

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

In the Matter of Exemption to Prohibition on)
Circumvention of Copyright Protection Systems) Docket No. RM 2002-4
for Access Control Technologies)

Reply Comments Of The Progress & Freedom Foundation and
The Center for the Study of Digital Property¹

I. Summary

These Reply Comments Of The Progress & Freedom Foundation and The Center for the Study of Digital Property Reply Comments address exemptions for various classes of works proposed in various comments, for example those proposed in Comments 33 and 35. Comment 33 addresses "Literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage, or obsolescence." Comment 35 addresses four classes of works Copy-Protected CDs, DVD Region Coding, Unskippable DVD Advertising, and Public Domain Film on DVD.

These Reply Comments focus on the potential for exemptions to result in serious unintended consequences that would undermine the development of efficient markets in digital goods. Broadly worded categories may be used by infringers to greatly increase the costs of enforcement actions and ultimately interfere with the use of technological protection measures to efficiently protect and market works. We recommend that, in establishing exceptions, the Register and Librarian carefully consider the overall potential effect of any specific exception on the ability of content providers effectively utilize technological access controls to protect and market their content.

II. Discussion

The Progress & Freedom Foundation (PFF) and its Center for the Study of Digital Property (CSDP) (hereinafter collectively CSDP or the Center) hereby submit comments on establishing exemptions to the prohibitions on circumvention of control protection systems for access control technologies.²

¹ The views expressed here are those of the author and do not necessarily reflect the views of the Foundation, its Center, Officers or its Board of Directors.

² See Section 103 of the Digital Millennium Copyright Act, Pub. L. 105-304 (1998).

CSDP is a market-oriented, property-rights think tank that is devoted to studying how to effectively protect digital content and thereby promote a vibrant marketplace for digital products on the Internet and through other distribution channels. The Center seeks to underscore the role of efficient mechanisms for protecting and enforcing “marketable rights”³ in fostering a diverse marketplace that serves consumers’ interests.

The Center’s interest in this proceeding derives from the potential significance of technological access control measures to the development of an efficient market for content. The existence of widespread digital piracy on the Internet, together with cheap duplication of CDs and DVDs, has presented unprecedented challenges to the copyright system and other mechanisms for protecting authors’ rights. The anticircumvention provision of the Digital Millennium Copyright Act⁴ at issue in this proceeding is specifically designed to counter the threat of this digital piracy.

Section 1201(a)(1)(A) of the DMCA provides that “[n]o person shall circumvent a technological measure that effectively controls access to a work protected under this title.” However, subsection 1201(a)(1)(B) provides for a exceptions to this provision,⁵ and Congress directed that the Librarian of Congress, upon the recommendation of the Register of Copyrights, should specify the exceptions based on enumerated criteria.⁶

The thrust of the Center’s concern is the potential for exemptions to result in serious unintended consequences that would undermine the development of efficient markets in digital goods. In particular, an exception intended to protect noninfringing uses could interfere with effective enforcement directed at infringing uses. Broadly worded categories may be used by infringers to greatly increase the costs of enforcement actions and ultimately interfere with the use of technological protection measures to efficiently protect and market works.

We recommend that, in establishing exceptions, the Register and Librarian carefully consider the overall potential effect of any specific exception on the ability of content providers effectively utilize technological access controls to protect and market their content. The ability to efficiently protect content may play a crucial role in fostering a diverse market in digital content.

In particular, we emphasize that the statute directs the Registrar and Librarian to consider “the effect of circumvention of technological measures on

³ *Eldred v. Ashcroft*, 123 S. Ct. 769, 788 (1993)

⁴ Digital Millennium Copyright Act, Pub. L. 105-304 (1998).

⁵ 17 U.S.C. § 1201(a)(1)(A) “shall not apply to persons who are users of a copyrighted work which is in a particular class of works, if such persons are, or are likely to be in the succeeding 3-year period, adversely affected by virtue of such prohibition in their ability to make noninfringing uses.” 17 U.S.C. § 1201(a)(1)(B).

⁶ 17 U.S.C. § 1201(a)(1)(C) and 1201(a)(1)(D).

the market for or value of copyrighted works.”⁷ This factor, analogous to the critical fourth factor in fair use analysis,⁸ should, we believe, play a central role in the determinations under this provision as well. It is most significant that Congress directed that the inquiry consider the impact of the exemption on copyrighted works generally, and not just on the class of works for which the exception is requested. It is precisely because an exception may have spill-over effects, interfering with the efficacy of the protection of other works, that such a broad inquiry is essential. The effect of the existence of a proposed exception on the market for all copyrighted works should be considered.

In this regard, the Register and Librarian should reconsider the exception for “Literary Works, Including Computer Programs and Databases, Protected by Access Control Mechanisms That Fail to Permit Access Because of Malfunction, Damage or Obsolescence.”⁹ After an extensive discussion concluding that there was “genuine harm” created by the unavailability of these works, the Registrar spent only a single paragraph on the other factors.¹⁰ The entire analysis of harm to the market took a single sentence, and focused solely on whether proper use of the exception would undermine the market for the class of exempted works.

Circumvention of access controls in these instances should not have a significant effect on the market for or value of the works, since copyright owners typically will already have been compensated for the use of the work.¹¹

This is an unduly narrow view of the potential impact of this exception on the market. Even if owners of those particular works have been compensated, the exception could be used to protect those seeking unauthorized access as well. Indeed, earlier in its analysis the Register demonstrated its concern for misuse of the exception in refusing to extend it to the case of lost or stolen access devices, finding that “exempting works in this situation could unfairly prejudice the interests of copyright owners, who have no way of ascertaining whether the [access device] was in fact lost or stolen.”¹²

The Register also demonstrated its recognition of enforcement concerns in rejecting calls for importation of the first sale doctrine in the digital context.¹³ Selling digital media over the Internet requires that the seller delete the file sold. Even though some would presumably comply voluntarily, the difficulty of policing would result in widespread piracy under the guise of exercising of first sale rights.

⁷ 17 U.S.C. §1201(a)(1)(C)(iv).

⁸ See 17 U.S.C. §107.

⁹ See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 Fed. Reg. 64556 (October 27, 2000).

¹⁰ 65 Fed. Reg. 64556, 64565-66.

¹¹ 65 Fed. Reg. 64556, 64566.

¹² 65 Fed. Reg. 64556, 64566.

¹³ U.S. Copyright Office, Report to Congress Pursuant to Section 104 of the Digital Millennium Copyright Act, at 78-101 (available at www.copyright.gov/reports/studies/dmca/dmca_study.html).

In a similar vein, the Register should consider whether there may be mechanisms to reduce or prevent such harm, consistent with 1201(a)(1)(C)(iv).

A number of the proposed exceptions raise similar problems; proponents focus on proposed non-infringing uses, but do not explain how the exception they seek can be adequately policed to ensure protection of “the market for or value of copyrighted works.” We request that the Register ensure that any exceptions are defined in a manner that ensures they can be properly policed.¹⁴

Finally, anticircumvention protection for access controls may be particularly important to permit content distributors to implement Digital Rights Management solutions and thereby enable new business models. Consumers commonly exercise a wide range of choice when they purchase digital entertainment products. DRM technology promises to enable firms to better meet diverse consumer preferences by offering increasingly diverse packages and prices. Furthermore, the competition among various providers of entertainment contents and the importance of offering those combinations that consumers most highly value will serve to ensure that producers will serve consumer interests as they pursue profits.

We commend the Register for its discussion of the potential value of “pay-per-use” business models in the last proceeding. We request that any impact on the efficacy of these models be carefully considered in evaluating the impact of a possible exception on the entire “market for ... copyrighted works.”

Respectfully Submitted,

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¹⁴ In this regard, we commend the Register’s rejection, in the last proceeding of a proposal that “[I]n substance ... would exempt all users who wish to make noninfringing uses, regardless of the type of work, provided that they either lawfully acquire a copy raised legitimate concerns about difficulties in converting data from one format to another.”