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John T. Mitchell
1717 K Street, NW, Suite 600
Washington, DC 20036, U.S.A.
1-202-415-9213 (voice)
1-202-318-9169 (fax)
john@interactionlaw.com

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Ms. Marybeth Peters
Register of Copyrights
Library of Congress
Copyright Office
101 Independence Avenue, S.E.
Washington, D.C. 20559-6000

Dear Ms. Peters:

On behalf of Video Software Dealers Association (VSDA), the trade association for retailers of lawfully made, non-infringing copies of motion pictures and video games, I voice concern over the *Notice of Inquiry on the Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, 70 Fed Reg. 57526 (October 3, 2005) Docket No. RM 2005-11 (*NOI*), and respectfully request that it be revised to permit unfettered participation.

The strict rules set forth in the *NOI* have the effect of stifling legitimate comment and debate over possible misuse and abuse of the anti-circumvention provisions of the Digital Millennium Copyright Act, 17 U.S.C. §1201(a). Members of the public with important observations to offer concerning how Congress' objectives in enacting the DMCA are thwarted by misuse of access control technology, but who are unable to explain their concerns without running afoul of one of the many technically, legally and semantically complex requirements placed upon them, will find their contributions summarily dismissed.

Regardless how stringent the Copyright Office's own internal standards may be in fashioning an exemption, it is improper and unwise to impose those standards as a litmus test upon the commenting public. Commenters must be permitted freely to inform your staff of their concerns. Even the most irrelevant, off-topic or otherwise non-compliant comments in support of some untenable exemption may nevertheless provide useful information to you and your staff as you determine how best carry out Congress's intent, expressed in Section 1201(c), that nothing in the DMCA may alter the rights and limitations imposed elsewhere, such as in Sections 107-122 of the Copyright Act. Your office was empowered to craft appropriate exemptions to ensure that technological protection measures that impair Sections 107-122 without furthering any cognizable copyright interest are made subject to lawful circumvention.

For example, forcing commenters to identify a crabbed "class" of works necessarily impairs reasoned consideration of the harm Congress intended to prevent. It is erroneous to consider exemptions solely through the prism of whether a given work to which a person is improperly denied access is nevertheless available in some other form. Where a copyright owner

has used a technological protection measure to destroy a given DVD rental copy of a movie, the availability of a VHS rental copy of that movie should not cause dismissal of consideration whether a retailer may circumvent the technology to continue renting the DVD copy. When Congress enacted Section 109, it entitled the owner of each and every lawfully made copy to redistribute that copy over the objection of the copyright owner. The fact that a different copy could be so distributed is irrelevant. To ignore this is tantamount to having the Copyright Office unilaterally amend the DMCA such that a copyright owner may not only use technology to protect the copyright from infringement but may freely use technology to nullify any of the limitations Congress placed upon the copyright itself, so long as some other access, possibly burdensome and commercially insignificant, is left open.

Similarly, Section 202 of the Copyright Act distinguishes the physical medium from the work itself. Accordingly, it is reasonable to conclude that Congress did not intend for copyright holders to gain control over noninfringing uses of the physical media owned by others and upon which their works are recorded, merely because they could point to the availability of other copies or phonorecords containing the same work, perhaps at a premium price or in a less convenient format.

Congress' authority to enact Section 1201(a)(1)(A) derives from its power under Article I, Section 8. (The DMCA does not invoke the Commerce Clause.) The legislative history indicates that the DMCA was enacted solely to protect existing copyrights. Nothing in the DMCA can be read to confer any power upon a copyright owner to exclusively control trade, commerce or speech that Congress has expressly placed beyond the exclusive control of the copyright owner. It is unlikely that Congress intended to create criminal and civil liability for the circumvention of technologies employed capriciously by a copyright owner seeking control over lawful, noninfringing uses that fall beyond the scope of the copyright owner's rights. Congress simply has no power to do so.

Accordingly, rather than defining "classes" of works by virtue of the categories set forth in Section 102, it would be more appropriate to identify "classes" characterized by the use of a particular technological device by a copyright owner to impose a non-existent right of private performance, or to nullify Section 109 rights or other rights belonging to the public.

The current *NOI* bars VSDA and others from even raising such arguments. For these reasons, VSDA respectfully requests that you relax the rules applicable to the Notice of Inquiry and receive, unfettered, any comments that the writer believes might inform you and your staff in carrying out the Copyright Office's statutory obligation.

Respectfully submitted,

A handwritten signature in black ink that reads "John T. Mitchell". The signature is written in a cursive style with a large initial "J" and "M".

John T. Mitchell