September 8, 2009

Response of MOTION PICTURE ASSOCIATION OF AMERICA to Further Copyright Office Questions in §1201 Rulemaking Proceeding

The Copyright Office has requested comment "on whether there is some way to qualify or more clearly delineate how large a 'portion' [of a work] may be, at least in terms of its outer limits," should the Copyright Office decide to recommend a DMCA exemption to permit the circumvention of CSS technical protection measures on DVDs. The Copyright Office suggests that such a limitation would take the following form:

> ... the portions of any single work used shall be, collectively, no greater than *x* minutes in duration and represent no greater than *y* percent of the duration of that work....

The stated purpose of this proposed limitation is to provide guidance to users for purposes of predicting liability under section 1201(a)(1).

MPAA respectfully submits that the Office's approach here is fundamentally misguided. The Office states that it is "inclined to believe that more specific limitations are advisable" because "this is a regulatory proceeding." It is, in fact, a proceeding in which the Office has been directed to recommend which "particular classes of works" ought to be exempt from the section 1201(a)(1)(A) prohibition for the next three years.[1] By proposing to define a "particular class of works" in terms of what "portion of a work" is used after circumvention of CSS is accomplished, the Office threatens to deform the statutory category beyond its breaking point. It proposes that a particular audio-visual work could at the

[1] See 17 USC §1201(a)(1)((B) and (C).

same time fall both inside and outside the contours of a "particular class of works," depending not upon whether users are prevented by the prohibition on circumvention from making non-infringing uses of works within the class – the statutory standard – but instead upon how much of the circumvented work is ultimately used in one of several contexts (classroom use, use in producing a documentary film, or use in preparing a "transformative" derivative work).

In effect, the Office proposes to wrench one of the traditional fair use factors – "the amount and substantiality of the portion used in relation to the copyrighted work as a whole," 17 USC section 107(3) -- entirely out of its statutory context and employ it for another and wholly different purpose – to determine whether circumvention of an entire work is prohibited. This is clearly contrary to Congress's expressed intent for this proceeding.

As the Office knows from our letter of November 14, 2008, and from the submission of the Joint Creators and Copyright Owners on February 2, 2009 (see pages 6-8), MPAA is already gravely concerned that the Copyright Office has exceeded the statutory directive by defining a particular class of works in terms of particular categories of uses or users.[2] The current proposal to define a particular class of works for which circumvention of technical measures is permitted in terms of the portion of a work that is used further strays from the statutory directive and threatens to totally subvert the clear intent of Congress by confusing fair use with the ability to circumvent.

As the Copyright Office knows, there is no fair use exception to the prohibition of circumvention in section 1201(a)(1)(A). Such an exception was extensively debated and specifically rejected by Congress, and the courts have consistently so interpreted the statute.[3] By suggesting

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[2] See attached letter of copyright industry organizations dated November 14, 2008.

[3] For a recent articulation of this well-established principle, see RealNetworks, Inc. v. DVD Copy Control Association, Inc., No. C 08-04548 MHP, 2009 U.S. Dist. LEXIS

injection of a fair use factor relating to the downstream use of copyrighted materials in order to determine whether or not a work falls within a "particular class of works" for purposes of defining an exemption to the DMCA prohibition on circumvention, the Copyright Office is contradicting the clear and unambiguous intent of Congress to distinguish the prohibition against circumvention and the statutory defenses thereto from a cause of action for copyright infringement and the statutory defenses thereto, including fair use.[4]

Although determinations of what constitutes a fair use under section 107 of the Copyright Act must be made on the basis of the particular facts and circumstances of a given use, guidelines as to what portion of a work may be used have been agreed to by a broad cross-section of stakeholders in one area, that of educational multimedia uses.[5] Those guidelines provide that "up to 10% or 3 minutes, whichever is less, in the aggregate of a copyrighted motion media work may be reproduced or otherwise incorporated as part of a multimedia project ..." Note, however, that these guidelines include other substantive limitations beyond these "portion" limitations, including limitations on the time periods during which the multimedia project may be used and the number of copies that may be made.

70503 at * 81-83 (N.D. Cal. Aug. 11, 2009) ("fair use can never be an affirmative defense to the act of gaining unauthorized access"). See also Universal City Studios, Inc. v. Corley, 273 F.3d 429, 443 (2nd Cir. 2001) ("the DMCA ... does not concern itself with the use of [copyrighted] materials after circumvention has occurred."); Chamberlain Group, Inc. v. Skylink techs., Inc., 381 F.3d 1178, 1195 (Fed. Cir. 2004)("Defendants who use [devices prohibited under 1201(a)(2) may be subject to liability under §1201(a)(1) whether they infringe or not."); 321 Studios v. Metro Goldwyn Mayer Studios, Inc., 307 F.Supp. 2d 1085, 1097-98 (N.D.Cal. 2004) (legal downstream use of the copyrighted material by customers is not a defense to liability under §1201(b)(1).

[4] Section 1201(a)(1)(D) specifically separates the determination to be made in this proceeding from determinations of what constitutes fair use: "Neither the exception under subparagraph (B) from the applicability of the prohibition contained in subparagraph (A), nor any determination made in a rulemaking conducted under subparagraph (C), may be used as a defense in any action to enforce any provision of this title other than this paragraph."

[5] See, http://www.utsystem.edu/OGC/IntellectualProperty/ccmcguid.htm#4

Assuming that a court would approve of these guidelines in a particular situation as one part of the analysis for determining fair use in a copyright infringement action, these limitations, or any other limitation, on the portion of a work used for purposes of determining fair use has no place in determining whether circumvention of technical measures is permitted. To apply such a standard would, in effect, suggest a fair use exception to the DMCA prohibition against circumvention which, as previously stated, was specifically rejected by Congress and which, to date, has been properly rejected by the Librarian in every section 1201 rulemaking proceeding.

The Copyright Office's proposed approach can only create confusion between determinations of when a use of a copyrighted work is "fair" and when circumvention of technical measures to enable such use is permissible. Applying a fair use factor -- portion of the work ultimately used after the circumvention is accomplished -- to a determination of whether a circumvention exemption is available, would certainly create such confusion, to the detriment of users, who would be shocked and disappointed to learn that the Office's incorporation of this metric into the definition of a "particular class of works" would not even be admissible evidence in a case in which the fair use defense was claimed based in part on how little of an audio-visual work was used. 17 USC 1201(a)(1)(E). More significantly, such an approach would seriously undermine the Congressional intent: to prohibit <u>any</u> unauthorized circumvention of technical measures to gain access to a copyrighted work, <u>whether or not</u> the intended use is a fair use or otherwise non-infringing, except where such circumvention is allowed under one of the several carefully crafted statutory exemptions contained in the DMCA itself or where the Librarian finds, under the focused inquiry mandated by the statute, that an exemption is necessary so that non-infringing uses of a defined particular class of works are not adversely affected.

While a limitation on the portion of a work that is used relates to a fair use determination and is wholly inappropriate as a consideration in determining the scope of an exemption to the DMCA's prohibition against circumvention, a limitation on the portion of a work protected by technical measures that is circumvented might be appropriate in sharpening the definition of a particular class of work. If the Copyright Office determines that an exemption has been justified, an act of circumvention should be limited to the smallest amount necessary and technically feasible to accomplish the non-infringing use.

As stated in our previous responses to questions from the Copyright Office,[6] it is possible in some cases to decrypt individual VOB files and possibly chapters containing a pre-defined portion of a motion picture. However, it is not possible so far as we know to decrypt arbitrary portions of a motion picture in order to access only the exact portion intended for a particular use.

Should the Copyright Office determine that an exemption is warranted with respect to some subset of audio-visual works on DVD, it may be appropriate, based on the evidence presented, to limit the amount of any such work that can be circumvented without liability to an individual VOB file or chapter containing the material that is to be used. Such a limitation would, in fact, provide greater certainty to the definition of a "particular class of works," which the Office's proposed formulation would not. However, to the extent that the use can be accomplished through circumvention of only the technical measure[s] controlling access to a portion of the work, there would appear to be no justification for an exemption that extends to circumvention of technical measures controlling access to other portions of the work.

Moreover, any exemption should be further limited to works that are not available from sources such as the film

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[6] Responses of Motion Picture Association of America to Copyright Office Questions in §1201 Rulemaking Proceeding, July 10, 2009.

server project described in our earlier comments.[7] Such a limitation would be consistent with the decision of the Copyright Office to recommend an exemption for the visually impaired which was limited to e-books that have the read-aloud function disabled or are otherwise not available in specialized formats for the visually impaired.

As stated repeatedly in this proceeding, and demonstrated at the public hearing on May 6, there are readily available, affordable and effective means to access portions of audiovisual works for purposes of making non-infringing uses. Thus, there is no basis for recommending a DMCA circumvention exemption for audiovisual works on the ground that non-infringing uses are or are likely to be adversely affected by the prohibition against circumvention.[8] The only evidence proffered in this proceeding in support of an exemption relates to the convenience of circumventing technical measures rather than using other alternatives to gain access to audiovisual works. Mere convenience is not an acceptable basis for undercutting the effectiveness of technical protection measures which have made possible the cornucopia of audiovisual works available to American consumers today.

Conclusion

Consideration of the amount of a work that is used for a non-infringing purpose is irrelevant to a determination of whether a particular act of circumvention should be exempted from the prohibition in section 1201(a)(1) of the DMCA. Defining a "particular class of works" in terms of the amount of a work that is used after circumvention would be wholly inappropriate and contrary to the statutory directive. Should the Copyright Office determine that non-infringing uses of a particular class of works will be adversely affected in the

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[7] See "Comments of Motion Picture Association of America" filed February 2, 2009, at pages 10-11.

[8] If the Office determines that proponents have met their burden in this proceeding, MPAA would not oppose recognition of an exemption for classroom uses along the lines of proposed exemption 4E, with certain modifications that are discussed on pages 28-30 of the comments of the Joint Creators and Copyright Owners.

absence of an exception to the prohibition against circumvention in section 1201(a)(1), a limitation yielding more predictable results and less subject to abuse would focus on the amount of a protected file that may be circumvented. However, MPAA respectfully submits that the evidence in this proceeding will not support such a determination with respect to nearly all of the proposed exemptions about which this question inquires.

Thank you for this opportunity to supplement the record of this proceeding. Please contact the undersigned if you have additional questions or require further information.

Fritz E. Attaway
Executive Vice President, Special Policy Advisor
Motion Picture Association of America, Inc.
1600 Eye Street, N.W.
Washington, D.C. 20006
202 293-1966
fattaway@mpaa.org

ATTACHMENT

November 14, 2008
VIA E-MAIL AND U.S. MAIL

James H. Billington, Librarian of Congress
The Library of Congress
LM-608
101 Independence Avenue, S.E.
Washington, DC 20540-1000

Marybeth Peters, Register of Copyrights
U.S. Copyright Office, James Madison Memorial Building
LM-403
101 Independence Avenue, SE.
Washington, DC 20559–6000

Re: Exemptions to 17 U.S.C. § 1201(a)(1)

Dear Dr. Billington and Ms. Peters,

I write to you on behalf of five copyright industry organizations, to express concerns regarding the ground rules for the recently initiated fourth triennial rulemaking on potential exemptions to the 17 U.S.C. § 1201(a)(1) prohibition on circumventing access control technologies. See Notice of Inquiry ("NOI"), 73 Fed. Reg. 58073 (Oct. 6, 2008). These organizations include the Association of American Publishers, the Business Software Alliance, the Entertainment Software Association, the Motion Picture Association of America and the Recording Industry Association of America, and will be referred to in this letter as the "copyright organizations."

The copyright organizations plan to participate actively in the rulemaking process, as they have in past triennial rulemakings. However, they do not plan to propose any exemptions to be recognized during the 2009-2012 period.

The NOI states that "interested parties should assume that the standards developed thus far [in the previous

rulemaking proceedings] will continue to apply in the current proceeding." 73 Fed. Reg. at 58076. The copyright organizations are disappointed that while the NOI invites proponents of exemptions who wish to "argue for adoption of alternative approaches" to propose changes to these standards in the initial comment phase, it forbids parties who are not proposing exemptions (such as the copyright organizations) from making such arguments until much later in the process. 73 Fed. Reg. at 58076, and n. 3. The NOI also indicates that "the initial comments will frame the inquiry throughout the rest of the rulemaking process." 73 Fed. Reg. at 58075. Since these procedures foreclose the possibility for the copyright organizations to express their concerns about elements of the standards announced in the last rulemaking proceeding until after the scope of the inquiry has been framed by the initial comments, they take this opportunity to express them, and to urge respectfully that you proceed cautiously in applying these standards in this proceeding.

As the NOI acknowledges, the Register determined during the last triennial rulemaking to modify her interpretation of the scope of the statutory phrase "particular class of works." See 17 U.S.C. § 1201(a)(1)(B). As initially interpreted, a "class of works" was to be identified "primarily based on attributes of the works themselves, and not by reference to some external criteria such as the intended use or the users of the works." 73 Fed. Reg. at 58076. In her 2006 Recommendation, as ratified by the Librarian in his decision, the Register determined that it would be appropriate in at least some cases to define the class in terms of particular described categories of uses or users. See 73 Fed. Reg. at 58076-77; Recommendation of the Register of Copyrights in RM 2005-11; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies 15-24 (Nov. 17, 2006). The NOI indicates that this approach will be followed in the current proceeding, but notes that the approach to this issue "may continue to develop in this and subsequent proceedings." 73 Fed. Reg. 58076. The copyright organizations wish to present their views for inclusion in that developmental process now.

While we continue to believe that the interpretation you initially applied to "particular class of works" was more consistent with legislative intent, we share the view expressed in the NOI that the altered scope of what qualifies as a "particular class of works" may enable you to craft exemptions that are "neither too narrow nor too broad." 73 Fed. Reg. 58077. We also appreciate your attempts to craft precise exemptions during the last rulemaking. However, we are concerned that the new approach to what constitutes a "particular class of works" will naturally tend toward an accumulation of exemptions on behalf of particular groups of users or intended uses. Such a proliferation of exemptions could confuse consumers; prove difficult to administer; improperly spawn an underground marketplace for circumvention services; and disrupt the legitimate market for copyrighted works, by eroding confidence in the integrity and applicability of technological measures to control access to such works.

We suggest that the risk of these detrimental outcomes can be ameliorated by conscientiously applying some limiting principles to the drafting of any exemptions for which you determine that the proponents have met their burden of persuasion on all other issues outlined in the NOI. These limiting principles include:

- First, every granted exemption should *clearly specify* who can carry out acts of circumvention. For example, the text of the exemption itself should inform the public that only a qualified user described in the exemption may exercise it, and that it is unlawful for another person to exercise it for that user's benefit.

- Second, every granted exemption should clearly state that it only applies to the extent circumvention is "*necessary*" to carry out the particular lawful use which has been employed to refine the particular class.

- Third, every granted exemption should explicitly state that it is only applicable "when circumvention is

accomplished *solely for the purpose*" of enabling the particular lawful use involved.

- Fourth, every exemption should consider the *effect* of an act of circumvention as well as its *purpose*. No exemption should apply to acts of circumvention that enable unauthorized access to works in circumstances beyond those for which entitlement to an exemption has been proven, even in the absence of proof that a broader scope of unauthorized access was intended.

- Fifth, every exemption aimed at works in digital formats should be limited to circumstances in which "*all* existing digital editions or copies of a work contain access controls that prevent" the particular lawful use involved.

- Sixth, every exemption should be conformed to the *scope of the evidence*. If a proponent of an exemption meets its burden in relation to a specific type of access control (e.g., CSS) used to protect a particular category of work (e.g., audio-visual), any exemption granted should only apply to circumvention of that type of access control rather than all access controls used to protect that type of work.

- Seventh, every proposed exemption that concerns an *area already addressed by a statutory exception* to Section 1201(a)(1)(A) should receive heightened scrutiny. Of course, if the proponent cannot prove that the circumvention conduct in question falls outside the scope of an existing statutory exception, the proposal must be rejected. See Recommendation of the Register of Copyrights in RM 2002-4; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies 181-82 (Oct. 27, 2003) ("There is no basis for the Register to recommend an exemption where the factual record indicates that the statutory scheme is capable of addressing the problem."). Uncertainty regarding the scope of an existing statutory exception is not persuasive evidence of a need for an administrative exemption concerning the same lawful use. Opponents

of exemptions should not bear the burden of demonstrating that an existing statutory exception already applies; the burden should remain squarely on proponents of exemptions to demonstrate the opposite.

But even where the proponent can persuasively show that the circumventing conduct she seeks to undertake is not covered by any existing statutory exception, particular caution must be exercised when the non-infringing use that the prohibition allegedly inhibits closely resembles the activity that the existing statutory exception seeks to foster (e.g., security testing, encryption research, reverse engineering of computer programs, privacy protection). The fact that Congress, in crafting a statutory exception to protect such non-infringing conduct, chose not to immunize circumvention in the specific circumstances addressed by the proposed administrative exemption, should weigh heavily against the proposal.

We base these requests primarily on methods that you have used in crafting exemptions recognized in previous rulemakings. We believe that if these methods are consistently applied to all proposed exemptions, the likelihood of the harms referred to above will be reduced.

Thank you for your consideration of the views of the copyright organizations. We look forward to participating in this process and more fully articulating how the approaches described above should be applied in this rulemaking proceeding. If you have any questions, please feel free to contact me.

Sincerely yours,

Steven J. Metalitz
of
MITCHELL SILBERBERG & KNUPP LLP

cc: David Carson, Associate Register of Copyrights
Robert Kasunic, Principal Legal Advisor