Congress clearly intended that such exemptions be considered de novo in each triennial rulemaking proceeding with the burden of persuasion remaining on the proponent. The contrary argument made in Submission 33 should be summarily rejected. Submissions 31 and 32 have not met their burden, at least on this record. Proponents should be required to explain why the works in question are not sufficiently available to researchers without the need of an exemption pertaining to access controls, and to provide more evidence that the adverse impact is, in fact, substantial. If on a supplemented record proponents can carry their burden of persuasion, any exemption the Librarian might grant in this area must be limited to the types of filtering software where circumvention has been carried out under the expiring (2000-03) exemption, and must exclude network security software. Furthermore, the exemption should apply only to works not reasonably available with the consent of the owner of copyright in the compilation or by some other means not involving a violation of Section 1201(a)(1).

Argument:

These submissions propose that the Librarian create in 2003 an exemption to Section 1201(a)(1) for a class of works identical to one created in the 2000 rulemaking, and which will expire on October 28, 2003.¹ 37 C.F.R. § 201.40 (2000).

At the outset, the Librarian should summarily reject the argument put forward by the Library Associations that this exemption should be recognized in this rulemaking “absent evidence that the problems which originally warranted the exemptions have been corrected by the marketplace.” Submission 33, at 5.² In effect, this approach shifts the burden to opponents of the exemption to demonstrate why it should not be granted for the period 2003-2006. It could hardly be clearer that this allocation of the burden is contrary to the intent of Congress and to the ground rules established for this proceeding by the Copyright Office. As the Register stated in her notice initiating this proceeding, “[t]here is a presumption that the prohibition will apply to any and all classes of works, including those as to which an exemption of applicability was previously in effect, unless a new showing is made that an exemption is warranted. Final Reg.,

¹ Submission 31 uses the label “censorware” in addition to “filtering software.”

² Submission 29 takes the same unjustified approach. Submission 29, at 10.

65 FR 64556, 64558. Exemptions are reviewed de novo and prior exemption will expire unless the case is made in the rulemaking that the prohibition has or will more likely than not have an adverse effect on non-infringing uses.” Notice of Inquiry, 67 Fed. Reg. 63,578, 63580 (Oct. 15, 2002) (hereafter “NOI”).

The most extensive submission in support of this proposed class, Submission 31, attempts to meet the requisite burden of persuasion. This submission contains evidence that the existing exception has been relied upon on several occasions since October 2000 by the submitter (Seth Finkelstein) and by other parties to gain unauthorized access to the lists of websites contained in certain filtering software applications. These applications, which Finkelstein labels “censorware,” are apparently designed and marketed primarily to provide a means for blocking access to sites that are deemed harmful to children, unsuitable for public display in a public library, or for some other reason objectionable to some segment of the public. Finkelstein, and other parties relying upon the currently recognized exception, have (according to the submission) used the lists to which they have gained access in non-infringing ways, specifically in ways that (they assert) fall within the scope of the fair use defense to infringement. The submission demonstrates primarily that Finkelstein and other parties have conducted research and publicized results that comment critically upon the effectiveness and precision of these applications in blocking objectionable sites, and upon the extent to which they instead block sites which should not be blocked (because they would not be deemed objectionable).

Finkelstein candidly admits that not all of the research that he and his colleagues wish to undertake with respect to “censorware” programs requires obtaining unauthorized access to the lists by decrypting them in a way that might otherwise violate Section 1201(a)(1). In fact, according to Finkelstein, expert testimony by Ben Edelman based upon such non-decryption research methods appears to be a factor in the result achieved in the highly publicized federal court decision striking down Congressional mandates for the use of such filtering software in libraries. *See American Library Ass'n Inc. v. United States*, 201 F. Supp. 2d 401, 435 (E.D. Pa.) (finding unconstitutional certain provisions of the Children’s Internet Protection Act), *prob. juris. noted*, 123 S. Ct. 551 (2002). But he asserts that “deeper, more in-depth” investigations, of the sort that expose problems that cannot be “fixed in [the] next release” of the application in question, could not be undertaken without a reasonable fear of legal jeopardy under Section 1201(a)(1) unless an exemption were recognized. Submission 31, at 5. Another submitter in support of the same proposed class states that the exemption is needed in order to discover the contents of the list of websites “in its entirety” and to “find everything” about “what these products block.” Submission 32, at 1.

The Joint Reply Commenters are not in a position either to confirm or to contest the factual allegations made in these submissions. However, assuming the truth of all these allegations, we question whether the case for an exemption has been made, and believe that a stronger record may be needed, in at least two areas. Finally, even assuming that the record were supplemented in these areas, we do not believe that such a record would support the recognition of as broad an exemption as these submitters seek.

First, as noted, the submitters concede that researchers have been able to achieve at least some of the goals of their assertedly non-infringing uses of the website lists without taking action

(i.e., unauthorized decryption) that would violate Section 1201(a)(1) in the absence of an exemption.³ This raises questions of whether the work in question is sufficiently available to them for non-infringing uses without an exemption, and, whether the impact of the prohibition upon their acts of criticism, comment, research and the like is sufficiently substantial to warrant recognition of an exception. See Section 1201(a)(1)(C); NOI, at 63,580-81. As with the availability of works in unprotected formats, the availability of partial lists of websites, even when access to the full list is protected by encryption, may be sufficient, even if not “preferred or optimal,” to allow these members of the public to make the non-infringing use of the work that they seek. The extent to which this is the case should be “a factor to consider in assessing the need for an exemption,” and submitters should bear the burden of demonstrating more clearly that these alternative routes to the goal of their non-infringing use are not, in fact, sufficiently available. 67 Fed. Reg. at 63580.

Second, because the proponent of the exemption must show that the claimed adverse effect of Section 1201(a)(1) on his non-infringing use is or is likely to become “substantial,” and that it is not “[d]e minimis or isolated,” *id.*, we suggest the Register should require proponents to make a more complete record on issues such as (1) how many members of the public have made use of the exemption that has been in existence since 2000; (2) how often or how frequently they engage in activities that would otherwise violate Section 1201(a)(1); and, (3) how much they expect to do so in the next three years if the same exemption is recognized in 2003..

Assuming that proponents supplement the record sufficiently to carry their burden of persuasion with respect to the need for an exemption, the Joint Copyright Owner Commenters believe that any exemption granted must be more narrowly tailored in order to comply with the mandate given by Congress to the Librarian. To do so, at least two qualifications must be added to the exemption sought by these submitters.

As described above, the evidence presented in these submissions is directed exclusively to “filtering software” used to prevent access to Internet sites containing material deemed objectionable to children or otherwise inappropriate for some segment of the public or for display in a public setting. But the exception is not explicitly limited to that type of filtering software; and filtering software is also used for many other purposes. These include security-related purposes, such as to prevent infection of a computer network by web-based viruses, or to monitor certain kinds of attacks upon secure computer systems. Many of these security-related filtering software applications also contain “lists of websites” that are deemed to present or to harbor threats to security or system integrity. If the exemption were recognized in the wording sought by these submitters, these security-related applications could become open to unauthorized access, with potentially serious implications for computer and network security. Furthermore, while such lists could be resident in the software package installed on the user’s computer, often they are maintained on a remote server. In such a case, circumvention of access

³ After all, a research method that contributes (through expert testimony) to the invalidation on constitutional grounds of an Act of Congress is nothing to be sneezed at. Finkelstein notes that his research, using methods relying upon the exemption established in the Initial Rulemaking, was cited and “seems to have been a factor” in the CIPA decision. It is worth noting, however, that Edelman has asserted that the CIPA court partly relied on his expert testimony on overblocking in reaching its decision. See *Edelman v. N2H2, Inc.*, 02-CV-11503, Complaint for Declaratory and Injunctive Relief, at 12 (D. Mass. July 7, 2002). Finkelstein identifies Edelman as the researcher who used the method that does not rely upon decryption. See Submission 31, at 5.

controls means hacking into a secure computer, potentially exposing other sensitive data to inappropriate dissemination. Such behavior should not be condoned by an exemption to liability under Section 1201(a)(1), particularly when the evidentiary record is completely silent on any need to allow circumvention in this circumstance in order to carry out legitimate non-infringing uses.

It is understandable that the phrasing of the exemption recognized in 2000 was not as sensitive to computer or network security concerns as one would expect it to be in today's environment of heightened security awareness. If such an exemption is recognized in this proceeding, it should be limited to what the proponents describe as "censorware," and should not extend to "lists of databases" in network security software.

Second, the exemption sought by these submitters is so broadly phrased as to apply even in cases in which access to the compilation in question could readily be obtained through legitimate means, i.e., with the authorization of the copyright owner. We recognize that the proponents have offered evidence indicating, in at least some cases, the compilers of the encrypted lists of blocked web sites in these applications have claimed them as trade secrets and have refused access to researchers. Submission 31, at 7. We have no reason to doubt this and are prepared to assume that neither Finkelstein nor his colleagues would have been granted access to the lists in any of the instances in which they found it necessary to circumvent the encryption protecting the lists. However, the exemption they seek is not, by its terms, limited to cases in which access to the full list could not be obtained with the consent of the owner of copyright in the compilation or by some other means not involving a violation of Section 1201(a)(1). It is essential that such a limitation be included in any exemption recognized in this area in order to arrive at a result that is fully supported by the evidence and consistent with the intent of Congress in establishing this rulemaking procedure.

It is instructive in this regard that most of the statutory exceptions to Section 1201(a)(1) depend upon either a showing that the material to which access is sought is not otherwise reasonably available, or that authorization for the circumvention has been obtained or at least requested in good faith. *See* 17 U.S.C. § 1201(d)(2) (library exemption inapplicable if copy of work is "reasonably available in another form"); 17 U.S.C. § 1201(f)(1) (reverse engineering exception inapplicable if information sought is "readily available"); 17 U.S.C. § 1201(g)(2)(C) (encryption research exception inapplicable without "good faith effort to obtain authorization"); *see also* 17 U.S.C. § 1201(j)(1) (security testing exception applies only when circumvention is carried out with authorization of computer system owner or operator). The path clearly marked by Congress in these provisions balances the relevant interests by making a particular act of circumvention legally justified only if reasonable steps have first been taken by the party seeking to perform the act.

The reason for such an approach is readily apparent. In some circumstances, a copyright owner would consent to permitting or even providing access for non-infringing uses in order to prevent the situation in which his work may be placed "in the clear" for a wide range of uses, including infringing ones. Even if this result would not have occurred in the cases described by the submitters, the evidence they have offered provides no reason for extending the exemption they seek so broadly that it would cover such situations. The assertion of a strong public interest

in access to the information contained in a work to which access controls apply – a claim that could be made with respect to many copyrighted works – is by itself insufficient to justify an exemption in this proceeding that would apply without regard to whether the information is available through other means that do not require circumvention. A more carefully calibrated class of works, excluding those that would be reasonably available to the would-be circumventor with consent of the copyright owner or in other ways not requiring circumvention, would work no hardship upon the submitters in this proceeding, but would maintain the balance struck by Congress in related areas and help to protect these copyrighted works against more nefarious uses than those contemplated by the submitters.

Section II.

Proposed Class: Works protected by malfunctioning, damaged or obsolete access controls.

Initial Round Submissions:

18
29(4)
30(6)
32(2)
32(3)
32(4)
32(5)
33(1)
35(1)

Summary of Argument:

Most of the submissions analyzed in this section call for the Librarian to recognize an exemption identical to, or based upon, an expiring exemption created in 2000. But some of these proposals (e.g., Submissions 29(4), 32(2), and 33) offer virtually no supporting evidence, apparently ignoring the fact that Congress clearly intended that such exemptions be considered *de novo* with the burden of persuasion remaining on the proponent. Submission 30(6) provides two examples but neither falls within the scope of the expiring (2000) exemption which the submission seeks to revive. Submission 32(3) proposes (with little evidentiary support) to expand the expiring exemption to cover access controls that have not yet failed but are likely to fail in the near future. The justification for allowing someone to break through a protection today because it may not work tomorrow is unpersuasive.

Submission 32(5) proposes an exemption for circumventing access controls where the copyright owner fails to provide support means. Although little factual support is provided for the proposed exemption, Submission 32(5) does call to attention serious flaws in the expiring exemption, which is not limited to cases where the provider of the copyrighted material has gone out of business or has demonstrably refused, in response to a good faith request, to provide assistance to access a work protected by a malfunctioning access control mechanism. These two

limitations must be included if the expiring 2000 exemption in this area is revived in any form in 2003.

Finally, Submission 35(1), addressing copy-protected CDs, is out of the scope of this proceeding because, among other things, it appears that the proposal is directed at copy controls that inadvertently deny access by virtue of a malfunction, rather than to technical measures that control access in the ordinary course of their operation. In any event, this submission does not meet the requisite burden of showing a substantial adverse impact caused by Section 1201(a)(1).

Argument:

In the 2000 rulemaking, the Librarian created an exemption to liability under Section 1201(a)(1) for circumvention of access controls that protect “literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage or obsolescence.” Final Rule, 65 Fed. Reg. 64,556, 64,564-66 (Oct. 27, 2000) (hereafter “2000 Final Rule”). This exemption expires on October 28, 2003. In the initial round of this proceeding, several submitters have proposed either that an exemption for precisely the same class of works should be recognized for the 2003-2006 period (see Submissions 30(6), 32(2) , and 33(1)), or for a similar class (see the other submissions listed above). The Joint Reply Commenters do not support the recognition of any of these exemptions, based on the evidence currently in the record.

At the outset, the Librarian should summarily reject the argument put forward by the Library Associations that this exemption should be recognized in this rulemaking “absent evidence that the problems which originally warranted the exemptions have been corrected by the marketplace.” Submission 33, at 5. In effect, this approach shifts the burden to opponents of the exemption to demonstrate why it should not be granted for the period 2003-2006. It could hardly be clearer that this allocation of the burden is contrary to the intent of Congress and to the ground rules established for this proceeding by the Copyright Office. As the Register stated in her notice initiating this proceeding, “[t]here is a presumption that the prohibition will apply to any and all classes of works, including those as to which an exemption of applicability was previously in effect, unless a new showing is made that an exemption is warranted. Final Reg., 65 FR 64556, 64558. Exemptions are reviewed *de novo* and prior exemption will expire unless the case is made in the rulemaking that the prohibition has or will more likely than not have an adverse effect on noninfringing uses.” NOI, at 63,580.

Some of the other submissions in this category also deserve summary disposition. For example, in Submission 30(6), submitter Mitchell provides only two examples that purportedly support his call for a new exemption identical to the existing one. Neither appears to involve literary works, nor an access control measure that is either damaged, obsolete, or malfunctioning. Mitchell appears to be complaining that certain access control measures on motion pictures and on other DVD content *do* work as intended, not that they *don't* work and therefore should be open for circumvention without liability.

Indeed, the only other submission that calls for recognition of an exemption identical to the one established for 2000-2003 also fails to adduce any evidence in support of the proposal.

Submission 32(2) simply asserts that “literary works are still subject to malfunction, damage or obsolescence,” and thus the 2000 exemption should be “considered for renewal.” Submission 32, at 2. This however falls far short of the showing required to justify an exemption under the NOI.

The author of Submission 32 (Samuel Greenfeld) proposes two other classes in this general category. First, he proposes that circumvention be permitted of access control mechanisms that have not failed to permit access yet but that are “at high risk of failure in the near-term future because of malfunction, damage or obsolescence.” *Id.* at 2. Since virtually no evidence has been presented by any submitter in support of recognizing de novo the exemption created in 2000, it seems doubtful that there would be any legal basis for appending to this exemption an “additional clause” as proposed by this submitter. In any event, the justification for allowing someone to break through a protection that works today because of the apprehension that it may not work tomorrow escapes us and we think therefore this appendage should be denied.

This proposal (Submission 32(3)) appears to be aimed more at the problem of deteriorating media than at obsolete access controls (and thus may be more relevant to the proposals based on preservation and archiving). In some of the examples it provides, such as bleed-through in magnetic tape, it is not clear that there is any access control present to be circumvented. Other cited instances show that a marketplace solution is in place and thus an exemption is not needed (e.g., Capcom’s service of reprogramming a circuit board to restore decryption keys lost due to power failure). It certainly does not provide an adequate basis for broadening the scope of the expiring exemption.⁴

Finally, Greenfeld proposes (Submission 32(5)) that circumvention of access controls protecting literary works be permitted when “the copyright owner and/or their [sic] designated agent fail to provide the necessary support means.” *Id.* at 5. Greenfeld characterizes this class as a subset of the expiring exemption recognized in 2000, and he is probably correct. The Final Rule issued in 2000 describes this exemption as needed because “vendors of the software may be non-responsive to requests to repair or replace the dongle,” or when “companies go out of business or... have insufficient incentive to support access controls on their products at some point after the initial sale or license.” 2000 Final Rule, at 64,556, 64,565. The malfunctioning dongle example is cited by Greenfeld as well, Submission 32, at 5.⁵

Like the other proposals for recognition of a new exemption similar or related to the expiring exemption, submission 32(5) provides very little factual support of the kind demanded in this proceeding for a de novo determination that such an exemption is warranted. NOI, at 63,580-81. However, it does serve to call attention to one of the most serious flaws in the expiring exemption – its excessive breadth. The exemption is in no way limited to those cases in which the provider of the copyrighted material, with its accompanying assertedly faulty access

⁴ The same submitter has proposed (Submission 32(4)) the class of “literary works, including computer programs and databases that can only be accessed indirectly via an access control.” Submission 32, at 4. The submitter notes that “this case is meant to compliment [sic] case #3,” *id.*, which we take to mean that it cannot stand if the class proposed in Submission 32(3) is not recognized.

⁵ However, Greenfeld’s example of a “lost ... access key” falls outside the scope of the expiring exemption, at least in the case of a dongle, because of the inability of the copyright owner to reliably determine whether this is a real case of loss or a subterfuge for infringement. 2000 Final Rule, at 64,566.

control mechanism, is in bankruptcy, or has exited the business of disseminating copyrighted literary works. Nor is it restricted only to those instances in which the provider has demonstrably refused or failed to provide timely relief in the form of assistance to access the work that has been blocked by a malfunctioning access control mechanism.⁶ The failure to include in the expiring exemption any objective and readily verifiable criteria for determining when it is not illegal to circumvent access control mechanisms on literary works virtually invites abuse. This failure must be corrected in any future exemption which the Librarian decides to recognize in this area in this proceeding.⁷

Finally, in the same general category, in Submission 35(1), submitters Electronic Frontier Foundation (EFF) and Public Knowledge (PK) urge that a new exemption be recognized for “sound recordings released on compact disc that are protected by technological protection measures that malfunction so as to prevent access on certain playback devices.” Submission 35, at 3. The heading of this section of their submission is “Proposed Class #1: Copy-Protected CDs,” and they express the view that technological measures to restrict copying of music CDs are not access control mechanisms and are therefore not within the scope of this proceeding. However, they nevertheless argue for an exemption on the basis that “some have suggested otherwise.”⁸ It is possible for a particular technological measure to control both access to and copying of copyrighted works, and it is difficult to discern exactly which technological measures are of concern to these submitters. However, they claim that the operation of copy control technologies may have the “unintended consequence or malfunction” of impeding access to the recording on certain playback devices. If that is the case, a fear of malfunction does not convert a copy control technology into an access control, nor does it provide any legal basis for creating any exemption to Section 1201(a)(1).⁹

⁶ As pointed out in Section I of these Joint Reply Comments, most of the existing statutory exceptions for Section 1201(a)(1) depend upon a showing that the material to which access is sought is not otherwise reasonably available, or that authorization for the circumvention has been obtained or at least requested in good faith. *See supra* page 5.

⁷ This is not our only objection to the expiring exception. We believe that it is broader than any “class of works” that Congress intended to be recognized, and that it is fundamentally flawed by the omission of any requirement that the would-be circumventor seek the assistance of the right holder before engaging in circumvention. However, we believe that the utter absence of evidentiary support for recognizing the expiring exception again makes it unnecessary to explicate its flaws further, at least at this point in the proceeding. While most individual members of the Joint Reply Commenters did not believe that there was an adequate basis in the record of the 2000 proceeding for the exemption then recognized with regard to malfunctioning, damaged or obsolete access controls, the record before the Register at this juncture is even flimsier in terms of support for a new recognition of that exemption or anything based upon it. Of course, it may be possible that a more developed record will provide a sufficient basis.

⁸ Submission 35, at 6-7 and n. 24, citing to a single article in *Computer User*. *Id.* at 7, n. 23. That article asserts that production of a CD burner that “will be able to both play and record copy-protected CDs” would “[f]ly in the face of the DMCA’s explicit ban on any method used to circumvent anticopying efforts.” Dan Heilman, *No Bad Copies*, *Computer User.com*, March, 2002 at <http://www.computeruser.com/articles/2103,4,27,1,0301,02.html>. The most plausible reading of what this article is “suggesting” is that trafficking in such a product would violate Section 1201(b)(1), which deals with tools for circumventing copy controls.

⁹ Indeed, if the technology acts as an access control solely because it is malfunctioning, it is difficult to understand how it could possibly meet the definition of an access control measure under Section 1201(a)(3)(B), which focuses on the function the measure performs “in the ordinary course of its operation.”

Even if there are access control technologies encompassed by this submission, the proposed exemption is not supported by the facts.¹⁰ EFF and Public Knowledge do not demonstrate that the problem they identify is causing a substantial adverse effect or is likely to do so in the next three years. To the contrary, it would seem if anything that this is an isolated or de minimis inconvenience. As the Copyright Office noted in the NOI, “conjecture alone would be insufficient to support a finding of ‘likely’ adverse effect.” NOI, at 63,579. EFF and PK state that “Copy-protected CDs already appear to be commonplace in many parts of Europe and Asia,” Submission 35, at 6, but any rule that emerges from these proceedings is not applicable to those continents; the, and the submitters make no such assertion about the United States. They list only four titles for which they indicate they have verified that copy protection technology has been deployed, one of which is a UK release. Nor do they say that it is commonplace for such CDs to be incompatible with certain PCs, game consoles, and other devices that use CDs that contain computer data. They state that such devices “may fail,” but they do not provide any evidence concerning the frequency of actual failures in the United States.

Their argument that a substantial adverse impact, even if not present today, is “likely” to occur over the next three years seems to boil down to the fact that “no major record label has renounced the use of protection technologies on CDs in the U.S. market.” Submission 35, at 6. This assertion that it is “safe to assume” that a significant change will take place falls well short of meeting the “burden of proving that the expected adverse effect is more likely than other possible outcomes.” NOI, at 63,579.

In addition, EFF and Public Knowledge seem to base their argument for an exemption on the assumption that consumers are entitled to play copy-protected music CDs on any device capable of using CDs as a data storage format, such as computers, game consoles, and the other devices they mention. Neither the Copyright Act nor the DMCA was ever intended to require, or to confer upon users a right of, complete compatibility among all devices in all media. *See* Section V of these Joint Reply Comments. To the contrary, the statute clearly states that the Copyright Office must consider alternative formats in which a work is accessible as a reason *not* to provide an exemption. 17 U.S.C. § 1201(a)(1)(C)(i). Therefore, even if the copy protection of which the submitters complain is a form of “access control,” it would appear that the wide availability players that freely play such CDs would provide the alternative means of access that defeats the need for an exemption.¹¹

¹⁰ Besides the issues discussed in the remaining text of this section, we note that Submission 35 contains certain arguments and implications that need not be addressed here. Our failure to address them should not be considered a concession of their correctness. Instead we simply note that further discussion is not necessary at this time. The reasons cited in the text are a sufficient basis upon which to deny the exemption sought.

¹¹ The Copyright Office NOI clearly states that “mere inconveniences to noninfringing uses” do not justify an exemption. NOI, at 63,580.

Section III.

Proposed Class: Public domain works.

Initial Round Submissions:

2
14(1)
35(4)

Summary of Argument:

It is true that Section 1201(a)(1) does not apply to circumvention of an access control that protects only a public domain work; but this simple statement does not end the inquiry. Copies of copyrighted works protected by access controls are often distributed along with material that is in the public domain, and Section 1201(a)(1) clearly applies to such mixed products. The argument for allowing circumvention in the case of e-books of public domain titles (Submission 14(1)) is flawed because these materials remain widely available in both print and unrestricted electronic versions. Submission 35, which calls for an exemption to circumvent access controls on public domain audio-visual materials, is subject to a similar objection. It also: (i) confuses access and copy controls; (ii) contains a number of factual errors with respect to availability of titles in alternate formats; and (iii) fails to demonstrate that its predictions about future developments are more likely than not to occur.

Argument:

At least three submissions ask the Librarian to recognize an exemption for some or all works in the public domain that are protected by access control technologies.¹² At the outset, we must address a threshold issue raised by submitters EFF and PK: whether Section 1201(a)(1) would even apply to an act of circumvention of access controls that had been applied to a copy of a work in the public domain. The submitters assert that the prohibition does not apply, “because a public domain work is not ‘a work protected under [Title 17].’” Submission 35, at 31. We agree with this statement but still question whether it is dispositive as a practical matter, because most of the products to which these submitters seek unauthorized access contain copyrightable as well as public domain elements. For example, public domain materials are often released in the form of a compilation, which enjoys copyright protection if its contents have been selected, coordinated or arranged in an original way. See 17 U.S.C § 103; *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*, 499 U.S. 340 (1990). Public domain works created by federal government employees, which are in the public domain pursuant to 17 U.S.C. § 105, are often packaged with fully protected works created in the private sector. The public domain literary titles cited by submitter Rolenz (*see* Submission 14) are often issued along with commentaries, indexes, and other critical apparatus which are fully protected by copyright, as a

¹² Submission 14(1), which urges that the exemption cover all such public domain works, clearly proposes a category that is too broad to qualify as a “particular class of works” under the Librarian’s interpretation of that phrase. 2000 Final Rule, at 64555, 64559-61.

compilation of different versions of the same public domain text could also be. Thus, it will rarely be the case that allowing circumvention of access controls for public domain titles would not also expose to unauthorized access works that are still protected by copyright.¹³

Turning to the submissions themselves, we do not believe that any of them carries the burden required to justify the recognition of any of the classes proposed in this area.

Regarding Submission 14, submitter Rolenz's primary concern appears to be the ability to copy (print) or create derivative works of public domain literary works available in various e-book formats. It is not clear that allowing him to gain unauthorized access to these e-book products would actually enable him to make these uses since they involve activities falling under Section 1201(b) (or that would fall there if the works were not in the public domain). Thus it is questionable that recognizing the exemption he seeks would enable the non-infringing uses he cites. Perhaps more importantly, there is no evidentiary showing whatever that access control measures are preventing or inhibiting any non-infringing uses. The titles he cites are widely available in a number of print editions which may be copied, lent, or read aloud at will.¹⁴ As his own submission implies, Submission 14, at 4, it is rapidly becoming cheap and simple to digitize and distribute literary works in the public domain, and indeed the titles he cites are already available in digital formats from a number of other sources not mentioned in his submission.¹⁵ Finally, anyone is free to license either of the e-book formats cited in his submission and to release versions of these works in which the capabilities he seeks are enabled. If customers desire these capabilities, then presumably the less fully enabled versions which he has encountered will be driven off the market or their publishers will change policies.¹⁶

Submission 35 also seeks an exemption which may not achieve the goal it purportedly seeks nor advance the core goal of this proceeding – to make works more accessible. In essence, EFF and Public Knowledge are not complaining that access control measures are making public domain audio-visual works less accessible to members of the public. Rather they argue that the use of a format that depends upon access controls (DVDs incorporating the CSS access control) is making these works more widely available, but not in all the formats they desire as a matter of

¹³ Submitter Eldred seizes on this fact to call for an exemption that applies whenever a work not protected by copyright is included in material that is protected by an access control mechanism. Submission 2. We do not agree with him that Congress relied upon a "false assumption" in enacting Section 1201(a)(1), and note that he provides no justification for why a copyright owner should be rendered powerless to legally prevent circumvention of an access control applied to its protected work simply because public domain material is included in the same package. Indeed, since virtually every work protected by copyright contains unprotected elements, such as facts and ideas, the logic of this submission would lead to the absurd conclusion that this rulemaking should suspend the applicability of Section 1201(a)(1) for all protected works.

¹⁴ There are nearly 100 different print editions of *Treasure Island* and over 30 different print editions of *Leaves of Grass* (we assume that is the Whitman work referred to by Rolenz). See www.bn.com. On the current competitive market in print editions of public domain works, see Bill Goldstein, *Publishers Give Classics a Makeover*, NYTimes.com (Feb. 10, 2003).

¹⁵ For instance, both *Treasure Island* and *Leaves of Grass* are available from Project Gutenberg, an online source for free electronic books, at <http://promo.net/pg/>.

¹⁶ Indeed, the Microsoft Reader version of *Treasure Island* cited by Rolenz allows copying, lending and reading aloud while the Adobe version does not. Submission 14, at 1-2. Evidently the market is taking care of his problem without the need for an exemption from Section 1201(a)(1).

convenience.¹⁷ Even if these digital versions are of better quality and durability than their analog predecessors (or even if there were no analog predecessors, i.e., the work was never commercially released on VHS), and even if they incorporate other attractive features enabled by digital technology, the authors of this submission assert that this trend actually has the effect of “removing currently available content from the public arena,” because of the access controls incorporated in the DVDs. Submission 35, at 33 (emphasis in original). There is no basis for this extravagant claim.

The submission claims that “the prohibition on circumventing CSS’s access control functionality precludes both access and the ability to excerpt or reproduce a CSS-protected work.” *Id.* The claim of reduced or precluded access is totally unsupported, and indeed counterfactual. It appears to boil down to the complaint that DVDs can only be played on players containing technology licensed by the DVD-CCA, and that the inability of consumers to “play them on any device” must be remedied by allowing them to hack through access control protections. This argument was roundly rejected by the Register and Librarian in the 2000 rulemaking¹⁸; and with the increased prevalence of DVD playback technology in the U.S. market to a much greater degree today than in 2000, it rings even more hollow now.¹⁹ Thus, EFF and PK’s complaint must go principally to the asserted preclusion of “the ability to excerpt or reproduce” the work – i.e., to make a full or partial copy. This preclusion does not implicate Section 1201(a)(1) which is limited to access controls, and therefore cannot be cured by an exemption to that provision.²⁰

Moreover, the claimed preclusion has not been demonstrated to exist to any significant degree. The past few years have seen a profusion of releases of public domain audiovisual material, bringing to a mass market a wealth of material previously accessible only in film archives and isolated public performances.²¹ In the face of this dramatic broadening of public access to this material, EFF and PK have identified exactly nine assertedly public domain titles that they claim are available in DVD but not in VHS. Submission 35, at 31 n. 101. But in fact, as to the majority of these titles, including the most celebrated one, this assertion is not true.²²

¹⁷ As the Librarian found in the 2000 rulemaking, “the motion picture industry relied on CSS in order to make motion pictures available in digital format ... [T]echnological measures on DVDs have increased the availability of audiovisual works to the general public...” 2000 Final Rule, at 64569.

¹⁸ “There is no unqualified right to access works on any particular machine or device of the user’s choosing.” 2000 Final Rule, at 64,569.

¹⁹ As of January of 2003, there were 40 million U.S. households with DVD players and 95 million DVD capable playback devices including DVD-ROM drives and videogame machines. See Greg Hernandez, *DVD Players Surge in Popularity Nationwide, Figures Show*, Daily News, Los Angeles, Jan. 10, 2003, at <http://www.harbus.org/main.cfm/include/smdetail/synid/73080.html>.

²⁰ As the Register noted in her 2000 recommendation to the Librarian, “[s]imilarly, in all of the comments and testimony on this issue, no explanation has been offered of the technological necessity for circumventing the access controls associated with DVDs in order to circumvent the copy controls.” 2000 Final Rule, at 64,568.

²¹ See, e.g., The National Film Preservation Foundation’s *Treasures From American Film Archives: 50 Preserved Films*, at http://www.filmpreservation.org/dvd_treasures.html making available 50 titles from 18 film archives nationwide, 45 of which were never before available on video (or DVD); see also Sinister Cinema at www.sinistercinema.com.

²² The Joint Reply Commenters do not concede either that these nine titles are all in the public domain, or that they are currently unavailable on VHS. Indeed, the most celebrated of them, Pare Lorentz’s *The River*, is available on VHS, contrary to EFF and PK’s claim. See www.facets.org. Most of the several Laurel & Hardy shorts that EFF and PK cite are also available on VHS. *Along Came Annie* [sic in Submission 35; should be *Along Came Auntie*] is

For any of the titles listed in the submission that are in fact currently available in DVD but not VHS, it does not appear from the record that any of these titles was *ever* available in VHS, in which case to rely on the decision to release them in DVD to justify an exemption to Section 1201(a)(1) would fall in the category of no good deed going unpunished.

Even if we were to assume the accuracy of the submission on this score, the inability of consumers to copy or distribute nine public domain titles because of copy control features associated with CSS is not sufficient to carry the burden assigned to proponents of exceptions in these proceedings. At most the proponents have demonstrated a “[d]e minimis or isolated problem [that is] insufficient to warrant an exemption.” NOI, at 63,580. It is also a problem that the marketplace may be fully capable of curing. If, despite the widespread availability on DVD, there is sufficient residual demand for versions of these public domain titles that can be copied (for instance in the VHS format, or in an unprotected digital format), there is no indication that prints of the films from which such versions can be made are not now available. Indeed, as the Librarian will no doubt be aware, film prints of many public domain audio-visual works are available from the Library of Congress itself and from many other public archives in the United States.²³ With the help of the Library of Congress and such organizations as the National Film Preservation Foundation (and its affiliated organization the National Film Preservation Board), these archival prints have been the source for a number of public releases in various formats.²⁴

Submission 35 also makes a passing reference to anticipated future developments *see* Submission 35, at 31, and it may be that its authors are asserting that an exemption is required because of the “likely” impact of the Section 1201(a)(1) prohibition over the next three years, even if not because of its current impact. If that is the intent of this reference, the submitters have failed to carry their burden of “proving that the expected adverse effect is more likely than other possible outcomes.” NOI, at 63,579. They cite one newspaper article in support of the assertion that VHS tapes will “cease to be produced in favor of DVDs,” Submission 35, at 31 and n.100, and seem to be asserting that “VHS format [will be] phased out” to a “significant” degree in the next three years. *Id.* This may be a plausible prediction, but it is equally plausible to foresee a much slower fade-out of VHS, particularly in small niches such as public domain titles.

Indeed, reports of the demise of VHS are greatly exaggerated. In 2002, home video sales amounted to \$12.4 billion, 35% of which, or \$4.4 billion worth, was made up of VHS sales. VHS rentals made up \$5.3 billion in 2002, or 65% of total rentals for that year. *See* Jill Kipins, *Consumers Spent \$8.7B on DVDs in 2002*, Billboard, Jan. 18, 2003, at 6. The tenacity of the audiocassette two decades after introduction of the compact disc format counsels humility in attempting to chart in advance the growth or demise of any particular platform. In any event, in this proceeding, far more than plausibility is required to justify recognition of an exception that is

available from Amazon.com in the compilation *Laurel & Hardy and Friends, Vol. 1*. *Any Bonds Today* is available from Amazon.com in the compilation, *Cartoon Crazy's Goes to War*; *Bromo and Juliet* is available from Movies Unlimited.com in the compilation, *Laurel & Hardy and Friends, Vol. 9*; and *Roughest Africa* is available from Amazon.com in the compilation *Laurel & Hardy and Friends, Vol. 6*.

²³ *See* Library of Congress Motion Picture and Television Reading Room: Obtaining Copies of Audio and Moving Image Materials, at <http://lcweb.loc.gov/rr/mopic/copies.html>. In addition to making copies for public use, reference prints are available for researchers and scholars at the Library and at all public film archives for on-site use.

²⁴ *See*, for example, the Library of Congress *Origins of Film* series, available from Amazon.com in VHS format.

not required by current conditions. *See* NOI, at 63,579. Nor is it the goal of this proceeding to guarantee that all works formats be perpetually available in all formats, so long as the content is accessible to the public.

Section IV.

Proposed Class: Regional encoding of audio-visual works on DVD.

Initial Round Submissions:

15(1)
15(2)
17
20(3)
32(6)
35(2)
36

Summary of Argument:

These submissions renew the call for an exemption to circumvent regional coding of audio-visual works on DVD, a proposed class of works rejected in the 2000 proceeding. None of these submissions meets the burden of showing that conditions have changed sufficiently to justify overturning the conclusion reached two and one-half years ago. A few submissions provide some statistical and anecdotal information about the growing use of the DVD format to distribute foreign language titles, but fail to prove that regional coding technology has been consistently invoked in a way that prevents U.S. viewers from gaining access to them. Nor do the submissions confront the fact that regional coding of foreign works can preserve market opportunities for authorized U.S. distributors whose activities can make the titles much more widely available to U.S. viewers. The submissions also fail to demonstrate why the alternative means identified in the 2000 decision for gaining access to these works have become less available than they were then. To the extent that these submissions also raise the issue of regional coding of videogames, which depends on a different access control mechanism than is used for movies on DVD, they fall far short of making the case for permitting circumvention, particularly under circumstances in which, as they appear to concede, the result would be an increased risk of piracy.

Argument:

The circumvention of regional coding of commercially released audio-visual works on DVD was extensively explored in the 2000 rulemaking proceeding. The Register concluded in her Recommendation (and the Librarian agreed) that this regional coding “serves legitimate purposes as an access control” and thus “encourages the distribution and availability of digital audiovisual works.” 2000 Final Rule, at 64,556, 64,569. While the coding did “restrict unqualified access to all movies,” the impact on the public was characterized as an “inconvenience rather than actual or likely harm, because there are numerous options available to

individuals seeking access.” *Id.* The Recommendation noted that the “a more compelling case for an exemption might be made” if “material is available only in digital format protected by region codes and the availability of alternative players is restricted.” *Id.*

This conclusion provides a roadmap for 2003, which several submitters in this proceeding have sought to follow. However, in our view, they have fallen short of their goal, at least based on the information in the record at this point, and their requests to suspend Section 1201(a)(1) so that they may circumvent regional coding of DVD’s should be rejected.²⁵

The technology of the regional coding protocol used in connection with CSS on DVD’s containing feature films is described in some detail in the record of the 2000 rulemaking (*see, e.g.,* Post-Hearing Comment 12 of Time Warner, Inc. (2000 Proceeding)) That technology has not changed substantially since then; it remains an option, separate from the overall CSS access control technology, which a producer may choose to employ or not on a CSS-compliant DVD. Nor has the purpose for which this technology is used (by those who choose to use it) changed from that which was specifically recognized by the Librarian in 2000 as legitimate and beneficial to the distribution and availability of digital audiovisual works. 2000 Final Rule, at 64,569 and n.13. The Librarian’s conclusion should be different from the one he made in 2000 only if there has been such a significant contraction of the availability of these works in non-regionally coded formats, and such a significant restriction in the availability in the U.S. of “alternative players” other than those restricted to region 1 material, as to cause a “significant adverse impact” within the guidelines for this proceeding.²⁶ Because neither of these things has happened, this proposed exemption should be rejected.

The predictions or speculation of some submitters about the future unavailability (within the next three years) of audio-visual material on formats other than CSS-protected DVD have been analyzed in the preceding section of this submission. *See supra* page 16. But that analysis has only very limited relevance to this set of proposed exemptions. The issue is not the availability of titles only in the DVD format, but the availability of titles only in the DVD format in which regional coding has been enabled and in which that coding has been set to prevent access of the DVD on Region 1 players . Thus the lists compiled by submitter Arromdee (Submission 15) (unpaginated submission)) of DVD-only titles are probative of very little. Nor is the citation in Submission 32 of an article reporting that a major retailer is cutting back on VHS product in favor of DVD, since there is no indication that the aisles of Blockbusters throughout America are being denuded of DVD’s accessible on Region 1 players (i.e., those that are coded to play in Region 1, or those on which the regional coding option is not invoked at all). Submission 32, at 6, n.11. Similarly, Submission 20(3), which is a broad-gauged attack on the

²⁵ Because videogame products, as well as movies, contain audio-visual works, and because access controls in the form of regional coding are applied to some videogames in DVD format for play on certain console systems, the exemption sought by some of the submissions discussed in this section could, if recognized, permit circumvention of videogame access controls as well. At least one or two of the submitters intend this result (see Submission 15(2) [unpaginated submission], Submission 32, at 6-8) but most seem to be focused on audio-visual material such as films that are distributed on DVD’s which use the CSS access control. Both the regional coding technology and the market conditions are different for videogames than for movies so we discuss the videogame aspect of these submissions separately at the end of this section.

²⁶ Region 1 DVDs are those intended for commercial release in North America. Region 1 players are those DVD players able to play Region 1 DVDs.

DVD-related access control technology generally, makes no real effort to quantify the scope of the problem allegedly caused by region coding specifically.

Several more targeted proposals seek the recognition of a class limited to works available only on DVD and in formats not coded to be playable on Region 1 players, and some of these make an attempt to quantify the extent of demand in the U.S. for such products. Submission 35(2) relies for this purpose upon a census of the number of foreign nationals in the U.S., the number of features from Australia, India, or Hong Kong that have been released in the U.S. only on DVD, and examples of features that were popular in foreign markets but have never been released in the U.S. See Submission 35, at 16-17. These statistics may be somewhat suggestive of the number of titles in this class and the U.S. demand for them, but they are presented in a way that tends to exaggerate both these quantities. For example, the submitters assert that although over 800 feature films are produced each year in India, “one estimate suggests that only 55 titles are available on region 1 DVD.” *Id.* at 17. This “estimate” appears to derive from a search of a single online database, on which the same submitters may also have relied to the detriment of their credibility in another aspect of their submission.²⁷ The estimate also does not account for the availability (whether within or outside the U.S.) of Indian titles in DVD versions on which regional coding had not been enabled. The record before the Register in 2000 indicated – without contradiction, we believe – that “Indian movies on DVD are usually coded as ‘all region.’” Time-Warner, Inc., Post-Hearing Comments, at 4 (2000 proceeding). The information available to us indicates that this has not changed since 2000,²⁸ and it would be the responsibility of proponents of the exemption to document that it has and thus that the class of works which they have identified has grown. Finally, whatever number is established as the right numerator for the fraction that EFF and PK are trying to derive – the proportion of Indian films available to the owner of a Region 1 DVD player – the denominator is not 800 (or some multiple thereof) but the number of Indian titles that have been legitimately released on DVD in any configuration, which is probably substantially lower.

Similarly, EFF and PK’s evidence about the extent to which distributors of foreign titles are shifting to release their product only in DVD format is not supportive of their proposed class unless it can be shown that these titles are coded not to be playable on Region 1 players. See *id.* at 17-18.²⁹ In fact, to the extent there is more than a negligible market for them, these titles could be expected, through market forces, to attract U.S. distributors to serve that market by making the title available in a format that can be played on the devices most Americans use. The use of

²⁷ See Section III of these Joint Reply Comments, in which we showed that of the nine purportedly public domain titles that these submitters claimed were available only in DVD, the majority were also readily available in VHS.

²⁸ The General Secretary of the Film Federation of India has advised MPAA that to the best of his knowledge, no major Indian film producer invokes regional coding on DVDs of its titles.

²⁹ Submitters’ citation of *Rabbit Proof Fence* as an example of a title whose DVD version would fall within the scope of their proposed class may be illuminating. See Submission 35, at 17-18. This title is still in theatrical release in the U.S. as of the time of filing of this submission, but according to EFF and PK it is available for purchase and U.S. delivery, presumably from Australian retailers, in a DVD format encoded for Region IV only. If the proposed exemption were in place today, the box office results for this film would undoubtedly be negatively impacted by the simultaneous availability of the option to buy or rent the DVD and to watch it at home on a player which circumvented regional coding, under the shelter of the exemption. This would frustrate precisely the purpose of regional coding which the Librarian specifically recognized in 2000 as legitimate and supportive of distribution and availability of digital audiovisual media making it less, not more likely it would be widely disseminated here. 2000 Final Rule, at 64,569 and n. 15.

region coding on the original release helps preserve the market opportunity for these U.S. distributors, and is thus precisely the kind of “legitimate purpose ... encourag[ing] distribution and availability” to which the 2000 Recommendation refers in rejecting the proposed exemption. 2000 Final Rule, at 64,569. Indeed, it stands to reason that foreign titles will become far more widely available to American viewers through authorized American distributors than they might through isolated, one-at-a-time imports under 17 U.S.C. § 602(a), so long as the distributors can be assured that regional coding access controls are respected in the United States.

In Submission 36, submitter Carroll focuses solely on Japanese anime titles and avoids some of the pitfalls that undercut Submission 35. But only in section 3.2.3 of his unpaginated submission does he unambiguously identify any titles that have been legitimately released to home video solely on DVD and in versions not playable on a Region 1 player. Furthermore, his estimate of the proportion of the U.S. DVD market represented by anime may be overstated because the \$250 million figure upon which he relies appears to refer to the U.S. anime market as a whole, not just to DVD sales, and certainly not just to sales of DVDs in formats that cannot be played on Region 1 players.

Finally, in Submission 16, submitter Trouw’s main complaint appears to be less that anime titles are not available in Region 1 formats, than that the versions which are available have been localized for the U.S. audience, and thus their content deviates in certain ways from the original.³⁰ Assuming the validity of this observation, it is not materially different from what occurs whenever a copyrighted work is reissued in an edition for a different national market. Judgments or simply errors made in translation, in subtitling or dubbing, or even in preparing an American edition of a British novel, can deprive the American reader, viewer or listener of some subtle or even significant aspect of the work to some degree. This hardly makes these works “unavailable “ to U.S. consumers in the sense required to demonstrate the justification for an exception to Section 1201(a)(1).

Assuming that proponents can, through supplementation of the record, demonstrate that regional coding substantially reduces the availability of some describable category of audio-visual works for a sufficiently large segment of the U.S. public, the inquiry must then turn to whether this amounts to an “inconvenience rather than actual or likely harm.” 2000 Final Rule, at 64,569. The exemption was not granted in 2000 in part because “there are numerous options available to individual seeking access to this foreign content (PAL converters to view foreign videotapes, limited reset of region code option on DVD players, or purchase of players set to different codes).” *Id.* None of the submissions demonstrates that any of these options are any less available today than they were three years ago when they were enough to justify rejection of the proposed exemption, nor do any of them provide any basis for concluding that they are likely to become less available in the next three years. Indeed, with the ongoing worldwide decline in prices for electronic equipment (in general) and for DVD players, personal computers with DVD drives, and DVD-playing videogame consoles (in particular),³¹ the last alternative, at least, is

³⁰ This concern is also stated, in more generalized terms, by submitter Greenfeld, see Submission 32, at 7.

³¹ For example, within the last six months, Sony has reduced the retail price of its Playstation 2 by \$100. See David Becker, *Sony Shaves Price of Playstation 2*, CNET News.com, at <http://news.com.com/2100-1040-912973.html?tag=mainstry>.

probably much more readily available to U.S. consumers today than it was in 2000, a trend that is likely to continue over the next three years.³²

None of the submitters appear to seriously contest this, arguing instead that the Librarian was simply wrong in finding in 2000 that these were viable alternatives. Submission 35 stresses that using an out-of-region player also requires “expensive multi-standard televisions or signal converters.” Submission 35, at 21. This is not new information. The Librarian cited “PAL converters” as one of the “options available” in 2000, and the record in that proceeding also established that the television format problem is by no means unique to the DVD environment. In many cases a user would still have to arrange for signal conversion even if she were to be able to circumvent regional coding. Time-Warner, Inc. Post-Hearing Comments, at 4-5 (2000 Proceeding). Submitter Carroll stresses that the limitation on the number of permissible region resets on DVD players might require a student to acquire a new DVD player every third semester. Submission 36 (unpaginated submission). This may be true in a given case but it seems indisputable that the cost of such a new acquisition is probably much less today than it was in 2000 and will probably continue to fall in price over the 2003-2006 time period which is the focus of this proceeding.

Finally, we turn to those submitters who ask for an exemption to circumvent regional coding on other works than movies protected by CSS, notably videogames.³³ While submitter Greenfeld makes passing reference to this in Submission 32, he provides virtually none of the quantitative data needed to demonstrate either that there is a significant problem or that existing options are insufficient either to solve it or to reduce it to a de minimis level, too small to support an exemption from Section 1201(a)(1). Submitter Arromdee confronts the issue a bit more squarely in Submission 15(2), but his argument is fatally compromised by his observation that “the easiest way to make a machine capable of playing imports and unauthorized software involves making it able to play everything, which would include pirated games.” Submission 15 (unpaginated submission). This notion of making pirate games available is precisely why an exemption allowing circumvention of videogame regional coding is not only entirely unwarranted, but positively objectionable. The proposed exemption would be impossible to keep from morphing into a more destructive green light for videogame piracy, already a serious problem plaguing this fast-growing copyright industry sector in the U.S. and abroad. Unlike the situation in CSS, regional coding is tightly integrated into the overall access control systems that many in the videogame industry use to fight piracy. Even 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.

³² The record of the 2000 proceeding establishes that nothing in the CSS license restricts the sale of players in the U.S. that are pre-set to play titles from another region. Time-Warner, Inc. Post-Hearing Comments, at 3-4 (2000 Proceeding).

³³ Submitter Greenfeld evidently believes this is also going to become a problem for consumers of foreign “videogame music soundtracks” once these works are migrated from audio CD to “region-coded media.” Submission 32, at 7. But he never specifies what those media are, when the transition is expected to take place, or how significant the U.S. market is for these works, other than to say that “a number of small U.S. importers ... make a decent living off it.” This statement falls far short of the required showing of evidence for any exemption.

The Register observed in her Recommendation in 2000 that there was a “paucity of evidence” in support of an exemption for circumvention of regional coding of videogames, and that the “few comments that mentioned this issue do not rise to the level of substantial adverse affect [sic] that would warrant an exemption.” 2000 Final Rule, at 64,570. The same must be said of the evidence in the current proceeding, at least to this point.³⁴

Section V.

Proposed Class: Works in formats linked to a particular device, accessible only on a limited number of devices, or only on devices with particular access or playback technologies.

Initial Round Submissions:

1
4
5
6
8
10
11(1)
11(2)
11(3)
13
15(1)
20(1)
20(2)
21
30(2)
30(3)
34
38(1)
38(2)

Summary of Argument:

The common theme of this large group of submissions is that circumvention should be allowed when an access control technology restricts the ability of users to access a work from multiple devices, hardware, or software platforms. Copyright owners have never been legally required to enable access to their products from a multiplicity of platforms; for over a century, this decision has been left to market forces. Similar proposals were rejected in the 2000 rulemaking, in which it was concluded that “there is no unqualified right to access a work on a particular machine or device of the user’s choosing,” a proposition since affirmed by the courts in cases under the DMCA. Restrictions such as tying access to a single (or limited number of)

³⁴ For further discussion of the issue of regional coding of videogame product, see the separate reply comments of Interactive Digital Software Association (IDSA).

devices, or to specified technological platforms, have proven to be “use-facilitating” in a variety of environments, and none of these proposals carries the burden of showing that such restrictions have caused a substantial adverse impact on non-infringing uses. The most specific proposal in this group, dealing with “ancillary” audio-visual works on DVDs, falls short because the non-infringing use on which it focuses – quotation for purposes of criticism – is already being carried out without circumventing access controls, and because the works in question probably would not even have been created but for the availability of the DVD distribution channel, which depends upon access controls.

Argument:

In this section we address a congeries of submissions that appear to share a common theme: that circumvention of access controls should be allowed when those controls limit the number or character of devices or software platforms that may be used to access them.³⁵ The targets of these submissions range from access control measures that allow a copy of a work to be accessed only from a particular single playback device (e.g., Submission 30(3) as to sound recordings and audio-visual works, Submission 20(1) as to literary works); that allow access only from a limited number of machines (e.g., Submission 13); that allow access only from devices running a particular access control program, such as CSS (e.g., Submission 15(1)), or on which a particular software platform has been installed (e.g., Submission 30(2)). As shorthand for the activities which these submitters wish to enable, we will sometimes use the term “platform-shifting.”³⁶

At the outset, it is worth making three general observations about platform-shifting.

First, there is nothing new about the decision to release copyrighted material into the market in a particular format that is technologically incompatible with other possible means of obtaining access to it. At least for the past century, since the era when piano rolls and wax cylinders contested for primacy in the affections of listeners to recorded music, this has been a business decision for copyright owners to make, based on their perception of consumer expectations and a host of other information about the market. Market considerations have often dictated release of works in multiple formats, but not always, and there has never been any legal compulsion to make works available in multiple formats, at least not from Title 17 of the U.S. Code.

Second, there is no basis for assuming that the manipulation of a copy or phonorecord of a copyrighted work that is required in order to platform shift is noninfringing under the fair use doctrine. Indeed, quite the opposite is usually true: in order to platform shift, especially from

³⁵ Some of these submissions also raise other issues that we respond to in separate sections of our submission.

³⁶ We question whether any of these submitters has proposed a “particular class of works” within the meaning of the statute as interpreted by the Register and Librarian. 2000 Final Rule, at 64,556, 64,559-. Some clearly do not (e.g., Submission 6). Some of the others propose a class consisting of the entire universe of works falling within a particular category listed in Section 102(a) of the Copyright Act that are distributed in copies (or phonorecords) employing a specific, named access control technology (*see, e.g.,* Submission 15(1)). The Recommendation suggested that such a “class of works” might be “permissible,” *id.* at 64,560, but we question whether it is sufficiently narrowly focused to meet the statutory requirement.

one incompatible format to another, it is usually necessary to make a complete copy of an entire work, and such verbatim copying has often been viewed by the courts as quintessentially non-transformative and thus unlikely to fare well under the statutory test for fair use. *See UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000).

Third, in today's environment, restrictions on the ability to platform-shift can certainly be "use-facilitating." The Office and the Librarian concluded as much in 2000 when they noted that the employment of access controls such as CSS on DVDs provided an "overall benefit to the public resulting from digital release of audiovisual works," 2000 Final Rule, at 64,569, and the same is true in other contexts. The "use-facilitating" character of these controls is particularly strong when the process for carrying out a "platform shift" places a previously encrypted work "in the clear" and vulnerable to all comers to make uses, including clearly infringing uses, unhampered by access controls. Thus, a format that does *not* include technological restrictions on platform shifting may offer an exceptionally unattractive path for copyright owners to follow toward a digital marketplace; and consequently, to allow such restrictions to be circumvented is not the best way to maximize availability and choice of copyrighted works in such a marketplace for the benefit of the public.

In any event, the proposed classes addressed by these submissions do not appear to be significantly different from those that the Librarian rejected in his Final Rule issued in the 2000 rulemaking. These proposals from the earlier rulemaking are summarized in the recommendation accompanying the Final Rule as "Audiovisual Works on Digital Versatile Discs (DVDs)," Final Rule 2000, at 64,567, which is almost the same formulation used by some of the submitters in the current proceeding (*see* Submission 11, 15(1)). More significantly, the Register concluded in her 2000 Recommendation (and the Librarian agreed) that "there is no unqualified right to access works on any particular machine or device of the user's choosing." 2000 Final Rule, at 64,569. The rejection of the platform-shifting proposals submitted during the 2000 rulemaking proceeding was based upon this principle, as well as upon the "commercially available options" and the finding that the use of "technological measures ... have increased the availability of ... works to the general public, even though some portions of the public have been inconvenienced." *Id.* These findings, we submit, are equally applicable to the proposals submitted in this year's proceeding that call for an exemption from liability for circumvention for the purpose of platform-shifting.

The approach taken by the Register and Librarian has since been buttressed by the conclusions reached by the federal courts in interpreting and applying Section 1201. These precedents make it clear that platform-shifting forms no part of the concept of fair use. As the Second Circuit Court of Appeals has noted, "[f]air use has never been held to be a guarantee of access to copyrighted material in order to copy it by the fair user's preferred technique." *Universal Studios, Inc. v. Corley*, 273 F.3d 429, 459 (2d Cir. 2001). A U.S. District Court, citing *Corley*, reached a similar result: "Defendant has cited no authority which guarantees a fair user the right to the most technologically convenient way to engage in fair use. The existing authorities have rejected that argument." *U.S. v. Elcom*, 203 F. Supp.3d 1111, 1131 (N.D. Cal. 2002).

While the non-infringing uses with which this proceeding is concerned are not strictly limited to those covered by the fair use doctrine, the principle of these judicial interpretations of Section 1201 is applicable to the full range of non-infringing uses of copyrighted works. The Register and Librarian were correct when they determined in 2000 that the impact of access controls that prevent or restrict platform-shifting did not rise to the level required to justify recognition of an exemption to Section 1201(a)(1). They should reach the same conclusion in this proceeding.

Several of the proposals covered by this section require more specific discussion.

Submissions 13 and 20(1) address access controls that limit (in some cases, to one) the number of devices upon which a purchaser or licensee of an e-book may access the literary work.³⁷ Neither submission makes any attempt to quantify the practical impact of these limitations, nor to place them in the context of the overall market for literary texts. The e-book market is a fledgling sector in which experimentation and change are still the norm. Different vendors with different formats are competing fiercely for primacy in different segments of this market. Nearly all titles available in this format are also available in traditional ink-on-paper format, in many cases from a range of sources in different editions.³⁸ Furthermore, in some cases different e-book editions of the same title are available, whether from the same or different sources, with varying rules about the degree to which the e-book may be accessed from more than one device.

In short, it would be a very rare occurrence for a consumer who seeks access to a given text to be “locked in,” with no alternative means of accessing the work, to a single electronic edition that tightly controls the number of devices upon which the e-book may be accessed. Neither of these submissions demonstrates the existence of a “substantial adverse impact” today, nor any basis beyond mere speculation for concluding that the impact will become “substantial” over the next three years. (It seems at least as likely that, if the desire of a significant number of users of e-books for looser restrictions is as strong as it apparently is for these two submitters, the market will develop in a way that provides licensing options that respond to that desire.) The picture presented, instead, is one of a limited number of users who may be impeded in their ability to access the literary text electronically in their “preferred or optimal format for use.” NOI, at 53,578, 63,580. Under the ground rules established for this proceeding, this falls far short of what is required to justify recognition of a new exemption to Section 1201(a)(1).³⁹

³⁷ Both submissions actually propose classes that are much broader than the evidence presented could support. Submitter Russotto simply proposes the class of “electronic books,” which does not describe a “particular class of works” within the meaning of the statute. Submitter IP Justice proposes a class encompassing all “literary works restricted by access controls that tether the work to a specific device or platform,” a category much broader than literary works distributed in e-book format. However, since the evidence it provides is entirely limited to e-books, we will assume for purposes of this reply comment that its proposed class, if adopted, would be limited to literary works distributed as e-books.

³⁸ As noted in more detail in Section VIII of these Joint Reply Comments, so far e-book editions have supplemented, not supplanted, print editions of the same title.

³⁹ See *infra* Section VIII; see also NOI, at 63,580.

Submission 20(2) presents a similar argument with respect to sound recordings,⁴⁰ citing to three articles that purport to show that “compact discs, music downloaded from the Internet, and other types of sound recordings are increasingly restricted by technological access controls that prevent owners from listening to their own recordings on the system they choose.” Submission 20, at 3. A particular technological measure may control both access to and copying of copyrighted works, but all three articles appear to focus on copy controls, not access controls. One article states that a record label “had incorporated copy-protection software in promotional CD copies” of a single title, apparently in the U.K. Laura Rhode, *Sony: Downbeat for a New Online Music Battle*, CNN.com, Sep. 27, 2001 at <http://www.cnn.com/2001/TECH/industry/09/27/sony.music.battle.idg/index.html>. A second one reports on “the first label to sell copy-protected CDs in the United States,” referring to the release of a single title. Brad King, *Music So Nice, You May Pay Twice*, Wired.com, Dec. 18, 2001 at <http://www.wired.com/news/mp3/0,1285,49188,00.html>.⁴¹ The third article describes software released by IBM that reportedly “can limit or prevent the copying of digital content onto recordable media, and can restrict users’ ability to move content from one electronic device to another.” Tom Spring, *IBM Updates Copy Protection Software*, CNN.com, Apr. 10, 2002, at <http://www.cnn.com/2002/TECH/ptech/04/10/copyright.software.idg/index.html>. Only the last example on its face may describe an access control technology, and there is no indication that any record label has ever adopted it. With regard to the others, nothing cited by the proponents provides sufficient information about the operation of the particular technologies to determine whether they involve elements of an access control or whether they are entirely outside the scope of this proceeding. See NOI, at 63,579. Even if the operation of a copy control technology unintentionally impedes access to the recording on certain playback devices, that does not convert the technology into an access control, nor does it provide any legal basis for creating any exemption to Section 1201(a)(1). And even if an access control were somehow implicated, it is virtually inconceivable that the presence of one or even a handful of protected releases in the

⁴⁰ The class proposed in Submission 30(3) also includes sound recordings, but the only examples given involve audio-visual works. We discuss it below.

⁴¹ This article also contains a brief reference to a legitimate online music subscription service – MusicNet – that employs some access controls so that, for example, a downloader whose subscription expires can no longer access files. This is not a platform-shifting issue, of course, and in any case the article (dated December 18, 2001, not February 4, 2002 as Submission 20 asserts) is badly out of date. Legitimate on-line music services have significantly changed their policies since the services were first introduced. For example, when pressplay was first introduced on December 19, 2001, its four tiers of service, priced from \$9.95 to \$24.95 per month, offered a set number of “tethered” (temporary copy) downloads for each month. All but the most basic plan also allowed a set number of permanent “burns” per month (i.e., downloads that could be burned to CD and thus played on any CD player). See *Pressplay to Launch Online Music Subscription Service; Offer Fans Streaming, Downloading, and Music Burning*, at http://www.pressplay.com/pressroom/pr_20011218.html. Today, pressplay offers three service tiers, priced from \$9.95- 14.95 per month, all of them offering unlimited “tethered” downloads, and two of them offering a set number of portable downloads, which can be burned to a CD and transferred to a portable device. See *The Service*, at <http://www.pressplay.com/thesevice.html>. Similarly, when Rhapsody was first launched by Listen.com in 2001, users were only able to stream music, not download it at all. See *Listen.com launches Rhapsody Digital Music Subscription Service*, at http://www.listen.com/about.jsp?sect=press&subsect=release&page=rhapsody_launch. Today, All Access Subscribers to Rhapsody (\$9.95/month) have the option of burning their own (untethered) CDs for \$0.99 per track, an unheard of convenience only a year ago. See *Subscription Plan Details*, at http://www.listen.com/rhap_about.jsp?sect=catalogs. All these changes are indicative of market pressures and undermine any speculation that technological restrictions on platform-shifting for sound recordings are likely to become more onerous in the coming three years.

U.S. market would add up to the “substantial adverse impact” that the statute requires before an exemption may be recognized.⁴² Finally, there is nothing to indicate that any (or any significant number) of sound recording titles that are subject to the technological controls that IP Justice targets are not also available in an alternative format that lacks such controls.⁴³

Submission 30(3) extends this argument to audio-visual works, at least in the sole example given in the submission (a single title is referred to, as are two services that provide downloads of feature films). But submitter Mitchell’s agenda is obviously much broader (and much farther outside the scope of this proceeding), since he titles this portion of his comment “Suppression of Lawful Trade in Copies and Phonorecords,” accompanies it with a long dissertation on antitrust and the doctrine of copyright misuse. He crafts his proposed class of works to include a given work if the access control is placed on it “by or at the request of the copyright holder,” but not if it is placed there by someone else. Submission 30, at 13 and n. 20. In terms of the ground rules applicable to this proceeding, however, the submission comes nowhere close to meeting the requirement to demonstrate a substantial adverse impact on the ability to make non-infringing uses. To begin with, it is not clear whether the technological measure which provides as the sole example is an access control (determining on which device a licensed copy of the film can be accessed) or a copy control (allowing copying only in a form which can be played back on a single device). Assuming it is an access control (and that it has been placed on the work “by or at the request of the copyright holder”), there is no basis for concluding that this restriction upon access to a single title (or even to multiple titles) rises to the level of a “substantial adverse impact,” especially if (as would appear to be the case) the same title is readily available in other formats to which this access control does not apply.⁴⁴ Instead, any impact on non-infringing use would appear to be “[d]e minimis ... isolated... [or a] mere inconvenience.” NOI, at 63,580. On the other side of the balance, it seems apparent that controls such as the one described are essential to minimize the smooth rollout of online distribution of feature films, minimize friction with other distribution modes, and keep down the cost of a download, compared to what it would have to be in order to take into account the possibility of access by multiple users on multiple devices for the price of a single transaction. In this regard, the technological measure is clearly “use-facilitating” and therefore supportive, not inhibiting, legitimate non-infringing uses.

⁴² Nor are all the uses described by this submission (which technological controls assertedly impede) necessarily non-infringing. They may seem so from a perspective that asserts that “copyright law has always been construed to empower users to ‘rip, mix, burn and create,’” Submission 20, at 3, but in fact a far more complex and fact-specific analysis is needed to determine whether the acts of reproduction, distribution, and public performance that are implicated by the activities described in the submission all fall within the ambit of fair use or any other exception to the exclusive rights of copyright owners in both the sound recording and the musical composition embodied therein. Nor is the Audio Home Recording Act as expansive as the submitter appears to believe, since even its broadest provision (17 U.S.C. § 1008) is a prohibition on enforcement actions, not an exception to protection, and it applies only to the use of certain devices or media as defined by the AHRA (and that chapter limits uses but only to those devices/media and only if they contain copy protection and abide by a proscribed statutory fee system).

⁴³ Further discussion of why an exemption is not warranted for CD copy controls may be found in Section II of these Joint Reply Comments.

⁴⁴ Though no film entitled *Dead on Arrival* (the title cited by submitter Mitchell) appeared on SightSound.com when it was viewed on February 3, 2003, there is a film entitled *D.O.A.* on the website, starring Edmund O'Brien and Pamela Britton, released in 1950. That film is available in both DVD and VHS formats on Amazon.com.

Taking the cause of platform-shifting one step beyond, in Submission 30(2), submitter Mitchell appears to be asserting that audio-visual works and sound recordings are not sufficiently available to subscribers to existing online download services such as Movielink, pressplay or MusicNet, because those subscribers are required to use specified software packages such as Real One Player or Windows Media Player in order to gain access to the copyrighted material. Considering that these software packages are virtually ubiquitous and are themselves available without additional charge, this proposal gives new meaning to the concept of “substantial adverse impact” that is the touchstone of this proceeding. Regardless of the merits, if any, of the thrust of this submission as a matter of antitrust law, it comes nowhere close to meeting the criteria set out in the NOI for making the showing required to justify an exemption in this proceeding.⁴⁵

Finally, we turn to Submission 21, which eschews the broad assault on the CSS access control technology previously rejected by the Register and Librarian in favor of a more targeted proposed class which was found, in the 2000 rulemaking Recommendation, to provide “perhaps the best case for actual harm in this context,” 2000 Final Rule, at 64,568, n.13: the “ancillary material” included in DVD releases but omitted from most VHS releases. This submission amply documents the characteristics of these audio-visual works, such as performances of the full feature with additional oral commentary, “making of” documentaries, interviews with cast and crew members, etc. It also shows the growing commercial significance of these ancillary works in marketing and publicizing the main motion picture to which they refer. What is never satisfactorily explained in the submission is why, now that these ancillary materials have become of *greater* professional and commercial value to actors, directors (including the directors of the “making of” films), producers and distributors of motion pictures, their protection against unauthorized access should be *lessened* (indeed, eliminated, at least for the next three years).

It is also unclear how the elimination of the prohibition on circumvention of access controls for these ancillary audio-visual works would have the desired effect of facilitating “quotation of [these works] for purposes of commentary and criticism.” Submission 21, at Sec. II (unpaginated submission). The critics on the Blogcritics site who are the main focus of this submission (*see* Sec. III (D)(iii)(5)) obviously already have access to these materials; they describe them in great detail in the posts excerpted in this submission. What they bemoan is the inability to copy portions of them to post on the site as part of their reviews. It is not clear how allowing them to gain unauthorized access to these products would actually enable them to make these uses since they involve activities falling under Section 1201(b). Thus, the extent to which recognizing the exemption submitter Miller seeks would enable the non-infringing uses he cites is questionable.⁴⁶

Submitter Miller presents numerous textual quotations from the Blogcritics site describing the content of these ancillary works in considerable detail. These belie his assertion that the illegality of circumventing access control measures is undermining their ability to engage in comment or criticism. While one may sympathize with their frustration at being

⁴⁵ Submission 34 proposes an identical class and should be disposed of in the same way as Submission 30(2).

⁴⁶ As the Register noted in her 2000 recommendation to the Librarian, “[s]imilarly, in all of the comments and testimony on this issue, no explanation has been offered of the technological necessity for circumventing the access controls associated with DVDs in order to circumvent the copy controls.” 2000 Final Rule, at 64,568.

unable to add video clips to their textual comments, it is now well established that the fair use doctrine does not create any right of access to material, and that, in the context of the current rulemaking, to be relegated to access in a manner that the critic does not consider optimal does not violate any cognizable right either. See *Universal Studios, Inc. v. Corley*, 273 F.3d at 459; *U.S. v. Elcom*, 203 F. Supp.3d at 1131; 2000 Final Rule, at 64,569. When submitter Miller asserts that “one is not to have his right [sic] to make fair use of a legitimately acquired DVD by circumventing CSS abridged by the plea that there exist other means to quote the work,” Submission 21, at Sec. III (D)(iii)(4), he is eloquent but manifestly wrong on the law and purpose of this proceeding.

The reasons upon which the Register relied in 2000 for recommending a rejection of a proposed exemption for these ancillary works are still valid today. She concluded at that time that “the availability of access control measures has resulted in greater availability of these materials,” 2000 Final Rule, at 64,568, n.13, and this remains the case today. Indeed, many of these works would never have been created but for the prospect that they would be distributed on a DVD protected by CSS. The increased volume and sophistication of these ancillary materials (as cited in this submission) is a direct result of the rapid growth of the DVD market and the growing realization that including these materials along with the feature film, delivers more value to the consumer and thus stimulates more sales and rentals of these products. In this sense the access control measures applied to material on the DVD (including these ancillary works) are use-facilitating. Those ancillary works which would have been produced even if the DVD format did not exist – for example, theatrical trailers – are increasingly available online in unprotected formats, from which the Blogcritics are free to quote.

Section VI.

Proposed Class: Circumvention for the purpose of noninfringing use.

Initial Round Submissions:

20(4)

20(5)

20(6)

28

30(1)

30(7)

Summary of Argument:

The arguments presented by submitters in this section are nearly identical to arguments proposed in the 2000 proceeding, and which were then thoroughly reviewed and rejected by both the Register and Librarian. Since no new evidence in support of any of these proposed classes of works has been brought forward as is required by this proceeding, there is no reason for the Register and Librarian’s conclusion to change. Therefore, these proposed classes of works (which as proposed are actually “uses,” not works) should not be exempted under Section 1201(a)(1).

Argument:

The arguments presented in this section are broadly directed more at particular uses than particular works. As such, they clearly fall outside the ambit of this proceeding, which is focused on identifying particular “classes of works.” *See* 2000 Final Rule, at 64,560 (“classifying a work by reference to the type of user or use . . . seems totally impermissible when administering a statute that requires the Librarian to create exemptions based on a ‘particular class of works.’”). For this reason alone, the Librarian and Register should reject the proposed exemptions.

Furthermore, these submissions propose classes that are virtually identical to those proposed in submissions made in 2000 that were thoroughly vetted and ultimately rejected by the Librarian and Register in those proceedings. For example, Submission 28 of the Association of American Universities proposes broad exemptions for Fair Use and "Thin Copyright" works. In the last proceeding, the Register and Librarian thoroughly explored and rejected this avenue, devoting entire sections of the 2000 Final Rule recommendation to its discussion. *See* 2000 Final Rule, at 64,566-67 (“thin copyright” works), 64,571-72 (“fair use” works).

The "Thin Copyright" work exemption that Submitter AAU et al proposes here is nearly identical to that proposed in the 2000 proceeding. "Thin Copyright" works are identified as "works that contain limited copyrightable subject matter, and which derive significant value from material in the public domain, such as facts, processes, ideas, or other elements beyond the scope of copyright protection." Submission 28, at 4. This is not noticeably different from the definition cited in the 2000 Final Rule recommendation: ". . . works consisting primarily (but not entirely) of matter unprotected by copyright, such as U.S. government works or works whose term of copyright protection has expired, or works for which copyright protection is 'thin,' such as factual works." 2000 Final Rule, at 64,566. Because Submitter's formulation of the class has not changed,⁴⁷ and submitter has not provided any new evidence warranting the exemption, there is no reason why the Register and Librarian's analysis of the proposed exemption should reach any different conclusion than it did in 2000. Therefore, the rationale dismissing the proposed exemption in 2000 will apply here as well.

In her 2000 recommendation, the Register stated that “the copyrightable elements in databases and compilations usually create significant value added. . . [and] [b]ecause it is the utility of those added features that most users wish to access, it is appropriate to protect them under Section 1201(a)(1)(A).” *Id.* Furthermore, the Register also noted that “Commenters have not provided evidence that uncopyrightable material is becoming more expensive or difficult to access since enactment of 1201, nor have they shown that works of minimal copyright authorship are being attached to otherwise unprotectible material to take advantage of the 1201 prohibitions.” Submitters AAU *et. al.* have not provided any evidence that the situation has changed. Thus, in this proceeding, these submitters have failed to meet the evidentiary burden to show why an exemption to 1201(a)(1)(A) is warranted.

Just as the "Thin Copyright" works issue was thoroughly addressed in the 2000 Final Rule recommendation, so too was the "Fair Use" works issue that submitters bring up again in this proceeding. Once more, submitters propose not a class of works, but a description of how

⁴⁷ *See* Submission 161 of the Association of American Universities, American Council on Education, National Association of State Universities (2000 proceeding).

works would be “used” which is clearly outside the scope of this rulemaking proceeding. The Register addressed this precise issue in her 2000 Final Rule recommendation: “[t]o the extent that proponents of such an exemption seek to limit its applicability to certain classes of users or uses, or to certain purposes, such limitations are beyond the scope of this rulemaking. It is the Librarian's task to determine whether to exempt any ‘particular class of works.’(emphasis added).” 2000 Final Rule, at 64,571. The 2000 Recommendation also noted that “the case has not been made that this is a problem or is about to be a problem,” *id.* at 64,572. Submission 28 provides no new evidence that would disturb this conclusion.

Finally, several submissions (20(4), 20(5), 20(6), 30(1), and 30(7)) propose an exemption to allow circumvention for a subsequent non-infringing use of a work by a party who has obtained initial lawful access to a copy of the work. These proposals are functionally identical to one that was extensively addressed by the Register and Librarian in the 2000 proceeding, and rejected by them at that time. *See* 2000 Final Rule, at 64,561-2, 64,572-3. Because the current formulation is not meaningfully different from the prior formulation,⁴⁸ and no sufficient evidence to change the conclusion reached in 2000 has been presented, there is no reason why the Register and Librarian's analysis should reach any different conclusion in this proceeding.

In the 2000 Final Rule recommendation, the Register noted that the proposed exemptions following this formulation went beyond the scope of the rulemaking. *See* 2000 Final Rule, at 64,573. The same is true here. Submitters are proposing that certain *uses* be exempt from the access-control provisions of Section 1201(a); they are not proposing that certain *works* be exempted. Therefore, these alleged classes of works, fall far outside the ambit of this rulemaking proceeding and should not be exempted from the protections of 1201(a)(1). Furthermore, it is worth repeating what the Register and Librarian noted in the last proceeding. Congress considered including an exemption for a very similar formulation, but ultimately decided against it. *See* 2000 Final Rule, at 64,573, *citing* HR 2281 EH, Section 1201(a)(1)(B). Therefore, “the fact that Congress ultimately rejected this approach when it enacted the DMCA, . . . is clear indication that the Librarian does not have the power to fashion a class of works based upon such a limitation.” 2000 Final Rule, at 64,573. As with other proposed exemptions under other sections of this reply comment, an exemption for this alleged class of works is more properly the subject of Congressional legislation, not a rulemaking procedure.

Finally, the evidence presented, notably by Submitters IP Justice and John T. Mitchell, does not meet the necessary burden to warrant an exemption. Many of the types of works Submitters seek to use are available in un-protected formats, and no evidence of any substantial adverse impact has been put forward. Other sections of this Joint Reply Comment, Section V in particular, have addressed the availability issue in more detail.

⁴⁸ Submissions 28(5) and 30(7) repeat almost verbatim the precise formulation rejected in the 2000 proceeding. Submissions 20(4), 20(5) and 20(6) vary the verbiage only to the extent of limiting the proposal to one of the categories listed in Section 102 of the Copyright Act. This is insufficient to overcome any of the reasons relied upon by the Register and Librarian for rejecting this proposal in 2000.

Section VII.

Proposed Class: Works sought to be used for archival, preservation, and migration purposes.

Initial Round Submissions:

23
24
25
42
47
48
49

Summary of Argument:

These submissions overlap to some extent with those discussed in section II of these reply comments, since in most cases they claim that technological obsolescence is impeding non-infringing archival activities, or the migration of digital materials to new platforms. However, it is not clear from the submissions that what is preventing these activities is indeed an access control which cannot lawfully be circumvented without an exemption. Submission 25 makes the strongest case, since it asserts that the archival privileges in Section 108 of the Copyright Act apply to submitter Internet Archive, but the specific type of protective technology it targets has previously been treated by the courts as a copy control, not an access control. Similarly to the submissions discussed in Section II, Submission 25 would be strengthened if limited to those access control technologies that are no longer supported because the entity providing them is out of business or explicitly refuses to assist an archivist that qualifies under Section 108. The availability of archival techniques not requiring circumvention also needs to be explored. The remaining submissions seek to circumvent to carry out activity that clearly does not fall under Section 108 and that may not be non-infringing at all. None of these submissions, in their current state, provides enough information to answer the questions summarized above, nor do they demonstrate the substantial adverse impact required to justify an exemption in this proceeding.

Argument:

The submissions discussed in this section all seek exemptions for the stated purpose of engaging in archival or preservation activities, or for migrating digital works from outdated or obsolete environments to newer ones. We do not support the recognition of any of these exemptions based on the record as it currently stands.⁴⁹

⁴⁹ We also do not believe that any of these submissions, with the possible exception of Submission 25, actually states a “particular class of works” within the meaning of the statute as interpreted by the Register and the Librarian. 2000 Final Rule, at 64,555, 54,559-61.

Submissions 23 and 24 both describe the problems faced by individuals who use computer programs that are discontinued, or older versions of programs that are no longer supported by the software publisher, or that run on platforms, which are or may soon be obsolete. It is not clear from the short descriptions in these submissions whether an access control technology is in place that is preventing the submitters from obtaining access to these programs, or to data which they have created using these programs. As was determined in the 2000 Rulemaking, if there is no such access control involved (within the meaning of the statute), then the submissions are outside the scope of these proceedings, and an exemption to Section 1201(a)(1) will not aid these submitters. *See* 2000 Final Rule, at 64,566. If there is an access control, and it is obsolete or malfunctioning, then these submissions may more properly be considered in the context of the submissions addressed in Section II of our submission.

For instance, submitter Hanson describes how he “lost the Alicec software utility” in a hard drive crash and therefore “cannot access [thousands of] animation images” that were compressed using the DOS-based Alicec software package. Submission 23, at 1-2. If the “utility” comprises or includes an access control as defined by the statute, then this may be an example of a “damaged or obsolete” access control as discussed in Section II. The justification for an exemption in this circumstance may depend in great part upon whether other avenues are available to Hanson to gain access to these images, either through an ad hoc inquiry to the software publisher (or its successor in interest) or through the availability on the market of authorized mechanisms for circumventing the access control technology. There are examples of commercial services offered by or with the consent of the copyright owner with the stated goal of enabling users to migrate files from older formats to more current formats that are more broadly supported. Obviously, such services are not available for all outdated formats, but where they are, the need for an exemption to Section 1201(a)(1) is especially questionable. Nor is it clear that all the activities that submitter Hanson describes are non-infringing. As discussed in more detail in Section V, platform-shifting often involves making verbatim copies of works, an activity that is presumptively infringing unless fair use or another applicable privilege or defense applies.

Submission 24 raises an additional and extraneous issue by targeting “click-wrap restrictions on use of data archival mechanisms, if enforceable through the DMCA.” Submission 24, at 1. Such restrictions are not “enforceable through the DMCA,” but rather are contractual obligations enforceable through state contract law, and thus are irrelevant to this proceeding. The issue here is not whether the “plausible techniques for obtaining the data [in an outdated format] ... violate ... the click-wrap agreement,” *id.*, but whether they violate Section 1201(a)(1). In that regard, and since the availability of access to the protected work through alternative means is a critical factor in the calculus, *see* NOI, at 63,578, 63,581, the presence of “commercially available. . . file format translators” that could solve this problem needs further exploration. Submission 24, at 1. Submitter Lewis asserts that these products are “not up to the task,” but if so this may be a problem that the market needs to be given a chance to address before any exemption is recognized. Similarly, submitter Lewis may be correct that vendors “may be unable or unwilling to provide a solution which is feasible to implement,” *id.*, but the framework of this proceeding requires not just speculation that a problem may occur, but concrete evidence that it has or that it is likely to, and that the adverse impact is “substantial”

rather than simply a matter of inconvenience or the unavailability of a preferred mode of access. These submissions standing alone do not meet that burden.

Submission 25 focuses solely on the impact of Section 1201(a)(1) on non-profit archival activities that assertedly fall within the scope of Section 108 of the Copyright Act. That provision contains exceptions to allow qualified libraries and archives to reproduce and distribute copies of works under specified conditions and purposes, but submitter Internet Archive claims that these are insufficient to allow it to carry out its archival activities, because, although it is able to copy the computer programs and other digital works that have been entrusted to it for archiving and preservation, it is then unable to access those copies, due to so-called “original-only” access controls that “deny access to any replica of the work in the ordinary course of operation.” Submission 25, at 4 and n.2. The submitter asserts that these are access controls, not copy controls, but that is far from clear. The submission refers the Register to *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255 (5th Cir. 1988) for a discussion of the technology in question; but that case describes a technology which is “designed to prevent the unauthorized duplication of programs,” and whose use is said to prevent the making of a “fully functional copy of a program.” 847 F. 2d at 256. Indeed, the ensuing discussion in the opinion regarding the applicability of Section 117 of the Copyright Act is premised upon the claim that the circumvention software enables users to “make archival copies.” *Id.* at 264. A technology which allows copying but which renders the resulting copies less than fully functional should be classified, in DMCA terms, as a copy control subject to Section 1201(b), not an access control. Of course, the *Vault* case long predates enactment of the DMCA, and the terminology it uses to describe the protective technology may not be determinative.

Internet Archive also describes its frustration in being “force[d] to rely for our historical record upon every individual copyright holder, many of whom may be unreliable archivists.” Submission 25, at 6. This certainly may well be an accurate description but it brings into focus the question of whether any exemption as sought by this submission should be contingent upon evidence that the copyright owner is unable or unwilling to assist in providing a means for circumventing the “original -only” technology, assuming it is an access control for DMCA purposes. Our comments in Section II of this submission may be relevant here, since they concern the more general question of circumvention of “obsolete” controls, a label which certainly seems to fit the technology described in *Vault*, and which seems generally applicable to the types of barriers Internet Archive appears to be encountering in its effort to preserve a digital historical record. Another issue requiring further exploration is whether alternative means not requiring circumvention are available to it in order to carry out its non-infringing activities, even if the Internet Archive considers them not optimal. For instance, many of the works it describes as included in the donation from Macromedia (as well as its example of a CD-ROM of letters) could be printed in hard copy or otherwise brought into the “analog realm of slowly degrading media,” *id.*, in which they could be preserved and archived without the need for repeated migration to new formats and the consequent (asserted) repeated need to circumvent access controls. This proceeding is not aimed at providing every user access to any and all available formats as a matter of convenience.

Finally, the situation of the Internet Archive, which assertedly qualifies for the greater copying privileges of an archive under Section 108, must be contrasted with the asserted claim of

submitter McNamee, in Submissions 47-49, that consumers need to “refresh” digital content of all kinds by repeated copying in new formats or even in the same format as the copy originally purchased. There is no indication that any of this unauthorized consumer copying activity is likely to be non-infringing and therefore the proper objective of an exemption to section 1201(a)(1). The same observations apply to submission 42, which also raises some of the platform-shifting issues addressed in section V of these reply comments.

Section VIII.

Proposed Class: Works in e-book format sought to be accessed by disabled persons.

Initial Round Submissions:

9
13
26
33(3)

Summary of Argument:

These submissions call for an exemption to allow print disabled readers to circumvent access controls on e-books in order to enable the use of Text-To-Speech (TTS) software on the underlying copyrighted material. The text-to-speech capability already exists for some e-books, and the proponents have not demonstrated the extent to which an exemption would be necessary to achieve their desired objective. Additionally, at present the e-book format is generally used to supplement print editions, not to supplant them, and the use of access controls on e-books has increased the availability of these texts to a number of broad segments of the public, as well as to print disabled persons in many cases. Based on the record compiled thus far, the proponents of these exemptions have failed to demonstrate the degree (if any) to which the relative inaccessibility of textual materials to print disabled persons has been caused by the prohibition on circumvention of access controls. Unless and until such causation is shown, the requested exemption should not be granted.

Argument:

These submissions all express the wishes of blind or visually disabled people to be able to circumvent access controls on e-books to the extent that those controls effectively limit their access to the literary works embodied in these products.⁵⁰ Most of the submissions seek roughly the same scope of an exemption. The focus of the Library Associations in Submission 33(3) is

⁵⁰ Submission 13 also puts forward two other reasons to allow circumvention of access controls on e-books. The first – to cut the “tethers” that allow some e-books to be accessed on only one or a limited number of devices – we respond to in Section V. The second is to allow researcher to perform “textual analysis” on the works, such as by creating concordances. Submission 13 (unpaginated submission). Presumably before the advent of e-books these tasks were performed manually. Given the small portion of the market represented by e-books and the continued availability of hard copy print editions in the vast majority of cases, it is hard to see how this concern rises above the level of inconvenience to meet the standard of “substantial adverse impact.”

on the ability to use standard screen-reader technology to “use text-to-speech synthesizers (TTS) to intercept text being written to a computer display so that it can be mechanically vocalized in response to user controls” and/or converted into “dynamic braille displays.” Submission 33, at 8. Submitter American Foundation for the Blind (AFB) seeks to achieve a similar goal. Submission 26 (“synthetic speech and braille devices”). So, apparently does submitter Russotto. Submission 13 (“screen-reader or other accessibility software”). The major commercial formats for the publication of e-books include options that, if consistently enabled, would probably largely satisfy the concerns of these submitters.

Submitter Weiss, however, calls for an exemption that would enable circumvention to allow disabled readers to overcome disabilities which are “as varied as the number of disabled people” and which he specifically asserts “cannot all be cataloged and addressed by e-book reader software companies.” Submission 9, at 1. His approach might require circumvention, not simply for the purpose of enabling an optional function that the publisher has chosen not to enable, but to put the entire work “in the clear” for whatever type of manipulation might be required to meet the stated needs of an individual reader. Obviously, this is a more sweeping proposal which raises more serious concerns about the security of literary works issued in this format.

One important question that is not addressed by any of the submissions is the extent to which e-books are being released without this TTS function enabled. In a proceeding in which the result may turn upon whether an adverse impact is “substantial” or whether instead it is more of an “isolated” or “de minimis” occurrence, the quantification of what is happening in the market would appear to be a critical aspect of the burden of persuasion that proponents of an exemption must shoulder. In this case, they have not met this burden. Trend data would also be important to meet this burden, although these submissions all seem to rely upon claims of adverse impact occurring today, not one that is only “likely” to manifest itself over the next three years. The submissions indicate that there could be (*see* Submission 33, at 12-13) or should be (*see* Submission 13 (“the market for unprotected electronic books is quite strong”)) a market solution to the problem as presented by all the submitters except Weiss, and even perhaps to a great deal of the problem as he conceives it. More data would shed more light on whether the prospects for a voluntary resolution are so poor that the Librarian must intervene by granting an exemption to the statutory prohibition.⁵¹

There is no gainsaying the assertion that blind and visually disabled people enjoy less comprehensive access to literary works than do the fully sighted. This fact has motivated a number of efforts by government and by volunteers (including many copyright owners and creators) to try to redress this imbalance, *see* Submission 33, at 10-11, and has led to enactment of several provisions of copyright law that exempt from infringement liability many activities undertaken with this goal. *See, e.g.*, 17 U.S.C. § 121, 110(8), and, the legislative history of Section 107 cited by AFB in Submission 26. Where all these submissions come up short in a critical fashion is in establishing any connection between this order of things and the prohibition contained in section 1201(a)(1).

⁵¹ Submission 26 focuses extensively on a market problem – inadequate disclosure by online retailers of the capabilities of e-books in their inventory – that seems beyond the scope of this proceeding to correct.

Today's e-book market, while significantly larger than in 2000, must still be considered nascent. At least at this relative early stage of the market for e-books, the new format has been used to supplement older distribution formats, not supplant them. The focus of publishers has been on standardizing e-book production processes and formats to enable simultaneous issuance of e-book and print versions of the same title. Nearly all titles remain available either in print form (from which they can, without infringement liability, be converted to formats more usable for print disabled persons), or in audiobook, braille, large print, or other versions in which they can be accessed directly by the vast majority of this population. Very few titles exist only in an e-book format, and even fewer in such a format that lacks a TTS option (or in which the publisher has chosen not to enable it). Conceding the assertion by the Library Associations that "fewer than 10% of the books published in the United States are ever made available to such individuals in accessible formats ... that are not subject to access controls," Submission 33, at 7, the number of titles made available in that fashion may be growing at least as rapidly as the total number of titles on the market. More importantly for this proceeding, there is no evidence that the foothold which e-books are establishing in the marketplace is crowding out these other accessible formats or making them less available than they were before e-books were first introduced. Indeed, to the contrary, at least some e-books are accessible, thanks to enabling of the TTS function, to print disabled readers, thus adding to the pool of works available to this population, not subtracting from it.

There is no question that overall the employment of secure e-book formats protected by access control mechanisms has been "use-facilitating," as that term has been used in the context of this proceeding, and that these formats have been "deployed, not only to prevent piracy and other economically harmful unauthorized uses of copyrighted materials, but also to support new ways of disseminating copyrighted materials to users." NOI, at 63,580; 2000 Final Rule, at 64,559, *quoting* House Manager's Report, at 6.⁵² Relying upon the availability of access controls for full text, many publishers of scholarly journals have made tables of contents and abstracts freely accessible on their websites. Because researchers can more accurately target their requests, they end up making more use of the articles they identify as relevant, with the end result that more people see and use these journals than ever before.⁵³ Anecdotally, one leading publisher suggests that requests for permission to use its materials in digital formats, which were denied nearly half the time prior to enactment of the DMCA, are now granted in 90% of cases. This indicates a much higher degree of trust in widely available access controls that prevent many unauthorized uses while at the same time enabling secure access by those who are entitled to it.⁵⁴

It can be argued that these illustrations of new non-infringing uses enabled by e-book distribution are not the specific non-infringing use that these submitters wish to promote. However, based on the record so far, it is difficult to articulate how the difficulties faced by print disabled persons in obtaining comprehensive access to literary works, real and substantial though

⁵² For instance, one format uses access controls to enable an automated library lending function that allows patrons to check out an e-book and check it back in. See www.openanc-book.org (July 2002 report). This is precisely the kind of technological controls that Congress realized could "make more works more widely available." House Manager's Report, at 6-7.

⁵³ Communication of American Institute of Physics to AAP.

⁵⁴ Communication of Houghton Mifflin to AAP

they be, can be laid at the door of Section 1201(a)(1). As the Librarian pointed out in adopting the Recommendation of the Register in the 2000 rulemaking proceeding, “the focus must be on ‘whether the implementation of technological protection measures ... *has caused* adverse impact on the ability of users to make lawful uses.’” 2000 Final Rule, at 64,558, *quoting* House Commerce Comm. Report, at 37 (emphasis added). *See also id.* at 64,559, *quoting* House Manager’s Report, at 6 (“the legislative history ... requires the Register and Librarian to disregard any adverse effects that *are caused* by factors other than the prohibition against circumvention”) (emphasis added); NOI, at 63,579 (“effects on noninfringing uses that are unrelated to section 1201(a)(1)(A) may not be considered.”). The flaw in the case laid out by these submissions is not in showing harm, but in proving causation: not in establishing that print disabled persons have been disadvantaged, but in demonstrating that the prohibition on circumvention of access controls on e-books has caused this harm, and that this harm outweighs the increased availability of works that these controls have made possible. The Joint Reply Commenters support increased availability of works in forms accessible to the disabled, but question whether this rulemaking is the proper or intended forum to accomplish this important purpose.

Section IX.

Proposed Class: Works protected by access controls whose circumvention is needed to carry out security research and/or remediation

Initial Round Submissions:

3
12
19
27
29
40

Summary of Argument:

These submissions ask the Librarian, in effect, to expand the exceptions already recognized in the statute (Sections 1201(j) and (g), respectively) for security testing and encryption research. It was already established in the 2000 rulemaking that this is an area in which the Librarian must proceed with particular caution because these were lines carefully drawn by Congress and not intended to be redrawn by the Library’s rulemaking proceeding. None of the submissions acknowledge the fact that much security-related development and testing activity does not implicate the DMCA prohibition at all because it does not involve an unauthorized circumvention of a mechanism that is controlling access to another’s work of authorship. None proposes a class of works that is narrowly formulated in accordance with the ground rules of this proceeding. And none demonstrates any substantial adverse impact on non-infringing activities that would otherwise violate the DMCA if an exemption is not granted.

Argument:

The initial round comments in this category have in common that they seek, in this proceeding, to expand the scope of existing statutory exemptions to Section 1201(a)(1), primarily those found in Sections 1201(g) (encryption research) and 1201(j) (security testing). As the Register noted in her Recommendation to the Librarian in the 2000 rulemaking, “[w]hen Congress has specifically addressed the issue by creating a statutory exemption for [defined activity] in the same legislation that established this rulemaking process, the Librarian should proceed cautiously before, in effect, expanding the [existing] statutory exemption by creating a broader exemption pursuant to section 1201(a)(1)(C).” 2000 Final Rule, at 64,571 (addressing the reverse engineering exception under Section 1201(f)). That caution should be applied here as constituting a further element of the burden of persuasion that the proponent of an exemption in this proceeding must carry. None of the proposals addressed below meets that burden and therefore they should be rejected.

In enacting the encryption research and security testing exceptions, Congress wanted to make sure that Section 1201(a)(1) was not applied to impede the development of stronger and more reliable means for safeguarding the security of digital resources of all kinds. This is a goal that has assumed increased national importance since enactment of the DMCA. It is important to remember, however, that the statutory exceptions only come into play once a *prima facie* violation of the prohibition itself has been demonstrated. This scenario rarely occurs in practice, because the vast majority of the research and testing that underlies the development of better security tools does not implicate the DMCA at all: these activities simply do not involve unauthorized circumvention of an access control used to protect a copyrighted work. Analyzing the characteristics or testing the strength of an encryption algorithm by itself, when it is not being used to control access to another’s copyrighted material, is more like testing the strength of a lock in the hardware store before purchasing it than it is like picking the lock after it has been placed on the door to another’s warehouse. *See* H.R. Conf. Rep. No. 105-796, at 67 (1998) (Conference committee report on DMCA); House Manager’s Report, at 16. One shortcoming of the submissions in this category is that they gloss over this distinction, and, to the extent that they engage the statute at all, focus solely on the breadth of the statutory exceptions.

Submission 27 asks for an exemption for access control research on the ground that non-encryption technologies as well as encryption technologies are used in access control mechanisms, and that the existing statutory exemption for encryption research (Section 1201(g)) shelters research about the latter but not about the former. One need not contest this premise to realize that this proceeding is not the proper forum for making this argument. The mismatch is obvious from the fact the submitter Felten is unable to formulate a proposed class of works that would both meet the criteria laid down in the 2000 rulemaking and avoid opening a huge loophole in the legal protections for access control technologies which far exceed the reach of this rulemaking. His first formulation, requiring proof of a “primary purpose to further a legitimate research project,” transgresses the conclusion of the prior rulemaking that “classifying a work by reference to the type of user or use ... seems totally impermissible when administering a statute that requires the Librarian to create exemptions based on a ‘particular class of works.’” 2000 Final Rule, at 64,560. Under his second formulation, as the submitter himself points out, “anyone would be allowed to circumvent any access control technology for any reason, provided

only that that technology was a potential subject of legitimate access control research.” Submission 27 (unpaginated submission). In other words, submitter Felten offers the Register the choice between distorting the framework for this proceeding and gutting the statutory prohibition itself. The Register should decline both invitations.

We suggest that she also decline to adopt the odd protocol which submitter Felten puts forward in the section of his submission entitled “The Librarian’s Analysis of My Request.” Submission 27. Beginning the inquiry with a decision about “whether legitimate research on access control technologies, considered as a whole, is beneficial or harmful to the public” is to lead it down a path that Congress has already fully explored and which is outside the scope of this proceeding. In enacting the DMCA, Congress acted with the stated purpose “to improve the ability of copyright owners to prevent the theft of their works, including by applying technological measures. The effectiveness of such measures depends in large part on the rapid and dynamic development of better technologies, including encryption-based technological measures.” House Manager’s Report, at 16. This indeed was the motivation behind enactment of the encryption research exception. Felten’s complaint is that this exception is not worded broadly enough to accommodate his research interests and those of some of his colleagues. This is an argument that can only be addressed by Congress and not by the Librarian of Congress in this proceeding.

In submission 29, submitter Hernan calls for the recognition of four proposed classes, but only one that seems on point for this section of our reply comments.⁵⁵ His proposed class is far broader than appropriate for recognition in this proceeding, and would extend to any access controls which have any of a range of “features, flaws or vulnerabilities presenting security or privacy risks.” Submission 29, at 1, 4. The problem (besides the excessive breadth of the proposed class) is that the method he proposes for determining whether an access control fits within this broad category and is therefore subject to circumvention without liability is to “circumvent or attempt to circumvent” the control, so long as “such conduct exposes features, flaws or vulnerabilities that present such risks.” *Id.* at 4. This logic seems circular, and either would permit the circumvention of any and all access control technologies (since such risks cannot be excluded a priori), or would make the permissibility of circumvention determinable only post hoc, and by a proposed standard that is ill-defined and which can only be subjectively determined.

We support submitter Hernan’s desire to see that access control technologies be subject to “research, challenge, test[ing] and otherwise stress[ed]” to identify any security or privacy risks. *Id.* In fact, the DMCA already provides ample leeway for doing so, both because many of these activities do not implicate the DMCA at all (see discussion above), or are already accommodated by the exceptions for security testing, encryption research, protection of personally identifying information, and in other provisions. See Secs. 1201(f) (reverse

⁵⁵ Hernan’s proposed class 2 describes the “computer software programs and databases ... that operate to control access to works...”. Submission 29, at 1, 6-9. In other words, he believes it should be legal to circumvent technologies that control access to access controls, if the latter controls possess flaws or vulnerabilities as described in his proposed class 1. We do not see how this class is not encompassed in class 1, but perhaps further elucidation will help explain this. Hernan’s remaining two classes are simply the same as those recognized in the 2000 rulemaking, and he provides no new evidence to explain why these exemptions should not simply expire. *Id.*, at 10. In any case, we have addressed these classes in sections I and II of our reply comments, respectively.

engineering); 1201(g) (encryption research); 1201(i) (protection of personally identifying information); 1201(j) (security testing). The developers of access control technologies, and in some cases the copyright owners of works protected by these technologies, can and do commission or consent to further “research, challenge and testing” that may go beyond the scope of these statutory exceptions. But to allow any legal acquirer of a protected copy of a work to unilaterally declare open season and set to work circumventing access controls, in the hope of identifying some vulnerability that would bring his unauthorized hacking within the scope of a new exemption, is far outside the authorized scope of this proceeding and Congress’ intention in adopting the DMCA exceptions, and would do nothing to relieve any “substantial adverse impact” of section 1201(a)(1) on non-infringing uses of copyrighted works.

Submission 40 attacks the DMCA along a broader front, but its main focus appears to be in the security testing and encryption research areas. The class it proposes for an exemption appears to be delineated solely by the specific uses which the circumventor of an access control wishes to make, a formulation that the Librarian has already determined is “totally impermissible” under the statute. 2000 Final Rule, at 64,560. Submitter USACM offers five “examples” in support of its proposal, with no indication as to whether any of these scenarios has ever occurred, and if so, whether anything more than an isolated example is involved. While hypothetical examples may be useful in delineating the scope of existing statutory exceptions, they are inapposite in this proceeding, which is neither intended nor empowered to revisit the exceptions already recognized by Congress.⁵⁶

Finally, three submissions (3, 12, and 19) appear to be motivated by concerns about specific incidents in which unidentified parties reached the conclusion that Section 1201 might expose them to criminal liability if they allowed U.S. citizens or residents to read information they had compiled or developed with regard to certain network security flaws. It is difficult to determine just what relief these submissions seek, but as far as we can tell their concerns appear to be misdirected in this proceeding. The dissemination of information about security vulnerabilities and their remediation could be relevant to at least two existing statutory exceptions to Section 1201(a)(1). *See* Section 1201(g)(3)(A) (whether and how information derived from encryption research was disseminated is factor for consideration in whether encryption research exception applies), and Section 1201(j)(3)(A) and (B) (how information derived from security testing is used is factor for consideration in whether security testing exception applies). Each of these provisions calls for a very specific, fact-bound inquiry whose outcome would be one of several factors a court would look to in determining whether a defense based on the given exception had merit. Such provisions epitomize the sort of carefully calibrated Congressional line-drawing that the Librarian should be especially “cautious” before tampering with in this proceeding. *See* 2000 Final Rule, at 64,571. When measured against the criteria set out in the NOI that proponents of new exceptions must fulfill, these submissions come up quite short. Unless and until it can be demonstrated that these submissions are anything more than attempts to redraw or perhaps obliterate the lines Congress drew to provide guidance about the applicability of specific statutory exceptions, they should be rejected.

⁵⁶ If the hypotheticals propounded by submitter USACM implicate conduct violating the DMCA at all, then a range of existing statutory exceptions may apply to one or more of them, including not only security testing and encryption research but also the broad exception recognized for law enforcement and intelligence activities, including those carried out by contractors. *See* Secs. 1201(e)-(g); 1201(i), (j).

Section X.

Proposed Class: Other Submissions

Initial Round Submissions:

7
14(2)
15(1)
16
20(6)
22
30(4)
30(5)
35(3)
41
50

Summary of Argument:

None of the proposals made in the submissions discussed in this section should be recognized. Submissions 7, 14(2) and 30(5) concern situations already fully considered by Congress and addressed in statutory exceptions that this proceeding cannot and was not designed to redraft. Submissions 22 and 35(3) fail to make the case that the impacts on non-infringing use that they describe are more than isolated examples or create problems that are more than inconveniences. Submission 30(4) is directed at licensing practices, not at Section 1201(a)(1). Submission 41 is directed at compulsory license provisions far outside the scope of this proceeding. Finally, Submission 50 may not involve access controls (the same is true of Submission 35(3)) and also fails to demonstrate a substantial adverse impact on non-infringing uses.

Argument:

This section groups together some submissions which require response but which do not fit easily into any of the preceding categories. In several cases, these submissions essentially call for re-drawing of lines already drawn by Congress in establishing specific statutory exceptions to Section 1201(a)(1), an area in which the 2000 Final Rule concluded that the Librarian and Register must “proceed cautiously” because “Congress has specifically addressed the issue” already. 2000 Final Rule, at 64,571.

Submission 7 discussed the use of access control technologies by criminals and the difficulties experienced by law enforcement in finding and using the appropriate tools to respond. This situation is squarely addressed by the law enforcement exception enacted by Congress as Section 1201(e), which makes Section 1201 in its entirety (not just Section 1201(a)(1)) totally inapplicable to authorized investigative and intelligence activities by law enforcement officials, and by private contractors working for law enforcement officials. This is

the broadest single exception in the DMCA. If, as submitter Colvin suggests, it is not broad enough, then Congress, not the Librarian, should be asked to broaden it further.

Submission 14(2) concerns so-called “spyware” software. While these programs may well raise significant privacy concerns, submitter Rolenz overlooks the fact that the DMCA has no impact on efforts – including those undertaken “ad hoc and ... by individuals on their own time,” Submission 14, at 7-- to identify or investigate these programs, except to the extent that such a program is used to “effectively control” access to copyrighted material within the meaning of Section 1201(a)(3)(B). As submitter Rolenz acknowledges, this is generally not the case: “encryption is generally used to hide information rather than to control access to it.” *Id.* Even if a “spyware” program were to be used as an access control measure whose circumvention is relevant to Section 1201, a specific statutory exception (Section 1201(i)) allows for circumvention of an access control if it (or the object it protects) surreptitiously collects personally identifiable information about the online activities of a party seeking to gain access. Nowhere in Submission 14 is it even asserted, much less demonstrated, that this existing statutory exception is insufficient to shield legitimate investigative activity from liability. Since we do not even know whether submitter Rolenz believes the statutory exception needs to be broadened, and if so why, no further consideration of his submission in this proceeding is warranted.

Submission 22 concerns scholarly journal articles whose authors wish to allow unrestricted access but whose publishers impose access controls. While submitter Suber contends that “it shouldn’t matter whether copyright-holder consent to open access is rare or frequent,” Submission 22, at 1, it does matter to this proceeding whether a claimed impact of Section 1201(a)(1) is isolated or widespread, *see* NOI, at 63,580, and this submission does not carry its burden of persuasion on that point. Authors of articles published in scholarly journals commonly transfer their copyright interest to publishers of the journals, and with it the right to decide whether or not access controls should be applied. In the case (which we believe to be relatively rare) in which the author retains copyright and the publisher, over the author’s objection, uses access controls with regard to a digital version of the journal, the circumvention of those controls would not even violate Section 1201(a)(1), unless it could be shown that the act of circumvention was undertaken without the author’s authorization. *See* Section 1201(a)(3)(A) (meaning of “to circumvent” an access control requires acting “without the authority of the copyright owner”). Thus the proposal in Submission 22 only addresses the situation in which the publisher contravenes the author’s instructions with regard to access control *and* in which the user is unable to contact the author to determine whether circumvention would be authorized by the author. In addition, for the proposed exemption to be of any value, the user would have to know (without contacting the author) that the author retained copyright, and that she wished her article to be available on an unrestricted basis. The number of cases that could pass through all these screens may be extremely small; at a minimum, submitter Suber has put forward no evidence to show the contrary. At bottom, the scenario he describes would appear to arise from a contractual dispute between an author and her publisher, in which the user seeks status as a third-party beneficiary entitled to use circumvention as a means of correcting the wrong done to the author. This proceeding is not the appropriate forum to accomplish this goal.

Submission 30(4) asserts that anyone should be entitled to circumvent an access control technology if he or she is also contractually forbidden to do so. It is not hard to discern that this

complaint is directed against licensing practices, not Section 1201(a)(1) itself. The enforceability of a license under which the licensee agrees not to circumvent a technological protection measure has nothing to do whether there is also a violation of Section 1201(a)(1), and an exemption to the operation of the statute would not make the license any more or less enforceable. Submitter Mitchell argues, in effect, that a violation of Section 1201(a)(1) should be actionable if there is no contractual agreement on the subject but not actionable if there is. It is impossible to square this outcome with the goal of this proceeding, since the asserted harm it would “cure” is by definition not caused by the statute, but by a contractual provision on the same subject.

Submission 30(5) calls on the Librarian to expand the privacy exception contained in Section 1201(i) to cover not only access control measures that surreptitiously collect personally identifiable information, but also those that collect such information openly and with the consent of the user, if the scope of such collection were deemed more than “reasonably necessary.” This is a classic example where the Librarian and Register should decline the invitation to re-set the balance struck by Congress in this statute, as well as to place a thumb on the scales as Congress continues to consider comprehensive privacy legislation in the online environment. This submission falls far short of making a persuasive argument to the contrary. It cites two examples of situations in which its proposed exemption would purportedly apply, one involving a concluded lawsuit regarding a single sound recording, the other decrying a policy by some unidentified web site operators to allow free but not wholly anonymous access to unspecified (and perhaps not even copyrighted) materials. This falls well short of showing any substantial adverse impact and thus of carrying the proponent’s burden of persuasion.

Submission 35(3) asserts, on the basis of a handful of examples, that a feature of the technology used on commercially released DVDs that governs the ability of licensed players to allow fast-forwarding is an access control, whose use to restrict skipping of promotional material is sufficiently widespread and serious that it justifies an exemption to Section 1201(a)(1).⁵⁷ It is far from clear that this feature is an access control within the meaning of the statute, and even if it is, it is hard to characterize the imposition on non-infringing use which this submission decries as more than an inconvenience to users. It also appears to be a harm fully amenable to a market place remedy.⁵⁸

In Submission 41, the Digital Media Association (“DiMA”) proposes “Copy-protected Red Book Audio format Compact Discs” as a class of works to be exempted from Section 1201(a)(1). DiMA asserts that “[c]ertain types of copy protection currently being applied to sound recordings in the Red Book Audio Compact Disc format prevent the copying (commonly known as ‘ripping’) of the sound recording from the CD to a computer hard disk drive.” Submission 41, at 4 (emphasis added). DiMA argues that the deployment of such technology, which to date has been very limited, threatens the ability of Internet webcasters to make multiple

⁵⁷ A similar argument is made in Submission 20(6), and referred to in Submission 15(1). These submissions are discussed in more detail elsewhere in these reply comments.

⁵⁸ With regard to the *Tarzan* DVD cited by name by Submitters 20 and 35, we are advised that 99% of the DVDs currently distributed by Buena Vista Home Entertainment provide a means for consumers to skip promotional material contained on the disks. This practice was adopted approximately three years ago in response to marketplace feedback.

ephemeral reproductions of sound recordings under the statutory license of Section 112(e) of the Copyright Act. DiMA's comments, like those of others proposing similar exemptions for different reasons, fail to establish that the proposed exemption is warranted.

As an initial matter, DiMA seeks an exemption for a class of media (not even works) that it has chosen to define as "copy-protected" discs. DiMA reiterates that its objection is to "copy protection" that "prevent[s] the copying" of CDs. Submission 41, at 4. As the NOI makes clear, and as explained above, the narrow statutory focus of this proceeding concerns circumvention of technological measures that control access to copyrighted works, not "copying," *see* NOI, at 63,579, and we do not see how the Office validly could in this proceeding define an exemption by reference to copy protection. As DiMA seems to suggest in note 1 of its submission, it is possible that a particular technological measure may control both access to and copying of copyrighted works. However, because DiMA's submission speaks only of copy control technologies, it simply is not possible to discern whether there are particular access control technologies that DiMA believes are interfering or may interfere with the ability of webcasters to make ephemeral recordings.

In addition, as DiMA notes, Section 112(a)(2) of the Copyright Act provides an exemption from 1201(a)(1) liability for ephemeral copies. Section 112(e), on the other hand, sets forth the conditions for a statutory license, not permission to break copy protection mechanisms. Under normal rules of statutory construction, the fact that Section 112(a) goes to great length to provide the conditions under which an exemption is available, while Section 112(e) does not, demonstrates that Congress intended that 112(a) provide the rule for when an exemption from liability for circumvention is available.

DiMA asserts that webcasters enjoy two paths to exemption from Section 1201(a)(1): a special exemption tailored precisely to the situation of their ephemeral recordings (Section 112(a)(2)) and the more general means of this proceeding. Section 112(a) already addresses the concerns of webcasters and expressly sets out conditions necessary for the webcasters to be entitled to an exemption from the anti-circumvention law. Like the various exemptions set forth in Section 1201 itself, these are carefully described in the statutory language and their purpose is clear: to provide an exemption for legitimate webcasters only in specified circumstances. By contrast, Section 1201 is intended to protect society from circumstances such as changing technology that were not and could not have been addressed by Congress. As the Register noted in her Recommendation to the Librarian in the 2000 rulemaking, "[w]hen Congress has specifically addressed the issue by creating a statutory exemption for [a defined activity] in the same legislation that established this rulemaking process, the Librarian should proceed cautiously before, in effect, expanding the [existing] statutory exemption by creating a broader exemption pursuant to section 1201(a)(1)(C)." Final Rule 2000, at 64,571 (addressing the reverse engineering exception under Section 1201(f)). That caution should be applied here and it should constitute a further element of the burden of persuasion that the proponent of an exemption in this proceeding must carry. DiMA has failed to provide any proof that meets this standard.

For example, DiMA's comments are devoid of any real evidence that webcasters have been unable to access sound recordings or make permitted ephemeral reproductions due to

access control measures employed by copyright owners, and we are aware of no complaints that the technical measures used to protect CDs actually have affected any webcaster in the exercise of the Section 112(e) statutory license. The only “evidence” cited are a handful of Internet-based news articles discussing the issue of copy protection generally, and DiMA offers mere speculation that CD copy controls might affect webcasters in the future. This meager showing falls well short of the “substantial adverse effect” on noninfringing uses required to support an exemption from Section 1201(a)(1). *See* NOI, at 63,580.

This proceeding was not intended by Congress to be a forum for the review and re-engineering of statutory exemptions and licensing provisions like those contained in Section 112. Section 112 sets forth a comprehensive ephemeral reproduction regime that was carefully crafted by Congress. Under Section 112(a), webcasters and other transmitting organizations may make one single exempt ephemeral reproduction. In addition, the Copyright Office recently ruled that under the Section 112(e) statutory license, webcasters are permitted to make as many ephemeral reproductions as necessary, provided they pay the established royalty rate and comply with the conditions of the statutory license. *See Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings; Final Rule*, 67 Fed. Reg. 45,239 (July 8, 2002).

Section 112(a)(2) generally requires copyright owners to make available to transmitting organizations the means for exercising their privilege under Section 112(a) should a technological protection measure employed by the copyright owner prevent them from doing so. 17 U.S.C. § 112(a)(2). As a fail-safe mechanism, transmitting organizations are shielded from certain liability for circumvention where the copyright owner does not do so. The webcasters that are the subject of DiMA’s comments are entitled to the benefits of this provision, and DiMA offers no explanation of why this provision is not wholly sufficient to give webcasters whatever access to copyrighted sound recordings they might need to make permitted ephemeral reproductions. Indeed, DiMA has not provided any evidence that a record label has rejected a request by a legitimate webcaster to provide the technical means to work around a protected CD.

Congress enacted these provisions of Section 112 at the same time as the provisions of Section 1201, and in Section 112(a)(2), Congress addressed with precision the relationship between those sections and the circumstances in which webcasters and others who transmit performances of sound recordings can engage in circumvention. The purpose of this proceeding is to address changing technological circumstances, not to second-guess and revise Congress’ decisions in crafting statutory exemptions and licenses.

It is strange that DiMA would seek an exemption under 1201(a)(1), asserting that it has met that section’s burden of proof, when it has not offered any evidence that the milder conditions for the webcaster-specific exemption under 112(a) have been met. Congress has already provided relief for webcasters under Section 112(a). Where DiMA cannot provide any evidence that it has tried and failed to resolve a legitimate problem under Section 112, the Office should decline DiMA’s invitation to tinker with the intricate provisions of Section 112 and should not effectively rewrite the statute by means of an exemption under another section (Section 1201(a)(1)(C)) which requires a higher burden of proof.

Finally, Submission 50 proposes to allow circumvention of access controls on all works constituting news footage (or any purported “record of fact”) for “forensic or analytical purposes.” There is no evidence in this submission that the obstacle to such analysis is an access control rather than a copy control. At issue in this submission but undefined is whether the proponent is seeking to be able to copy an image from a freely accessible news channel web site, for instance, or whether he seeks the ability without penalty to hack into the channel’s nonpublic files to locate images of a particular event in which he is interested, or something in between. Until this question is answered it is not clear whether the proposed exemption even falls within the scope of this proceeding. In any event, the submission in its current form calls for the Librarian to recognize a “class of works” based on a proposed use, and fails to prove that a substantial adverse impact on non-infringing use is caused by Section 1201(a)(1). NOI, at 63,579-80. Indeed there is no basis to presume that the proposed use is non-infringing. Certainly Submitter Ringland’s declaration that there is “an essential public right” to “apply enhancement techniques...for forensic or analytical purposes does not make it so. The many shortcomings of this submission require that the proposed exemption be rejected.

APPENDIX

AFMA

AFMA (formerly, American Film Marketing Association) is a trade association representing over 150 independent producers and distributors of motion pictures and television programming and the financial institutions that provide funding for independent production. AFMA hosts the American Film Market annually in California. Founded in 1981, AFM has grown to become the largest motion picture market in the world with over \$500 million in licensing deals closed annually. In addition to AFM, AFMA provides members with a variety of services including AFMA Collections, AFMA Arbitration, licensing and anti-piracy support, producer's services, and research and publications. AFMA is the voice and advocate for the independent film and television industry.

American Society of Composers, Authors, and Publishers (ASCAP)

ASCAP, the oldest and largest musical performing rights society in the United States, licenses the non-dramatic public performance rights of millions of copyrighted works of more than 130,000 songwriter and publisher members. ASCAP is also affiliated with over 60 foreign performing rights organization around the world and licenses the repertoires of those organizations in the United States.

American Society of Media Photographers (ASMP)

ASMP is a non-profit trade association founded in 1944 by a handful of the world's leading photojournalists to protect and promote the rights of photographers whose work is primarily for publication. Today, ASMP is the largest organization of editorial and media photographers in the world, with 40 chapters in this country and over 5000 members in the United States and more than 30 other countries. Its members are the creators of the most memorable images found in newspapers, advertising, magazines, books, multimedia works, and Internet web sites.

Association of American Publishers (AAP)

The Association of American Publishers, Inc. is the principal national trade association for the U.S. book publishing industry, representing more than 300 commercial and non-profit member companies, university presses, and scholarly societies that publish books and journals in every field of human interest. In addition to their print publications, many AAP members are active in the emerging market for e-books, while also producing computer programs, databases, and a variety of multimedia works for use in online, CD-ROM and other digital formats.

Association of American University Presses (AAUP)

The Association of American University Presses' 120 members represent a broad spectrum of non-profit scholarly publishers affiliated with both public and private research universities, research institutions, scholarly societies, and museums. Collectively, they publish about 10,000 books and 700 scholarly journals each year.

The Authors Guild, Inc.

The Authors Guild, Inc., founded in 1912, is a national non-profit association of more than 8,000 professional, published writers of all genres, including journalists, historians, biographers, academicians from many fields of study, and other authors of nonfiction and fiction.

Broadcast Music, Inc. (BMI)

Broadcast Music, Inc. ("BMI") is a New York corporation that licenses the public performing rights in approximately 4.5 million musical compositions on behalf of BMI's more than 300,000 affiliated songwriters, composers and music publishers as well as numerous affiliated foreign performing rights societies around the world. BMI's affiliates grant BMI non-exclusive rights to license their performing rights under Section 106(4) of the Copyright Act, and BMI in turn grants non-exclusive public performing rights licenses to licensees who use BMI's repertoire of musical works in a wide variety of businesses, such as broadcast radio and television stations and networks, cable networks and systems, restaurants, nightclubs and similar establishments, hotels, Internet web sites, concert promoters, trade show operators and background music service providers.

BMI operates on a non-profit making basis, and BMI distributes all of the license fees it collects to BMI-affiliated songwriters, composers and publishers after deducting its operating expenditures and reasonable reserves. BMI represents the interests of its affiliates in legislative matters and BMI actively seeks to educate music using industries about their rights and responsibilities under the U.S. copyright law.

Business Software Alliance (BSA)

The Business Software Alliance (www.bsa.org) is the foremost organization dedicated to promoting a safe and legal online world. The BSA is the voice of the world's software and Internet industry before governments and with consumers in the international marketplace. Its members represent the fastest growing industry in the world. BSA educates computer users on software copyrights and cyber security; advocates public policy that fosters innovation and expands trade opportunities; and fights software piracy.

Directors Guild of America (DGA)

The Directors Guild of America represents 12,500 directors and members of the directorial team who work in feature film, film/taped and live television, commercials, documentaries, and news. DGA represents and protects its members' collective bargaining and creative/artistic rights, serving as an advocate for their rights within the industry, before Congress, state legislatures, judicial proceedings, and in international policy fora.

Interactive Digital Software Association (IDSA)

The Interactive Digital Software Association is the U.S. association exclusively dedicated to serving the business and public affairs needs of companies that publish video and computer games for video game consoles, personal computers, handheld devices and the Internet. IDSA members collectively account for more than 90 percent of the \$6.9 billion in entertainment software sales in the United States in 2002, and billions more in export sales of American-made entertainment software.

Motion Picture Association of America (MPAA)

MPAA is a trade association representing major producers and distributors of theatrical motion pictures, home video material and television programs. MPAA members include: Metro-Goldwyn-Mayer Studios Inc., Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLP, The Walt Disney Company, and Warner Bros., a division of Time Warner Entertainment Company, L.P.

National Music Publishers' Association (NMPA)

NMPA is a trade association representing over 600 U.S. businesses that own, protect, and administer copyrights in musical works. NMPA is dedicated to the protection of music copyrights across all media and across all national boundaries.

Professional Photographers of America (PPA)

Professional Photographers of America is the world's largest photographic trade association, representing photographers from all walks of life. PPA photographic classifications include portrait, wedding, commercial, advertising, corporate and other photographers. PPA is very active in the fight to defend the creative works of its members and strongly urges consideration of the issues and opinions offered in this paper.

Recording Industry Association of America (RIAA)

The Recording Industry Association of America is the trade group that represents the U.S. recording industry. RIAA® members create, manufacture and/or distribute approximately 90% of all legitimate sound recordings produced and sold in the United States.

Screen Actors Guild (SAG)

Screen Actors Guild is a labor union, representing over 120,000 professional actors who work in feature films, television programs and commercials and infomercials, affiliated with the AFL-CIO through the Associated Actors and Artistes of America. The Screen Actors Guild represents its members through: negotiation and enforcement of collective bargaining agreements which establish equitable levels of compensation, benefits, and working conditions for performers; the collection of compensation for exploitation of their recorded performances and protection against unauthorized use; and the preservation and expansion of work opportunities.

SESAC, Inc.

SESAC, Inc., founded in 1930, is the second oldest musical performing rights organization in the United States. SESAC, Inc. represents approximately 3,800 composers and music publishers.

Writers Guild of America, west (WGAW)

The Writers Guild of America, west represents 8100 writers in the theatrical, television and cable industries.