

Classes of Works

- (1) Audiovisual works and sound recordings for which those filing comments seek exemptions to allow the circumvention of technological measures in order to create clip compilations for educational uses. [02, 05]
- (2) Derivative and collective works that contain audiovisual content already in the public domain for which those filing comments seek exemptions to allow the circumvention of technological measures in order to create clip compilations for educational uses. [05]
- (3) Works for which those filing comments seek exemptions to allow the circumvention of technological measures which may threaten to create security vulnerabilities. [06, 07, 08]
- (4) Literary works that are distributed with technological protection measures that prevent access to and fair use by people who are blind or visually impaired. [01]
- (5) Works for which those filing comment seek exemptions to expand the previously granted exemption for obsolete platforms where a required access control “dongle” is missing or broken to allow circumvention also of any computer programs and video games distributed in formats that require obsolete operating systems or hardware as a condition of access. [04]

Brief Summary of Time Warner Inc.’s Arguments

Time Warner Inc. joins in the comments filed by the Joint Reply Commenters [Association of American Publishers (AAP), et al.] and the DVD Copy Control Association, Inc. We write separately to underscore the wide variety of content we deliver to the digital marketplace and to provide perspective on how some of the technological protection measures (“TPMs”) used to enable this content delivery are developed and licensed. We submit that there is no need to promulgate additional exemptions to the prohibition against circumvention of access control measures because none of the submitted comments has adequately demonstrated sufficient harm to outweigh the other factors the Copyright Office must consider. In considering the requested exemptions, we urge the Copyright Office to accord significant weight to the consumer benefits derived from continued availability of copyrighted works via the numerous digital distribution modes supported by TPMs outlined in these comments. We likewise urge the Copyright Office to consider among the other factors the Librarian is entitled to weigh, the evolving nature of the TPMs used to protect copyrighted works, and the collaborative ways in which these TPMs are frequently developed and deployed. We believe that if the Librarian fully considers not only the benefits to the public from the continued availability of copyrighted works in digital form via distribution models and platforms protected by TPMs, but also the public benefit from the continued evolution of devices and services that respect TPMs, the Librarian will conclude that the harm of the proposed exemptions outweighs the benefit.

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

In the Matter of)	
Exemption to Prohibition on)	
Circumvention of Copyright Protection)	Docket No. RM 2005-11
Systems of Access Control Technologies)	
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Reply Comments of Time Warner Inc.

INTRODUCTION AND SUMMARY

Pursuant to the Notice of Inquiry and request for reply comments published by the Copyright Office in the *Federal Register* on October 3, 2005,¹ Time Warner Inc. submits the following reply comments regarding various requests to exempt certain classes of works from the prohibition against circumvention of technological protection measures that control access to copyrighted works.²

Time Warner Inc. joins in the comments filed by the Joint Reply Commenters [Association of American Publishers (AAP), et al.] (“Joint Reply Comments”)³ and the DVD Copy Control Association, Inc. (“DVD CCA Comments”)⁴. We write separately to underscore the wide variety of content we deliver to the digital marketplace and to provide perspective on how some of the technological protection measures (“TPMs”) used to enable this content delivery are developed and licensed. We submit that there is

¹ Notice of Inquiry for Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 70 *Federal Register* 57526 (Oct. 3, 2005).

² In addition to joining the Joint Reply Comments, this reply comment specifically addresses the following initial submission comments: Comment 1 submitted by the American Foundation for the Blind (literary works and access for blind or visually impaired persons); Comment 2 submitted by the Library and Copyright Alliance and the Music Library Association (audiovisual works and sound recordings and clip compilations); Comment 4 submitted by The Internet Archive (computer programs and video games and obsolete platforms and formats); Comment 5 submitted by Comment of Peter Decherney, Assistant Professor at the University of Pennsylvania’s Cinema Studies Program, Michael Delli Carpini, Professor and Annenberg Dean, and Katherine Sender, Assistant Professor at the University of Pennsylvania’s Annenberg School of Communication (audiovisual works and derivative and collective works that contain audiovisual works and clip compilations of copyrighted and public domain works); Comment 6 submitted by Edward W. Felten and J. Alex Haldermand, Department of Computer Science, Princeton University and Deirdre K. Mulligan, Samuelson Law, Technology & Public Policy Clinic, Boalt Hall, University of California (sound recordings and audiovisual works and security vulnerabilities); Comment 7 submitted by the Delaware County Pennsylvania Intellectual Property Forum (sound recordings and audiovisual works and security vulnerabilities); and Comment 8 submitted by the Computer and Communications Industry Association and Open Source and Industry Alliance (sound recordings and audiovisual works and security vulnerabilities).

³ Reply Comment of the Joint Reply Commenters [Association of American Publishers (AAP), et al.], dated February 2, 2006.

⁴ Reply Comment of DVD Copy Control Association, Inc., dated February 2, 2006.

no need to promulgate additional exemptions to the prohibition against circumvention of access control measures because none of the submitted comments has adequately demonstrated sufficient harm to outweigh the other factors the Copyright Office must consider.⁵ In considering the requested exemptions, we urge the Copyright Office to accord significant weight to the consumer benefits derived from continued availability of copyrighted works via the numerous digital distribution modes supported by TPMs outlined in these comments.

We likewise urge the Copyright Office to consider among the other factors the Librarian is entitled to weigh, the evolving nature of the TPMs used to protect copyrighted works, and the collaborative ways in which these TPMs are frequently developed and deployed. We believe that if the Librarian fully considers not only the benefits to the public from the continued availability of copyrighted works in digital form via distribution models and platforms protected by TPMs, but also the public benefit from the continued evolution of devices and services that respect TPMs, the Librarian will conclude that the harm of the proposed exemptions outweighs the benefit.

ABOUT TIME WARNER INC.

Time Warner Inc. is one of the world's largest media companies. We are uniquely situated to comment for this rulemaking because our diverse businesses encompass many aspects of content creation and distribution and touch consumers in all of the many ways they enjoy entertainment content. Our businesses include publishing, filmed entertainment, networks, cable, and internet service providers:

- America Online, Inc. ("AOL"): With approximately 20 million members as of June 2005, AOL is the nation's leading Internet Service Provider. AOL enjoys more than 110 million unique visitors to its network of Web properties and to the AOL service and is the second largest online network.
- HBO and Cinemax: HBO is the most-watched pay service in the U.S. – offering original series, HBO Films presentations, Hollywood blockbusters, documentaries, concerts and championship boxing. Cinemax is the second-most-watched pay service, showing more than 1,200 movie titles annually. The two services offer 15 distinct multiplex channels as well as high-definition feed and the industry's most successful subscription video-on-demand ("VOD") products.
- New Line Cinema: New Line Cinema is the most successful independent film company in the world. In addition to production, marketing and distribution of theatrical motion pictures, the fully-integrated studio has divisions devoted to home entertainment, television, music, theatrical exhibition and merchandising. Like Warner Bros., New Line Cinema makes its content available through a variety of online and VOD services as well as in DVD.

⁵ The DMCA requires the Copyright Office to balance the following factors in evaluating the requested exceptions: (1) the availability of works for use, (2) the effect of the prohibition on circumvention on particular uses, (3) the effect of circumvention of copyrighted works and (4) other appropriate factors, at the option of the Copyright Office. *See* 17 U.S.C. §1201(a)(1)(C) (1998).

- Time Inc.: Time Inc. and Time Warner Book Group are well-positioned in the publishing world with over 150 magazines worldwide covering the most popular magazine sectors, and approximately 70 new book titles released each year. Two out of every U.S. adults read a Time Inc. magazine every month. Time Inc. also releases certain magazine titles online – either through subscription or at no cost. Time Warner Book Group likewise makes its content available online and through e-books and audiobooks.
- Time Warner Cable: Time Warner Cable owns or manages cable systems serving subscribers in 27 states, which include some of the most technologically advanced, best-clustered cable systems in the country. Time Warner Cable was a pioneer in digital cable which allows consumers to receive VOD programming.
- Turner Broadcasting System (“Turner Broadcasting”): Turner Broadcasting is a major producer of news and entertainment products around the world, and the leading provider of programming for the basic cable industry. The TBS and TNT television services are each watched in approximately 90 million households in the U.S. as of December 2005. Turner Broadcasting’s properties also include, among others, TNT in HD, the company’s first all high-definition network; NASCAR Trackpass, winner of the first-ever Emmy Award for Interactive Programming; and popular branded VOD offerings from CNN, Cartoon Network, Boomerang and Turner Classic Movies.
- Warner Bros. Entertainment: Warner Bros. Entertainment – a global leader in the creation, production, distribution, licensing and marketing of entertainment – stands at the forefront of every aspect of the industry, from feature films to television, home video/DVD, animation, comic books, interactive entertainment and games, product and brand licensing, international cinemas and broadcasting. The Warner Bros. library consists of more than 6,600 feature films, 40,000 television titles and 14,000 animated titles.

As a large and multi-faceted media company, Time Warner is sensitive to the importance of maintaining a proper balance between the rights of copyright owners and the ability of others to make fair use of their works. Indeed, the ability to build on existing works in creative ways, and to use them for purposes such as commentary and reporting, is vital to our entertainment and news reporting businesses. In developing new formats and product offerings, one of our central goals has been to maximize consumer convenience to the greatest extent possible while maintaining the value of differentiated products. We believe that the anti-circumvention provisions of the DMCA, including the oversight provided by the rulemaking procedure, strike a healthy balance of interests and contain appropriate safeguards for the important public interest in a thriving fair use doctrine. We file these comments to underscore the importance of maintaining the protections of the DMCA that have resulted in a multitude of new legitimate digital offerings that consumers are embracing.

TIME WARNER AND THE DIGITAL MARKETPLACE

As in previous triennial reviews, many of the current comments seeking exceptions promote the false premise that rights holders are interested primarily in “locking up” their

works, and denying consumers the access they desire.⁶ To the contrary, as the following examples of new digital products and services that have been launched by Time Warner Inc.'s divisions demonstrate, the digital marketplace is thriving, and consumers are gaining unprecedented access to works in higher quality formats, and with greater functionality than ever before.

Time Warner Inc. and its divisions make a broad array of digital content available to consumers in a variety of product offerings supported by TPMs. Many of these products and services would not be available in the marketplace without the use of TPMs, and the legal protections against circumventing TPMs available under the DMCA.

- In2TV Project: In2TV, a new broadband network pioneered by AOL and Warner Bros., will allow consumers to stream full-length episodes from favorite series such as *Welcome Back Kotter*, *Sisters*, *Beetlejuice* and *Growing Pains* free and on-demand on the Web.
- GameTap: GameTap, a programming service recently launched by TBS, Inc., is the ever-expanding web-based playground of video games from arcade classics to console and PC hits. Gamers are able to play and access games, including Asteroids™, Centipede™, Pac-Man® and Pitfall!™ in their original format on home computers.
- Time Warner Cable: Time Warner Cable's digital video products and services include Digital Video, High Definition Television, Digital Video Recorders (DVR), Video on Demand and wireless home networking to interconnect multiple computers in the household with a single broadband connection.
- Video On Demand ("VOD"): In 2005, Warner Home Video offered 175 titles on the internet for purchase on Movielink and Cinemanow. Internet consumers made over 350,000 VOD buys of Warner Home Video films in 2004 and 2005 on these two services. Movielink is the leading broadband movie download service offering U.S. customers an extensive selection of new and classic hit movies, foreign films and other hard-to-find content. Movielink draws its content offerings from the vast libraries of major studios, such as Warner Bros., as well as others on a non-exclusive basis.
- Electronic Sell-Through Efforts: To address increasing demand for convenience and portability of legitimate content, Warner Home Video is involved in negotiations with several United States internet content services to launch electronic-sell through services in 2006, permitting consumers to download DRM-protected permanent copies of Warner Home Video titles to their PCs and portable media players.
- Online magazines: Time Inc.'s recent digital efforts include making full magazine content available on its Web sites for some magazine titles, and offering digital magazine subscriptions for such magazines as *Business 2.0* and *Popular Science*. Time Inc. also offers free web-only content on its Web sites. Time Inc.

⁶ See e.g., Comment of Peter Decherney et al., *supra* note 2, urging "consideration of how allowing technological protection to lock the public out of useful access to public domain works compromises the goals of the copyright system."

plans to launch complete online archives of magazines such as Time, Sports Illustrated and People in the near future.

- Statistics on DVD distribution: In the United States in 2005, Warner Home Video had 2,479 total releases, 662 new releases/new to DVD releases and 1,817 catalog releases. DVD sales and rental volumes in 2005 in the United States totaled 306,388,566 units.
- E-Books and Audiobooks: Time Warner Book Group distributes e-books and audiobooks through a variety of channels. Of the forty-nine Time Warner Book Group adult bestsellers in 2004, Time Warner Book Group published 43 as e-Books. Time Warner Book Group titles are also available as audiobooks, through a variety of services. For instance, David Baldacci's new thriller *Camel Club* is currently available for download as an audiobook from iTunes.

It is often assumed incorrectly that the TPMs applied to works in order to enable these new digital services and formats are unilaterally devised or imposed by rights holders without due consideration for the impact of such measures on devices or the consumers who use them. This has not been the case in our experience. Marketplace realities dictate the necessity for close cross-industry cooperation and responsiveness to consumer needs.⁷

Rights holders, and the investors who back them, benefit financially from ownership of copyrighted works only to the extent that such works are made accessible to lawful consumers of the works. This requires a wide audience of paying customers that wish to experience the works. Therefore TPMs cannot realistically be applied to works in ways that impede the legitimate communication and reception of the works by users, or otherwise interfere with the lawful expectations of paying consumers of copyrighted works.⁸

Because copyrighted works must be played, performed or displayed in order to be appreciated by consumers, TPMs typically cannot be unilaterally applied to works effectively. TPMs are most effective to the degree that consumer electronics devices and computers used by consumers are designed to respect the measures applied. The best method to achieve effective TPMs is multi-industry cooperation and bilateral implementation of TPMs.

Various multi-industry efforts to develop TPMs have therefore been pursued between rights holders and consumer electronic and information technology companies. These efforts are aimed at driving adoption of new digital technologies and at securing digital means of making content available to users in new and exciting ways. Such efforts generally adhere to the following principles:

- *Cost-recovery terms*: Patent claims necessary to implement the TPM are made available on cost-recovery terms, with the goal of enabling the growth of digital

⁷ For more information on the cross-industry licensing approach, see Dean S. Marks and Bruce H. Turnbull, *Technical Protection Measures: The Intersection of Technology, Law and Commercial Licenses*, 46 Journal of the Copyright Society of the USA (No. 4) 563 (Summer 1999).

⁸ *Id.*

businesses. Instead of generating profits from licensing the TPM, the licensors seek to enable new digital platforms for content distribution. Consumer electronics and information technology manufacturers benefit from being able to offer new distribution platforms and devices with greater functionality. Content owners benefit from being able to securely deliver content to consumers in new, exciting ways. Consumers benefit from the availability of new products and services with advanced features and greater availability of content.

- *Voluntary effort:* Most TPM efforts employ voluntary licenses for encryption technology. This allows manufacturers to avoid assuming license obligations unless they wish to enable access to protected content. Only products intended for use in accessing the TPM protected content need to assume any obligation. Unlicensed devices may easily pass through encrypted content without a need to follow particular rules, provided that the unlicensed devices do not circumvent the encryption technology to access the works. This approach has been particularly useful in allowing manufacturers of multi-purpose devices, such as PCs, to avoid assuming obligations at the device level.
- *Freedom in Implementation:* Device manufacturers retain significant design freedom in implementations, which benefits consumers because it encourages the development of new product features and functionalities. Innovation and healthy competition among product manufacturers occurs around new features and functions of formats and devices, without adverse effects on content protection.
- *Cooperation and Compromise:* Licensees from the involved industries make balanced compromises. Content owners agree to certain encoding and copying rules intended to facilitate the development of products and services that meet consumer desires while device manufacturers agree to build devices in a robust fashion that maintains the level of protection afforded by the TPM (e.g. by not sending decrypted content to unprotected digital outputs). For example, in return for offering robust protection, TPM suppliers require that content owners meet a generally accepted level of consumer expectations, such as the copying of television broadcasts (e.g., Digital Transmission Content Protection “encoding rules”) or the use of music on multiple devices and the creation of play lists (e.g., Fairplay).

Time Warner Inc. and its divisions have participated in various industry-enabling TPM efforts, including:

- *Content Scramble System:* This TPM enabled the launch of DVD technology – the most successful consumer entertainment platform in history.
- *Digital Transmission Content Protection:* This TPM facilitates secure home networking, allows commercial entertainment content to be securely transmitted among a variety of devices and ensures the consumer’s ability to make secure recordings of certain content received from conditional-access technologies.
- *Content Protection for Prerecorded Media, and Content Protection for Recordable Media:* This TPM enabled the launch of DVD audio and the development of secure recording and storage technologies (such as the SD Card) for commercial entertainment content.

- *High-bandwidth Digital Content Protection* (“HDCP”): This technology allows for secure connections between computers and display devices, and has been instrumental in facilitating high-definition display of protected content.

TPM solutions are constantly evolving to meet marketplace demands. As consumer interest in space shifting and format shifting has emerged, TPM systems have developed to make it possible for content owners to securely enable such activities. For example, Warner Bros. is one of the eight companies developing the Advanced Access Content System (“AACCS”), to be used with next generation optical discs. Among other features, AACCS will allow content owners to authorize consumers to make a copy (or, at the content owner’s discretion, multiple copies or clips of copies) of content distributed on an optical disc. This could enable, for example, a consumer to have an exact, full resolution copy of content from an optical disc safely stored on her home video server so that it can be watched throughout the house, without the need to move the disc from room to room. It might similarly enable an educator who wishes to make a clip compilation for use in a media class to obtain authorization to make several short recordings of clips, rather than a recording of the entire work.

All of the above-referenced technologies have been developed through rigorous multi-industry review and cooperation. For close to a decade, not only the content community, but also members of the consumer electronics and information technology industries that develop the products and services through which to enjoy commercial entertainment content, have collaboratively sought to develop and implement protection technologies and flexible content usage scenarios that are transparent to consumers and reflect the interests of the marketplace. These industries have built their content-delivery formats and platforms around the availability of TPMs that are adequately protected by laws against circumvention. The Copyright Office should weigh this factor heavily when considering the effect of circumvention of copyrighted works in the context of various requested exemptions.

RESPONSE TO SPECIFIC EXEMPTION REQUESTS

We join and incorporate by reference the Joint Reply Comments and the DVD CCA Comments regarding existing and new exemption requests. We write separately to add the following additional comments regarding the following proposed exemptions:

- (1) Audiovisual works and sound recordings for which those filing comments seek exemptions to allow the circumvention of technological measures in order to create clip compilations for educational uses.⁹
- (2) Derivative and collective works that contain audiovisual content already in the public domain for which those filing comments seek exemptions to allow the circumvention of technological measures in order to create clip compilations for educational uses.¹⁰

⁹ Comment of the Library and Copyright Alliance and the Music Library Association, *supra* note 2.

¹⁰ Comment of Peter Decherney et al., *supra* note 2.

- (3) Works for which those filing comments seek exemptions to allow the circumvention of technological measures which may threaten to create security vulnerabilities.¹¹
- (4) Literary works that are distributed with technological protection measures that prevent access to and fair use by people who are blind or visually impaired¹²; and
- (5) Works for which those filing comment seek exemptions to expand the previously granted exemption for obsolete platforms where a required access control “dongle” is missing or broken to allow circumvention also of any computer programs and video games distributed in formats that require obsolete operating systems or hardware as a condition of access.¹³

We address each of these proposed exemptions in turn:

Proposed Class: Audiovisual works and sound recordings for which those filing comments seek exemptions to allow the circumvention of technological measures in order to create clip compilations for educational uses.

Initial Round Submissions: Comments 2 and 5

Summary and Discussion:

Two submissions argue that an exemption should be granted to allow circumvention of technological measures in order to create clip compilations for educational uses.¹⁴ Time Warner Inc. opposes the granting of both proposed exemptions. Neither of the proponents of the proposed exemptions claim that users are being denied access to copyrighted works for educational purposes. Rather, both proponents claim that TPMs intended to prevent unauthorized duplication and distribution of the works hinder their desired copying activities, which the proponents argue ought to be permitted under the doctrine of fair use.¹⁵

The proponents argue that media studies professors cannot easily assemble “clip compilations” for use in the classroom and instead must manually advance films to the desired location, thus inconveniencing the professor and students.¹⁶ As the Librarian has noted previously, mere inconvenience is insufficient to warrant an exemption.¹⁷

¹¹ Comment of Edward W. Felten et al., *supra* note 2; Comment of the Delaware County Pennsylvania Intellectual Property Forum, *supra* note 2. Comment of Computer and Communications Industry Association and Open Source and Industry Alliance, *supra* note 2.

¹² Comment from American Foundation for the Blind, *supra* note 2.

¹³ Comment of The Internet Archive, *supra* note 2.

¹⁴ See Comment of the Library and Copyright Alliance and the Music Library Association, *supra* note 2; Comment of Peter Decherney et al., *supra* note 2.

¹⁵ See Comment of Library and Music Alliance and the Music Library Association, *supra* note 2 at 5. See also Comment of Peter Decherney et al., *supra* note 2 at 3.

¹⁶ Comment of Library and Music Alliance and the Music Library Association, *supra* note 2 at 5.

¹⁷ See e.g., Notice of Inquiry, *supra* note 1; Final Rule: Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 37 C.F.R. Part 201, 62014-5 (Oct. 28, 2003).

Moreover, technologies are commercially available to address the commenters' concerns. Pioneer Electronics offers DVD bar coding software called DVD Bar`N`Coder™ that allows users to mark and then navigate seamlessly to certain audio and video segments on a disc. According to reviews, the software allows users to tag frames on a disc with a barcode number. When the barcode is scanned, the disc navigates to the desired frames. Additional features include the ability to choose the particular DVD element the segment displays, such as camera angle or language. Video blackboard features of the associated DVD player allow professors to demonstrate particular concepts on screen by typing text and placing graphics or drawings on top of the scene displayed on the monitor without actually transferring the highlights to the disc.¹⁸

The underlying TPMs are likewise evolving to address consumer interests. AACIS technology for next generation optical discs will enable content owners to authorize consumers to make secure copies of copyrighted works distributed on optical discs. Should there be a desire to make copies of clips, rather than of the entire content of the disc, then the technology can likewise enable content owners to extend such clip offers to consumers.

In addition to the availing themselves of technological advances that address the requested exemptions, educators can readily obtain the requested materials by working with copyright owners. Warner Bros. has adopted a policy of collaborating with educational institutions to address this issue. In fact, Warner Bros. routinely works with schools to supply licenses at minimum or no charge (and in some instances supplies the desired materials themselves) in order to enable the use of clips for educational purposes. Warner Bros.' willingness to satisfy the requests of educational institutions for use of its copyrighted works is further evidence against the need to grant this exemption.

Proposed Class: Derivative and collective works that contain audiovisual works in the public domain that are protected by technological measures which prevent their educational use.

Initial Round Submissions: Comment 5

Summary and Discussion:

The University of Pennsylvania professors also argue that an exception should be granted for copying derivative and collective works that contain audiovisual works in the public domain.¹⁹ Time Warner Inc. opposes recognition of this proposal because it is unnecessary given the availability of technologies to display clips of the works. Furthermore, rather than ensuring public access to public domain works, this exception would have the real-life effect of limiting the commercial availability of public domain

¹⁸ See e.g., <http://www.pioneerelectronics.com>; <http://www.eschoolnews.com/news/showstory.cfm?ArticleID=1777>; <http://www.campus-technology.com/article.asp?id=436&p=4>.

¹⁹ Comment of Peter Decherney et al., *supra* note 2.

works. Conversely, rejection of the request would have only a *de minimus* effect on public domain uses of works.

We oppose the requested exemption because it is unnecessary. As with the educational clip compilation exemption proposal, the proponents of this exemption focus on the purported inability to effectively show clips of a CSS-protected disc containing public domain works in a classroom setting. As noted above, technology exists to meet the stated desires of the professors. Thus, this exemption is not needed.

Moreover, granting the requested exemption could have the perverse effect of limiting the availability of public domain works and accompanying educational and historical materials. Public domain works may be part of a larger collective or derivative work entitled to copyright protection, or may be incorporated in whole or in part in a copyrighted work. By effectively denying the creators of such copyright-eligible works the ability to protect their work with a TPM, the requested exemption could well lead to the understandable business decision to cease including public domain content in such works. This would lead to a shrinking rather than a flourishing of the public domain.

Rejecting the requested exemption and thus continuing to allow protection of works which contain public domain works or portions of works, would have only a *de minimus* effect on users. Creative uses of public domain works would not be affected. Only slavish, wholesale copying of a protected disc would be impeded. It would still be possible to re-shoot scripts, make new interpretations of works, and perform and make sound recordings of public domain works without authorization of the original copyright owner. Thus the purpose behind the public domain – to allow creators and the public to build on and continue to develop our collective cultural heritage – will not suffer.

Proposed Class: Sound recordings and audiovisual works that are distributed in various digital formats that are protected by technological measures which threaten to create security vulnerabilities.

Initial Round Submissions: Comment 6, 7 and 8

Summary and Discussion:

Three submissions argue for broad exemptions to permit circumventing TPMs applied to sound recordings and audiovisual works if the technological measures threaten to create security vulnerabilities.²⁰

The requested exemptions amount to an open-ended request for the Copyright Office to review and opine on the technical merits and the security vulnerabilities of technologies that might be deployed to protect copyrighted works. Granting such a request with respect to any particular technology would be tantamount to outlawing the use of the

²⁰ Comment of Edward W. Felten et al., *supra* note 2; Comment of the Delaware County Pennsylvania Intellectual Property Forum, *supra* note 2. Comment of Computer and Communications Industry Association and Open Source and Industry Alliance, *supra* note 2.

technology. The Copyright Office is not the appropriate forum for such requests, and this rulemaking proceeding is not the appropriate vehicle for such a proposal.

In addition, as explained above, TPMs are often developed for bi-lateral implementation; thus, a given TPM technology may be implemented in different ways in different products. This could mean that whether or not a security vulnerability exists could vary from device to device and from product to product. Granting the requested exemption in this environment would create a “Wild West” of circumvention of access controls.

Although the requested exemption is much broader insofar as it seeks an unfettered ability to circumvent any TPM which a user determines may imply a security vulnerability; in form, it is similar to requests for exemptions sought in earlier proceedings to permit circumvention for fair use as the user unilaterally defined it. In the Final Rule from the 2003 proceedings, the Copyright Office rejected exemption requests for (i) all works for non-infringing uses, such as fair use and private use, and other use-based proposals and (ii) several classes, including "Fair Use Works".²¹ In both cases, the Copyright Office rejected the requests for failure to formulate an appropriately-scoped proposal and failure to specify a "class of works".²² The proposed exemptions here should be likewise rejected.

RENEWAL OF CERTAIN EXEMPTIONS

Proposed Class: Literary works that are distributed with technological protection measures that prevent access to and fair use by people who are blind or visually impaired.

Initial Submission: Comment 1

Summary and Discussion:

One submission argues for renewal of a previous exemption for literary works that are distributed with technological protection measures that prevent access to and fair use by people who are blind or visually impaired.²³

Time Warner expresses no position as to whether or not the requested exemption should be granted. We write to alert the Copyright Office to some of our activities to make the books we publish accessible to people who are blind or visually impaired. Time Warner Book Group collaborates with the American Foundation for the Blind (“AFB”), the proponent of the request. We are keenly aware of and support AFB’s efforts to make information and products accessible to individuals with vision loss. In fact, Time Warner Book Group constantly seeks ways to promote reading and to enhance access to the works we publish, especially by persons who are blind or visually impaired. Because of these ongoing efforts, Time Warner AudioBooks was the recipient of the Helen Keller

²¹ Final Rule, *supra* note 16.

²² *Id.*

²³ Comment of the American Foundation for the Blind, *supra* note 2.

Award. Our extensive audiobook business accommodates the needs of visually-impaired persons by making works available in audible fashion. Time Warner Book Group is also currently engaged in endeavors that synchronize text and audio for use by both sighted and visually-impaired persons. We have already published such a version by one of our bestselling novelists, James Patterson, entitled *The Jester*. We intend to continue these efforts to better meet the needs of all readers who wish to access our works, and hope to continue our cooperation with AFB as well.

Proposed Class: Obsolete platforms where a required access control “dongle” is missing or broken to allow circumvention also of any computer programs and video games distributed in formats that require obsolete operating systems or hardware as a condition of access.

Initial Round Submissions: Comment 4

Summary and Discussion:

The Internet Archive argues that a previous exemption for obsolete platforms where a required access control “dongle” is missing or broken should be expanded to allow circumvention also of any computer programs or video games distributed in formats that require obsolete operating systems or hardware as a condition of access.²⁴ While The Internet Archive apparently intends the exception to address archival uses, the exemption is not so limited.²⁵ Time Warner Inc. opposes the recognition of this exemption because it constitutes more than a modest expansion of the previously recognized exemption; despite The Internet Archive’s stated intentions, it is not limited to archival works; and because there is a significant market for computer programs and video games originally distributed in now-obsolete formats that could be disrupted by the proposed exemption.

The Internet Archive argues that the requested exemption will not harm copyright holder interests because there is no commercial market for computer programs and games distributed in now-obsolete formats.²⁶ Contrary to The Internet Archive’s assertion, the market for classic games is very robust.

TBS, Inc., a Time Warner company, recently launched GameTap, a broadband playground of video games. GameTap is an entertainment network that offers games on demand, plus original programming. To use GameTap, a subscriber downloads an application that acts as a gateway to the GameTap library. The application allows users to access and play hundreds of original console, PC and arcade games from their desktops in their original form.²⁷ To launch the service, GameTap licensed nearly 1,000 games from 17 publishers, including Activision, Atari, Eidos Interactive, Electronic Arts, G-Mode, Intellivision Lives, Midway, Namco, SEGA, TAITO, Team 17, Ubisoft and

²⁴ Comment of The Internet Archive, *supra* note 2.

²⁵ *Id.* at 13.

²⁶ *Id.*

²⁷ See http://www.gametap.com/home/about/press_releases/010506_print.html; See also http://www.gametap.com/home/about/press_releases/042705_print.html.

Viviendi Universal Games. The service began with 300 games available to users, and has rolled out additional games on a regular basis. GameTap features games such as Pong, Pac-Man, Asteroids, Centipede and Pitfall!. Users can select games by game type (e.g., action, adventure and strategy), game system (e.g., Sega Dreamcast, Atari 2600 and PC games) or other categories (e.g., game rings, “hot picks” and user favorites).²⁸

GameTap does not just allow subscribers to indulge in a nostalgia for games no longer available from their original producers. It also delivers new programming to subscribers, who by definition are interested in classic games. GameTap includes broadband video programming similar to the “extras” available on the DVD version of a film or television series. This new, original content includes features about the games in GameTap or of general interest to gamers; gaming news; and music videos. Protecting the business models that can be built using classic games thus increases the number and types of entertainment services available to consumers. Making games freely available because their original playback equipment is obsolete would remove the economic incentive to develop and distribute such new programming. GameTap’s experience also demonstrates that there is an active licensing market in classic games, so those such as The Internet Archive that wish to make archival uses of these games should be able to seek licenses for any activities that do not fall within currently recognized exceptions either to copyright protection or to §1201.

Because the comments described above do not provide evidence of the type of actual or likely adverse effect on non-infringing uses that is cognizable under section 1201(a)(1)(C) of the Digital Millennium Copyright Act, the Librarian of Congress should deny the requested exemptions. We would welcome the opportunity to provide further information through the hearing process.

Respectfully submitted,

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²⁸ *Id.*