

**UNITED STATES COPYRIGHT OFFICE**

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

**Docket No. RM 2008-8**

**JOINT COMMENTS**

**of**

**AAP: ASSOCIATION OF AMERICAN PUBLISHERS  
ASMP: AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS  
AVA: ALLIANCE OF VISUAL ARTISTS  
BSA: BUSINESS SOFTWARE ALLIANCE  
DGA: DIRECTORS GUILD OF AMERICA  
ESA: ENTERTAINMENT SOFTWARE ASSOCIATION  
MPAA: MOTION PICTURE ASSOCIATION OF AMERICA  
PACA: PICTURE ARCHIVE COUNCIL OF AMERICA  
RIAA: RECORDING INDUSTRY ASSOCIATION OF AMERICA**

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**JOINT CREATORS AND COPYRIGHT OWNERS COMMENTS**

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## **SECTION I: INTRODUCTION AND SUMMARY**

Nine leading copyright industry trade organizations – the Association of American Publishers (“AAP”), American Society of Media Photographers (“ASMP”), Alliance of Visual Artists (“AVA”), Business Software Alliance (“BSA”), the Directors Guild of America (“DGA”), the Entertainment Software Association (“ESA”), Motion Picture Association of America (“MPAA”), the Picture Archive Council of America (“PACA”), and Recording Industry Association of America (“RIAA”) (collectively referred to as the “Joint Creators and Copyright Owners”) – are pleased to submit this response (referred to herein as these “Joint Comments”) to the Notice of Proposed Rulemaking published in the Federal Register (73 Fed. Reg. 79,425) on December 29, 2008, as well as the Notice of Inquiry published in the Federal Register (73 Fed. Reg. 58,073) on October 6, 2008, and the comments received by the Copyright Office in response to the NOI. The Joint Creators and Copyright Owners look forward to sharing, throughout this proceeding, their views regarding the benefits of the 17 U.S.C. § 1201(a)(1) prohibition on circumventing technologies used to control access to copyrighted works, and their responses to proposed administrative exemptions to the prohibition. In this Introduction and Summary, we provide descriptions of the Joint Creators and Copyright Owners; a glossary of abbreviations used throughout these Joint Comments; and a brief summary of these Joint Comments.

### **A. Descriptions of the Joint Creators and Copyright Owners**

The Joint Creators and Copyright Owners represent authors, creators, copyright owners and most of the U.S. copyright based industries.

**AAP** 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 vibrant, evolving markets for e-books and audiobooks, while also producing journals, textbooks, computer programs, databases, and a variety of other multimedia works for use in online, CD-ROM and other digital formats.

**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 7,000 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.

**AVA** is an umbrella organization of professional and student photographers and photographic artists, consisting of the following groups:

- Professional Photographers of America (“PPA”) is the world’s oldest and largest non-profit trade association for professional photographers and photographic artists from dozens of specialty areas including portrait, wedding, commercial, advertising, and art. PPA consists of some 22,000 individual members and includes nearly 200 independent photography organizations that have elected to affiliate themselves with the association. For more than 129 years, PPA has dedicated its efforts to protecting the rights of photographers and to creating an environment in which these members can reach their full business and creative potential.
- The Society of Sport & Event Photographers (“SEP”) is a private, nonprofit association dedicated exclusively to serving the needs of sport and event photographers. SEP marshals the resources of the event photography industry and delivers them to its members via their exclusive online content, *Action News* publication and live events.
- Commercial Photographers International (“CPI”) is an energetic, nonprofit membership organization focused on the changing needs of commercial photographers. Led by successful commercial photographer volunteers and a skilled professional staff, CPI has put together information, resources and materials for photographers in this rapidly changing industry.
- The Student Photographic Society (“SPS”) was founded in 1999 to provide career-building resources, networking opportunities, and informational resources to photography students. SPS represents students and educators in 300 different colleges, universities and trade schools that offer degrees in photography.
- The Evidence Photographer International Council (“EPIC”) was founded in 1968 as a nonprofit educational and scientific organization with the primary purpose of advancing forensic photography and videography in civil evidence and law enforcement.

**BSA** is the foremost organization dedicated to promoting a safe and legal digital world. BSA is the voice of the world's commercial software industry and its hardware partners before governments and in the international marketplace. Its members represent one of the fastest growing industries in the world. BSA programs foster technology innovation through education and policy initiatives that promote copyright protection, cyber security, trade and e-commerce.

The **DGA** represents 14,000 directors and members of the directorial team who work in feature film, film/taped and live television, commercials, documentaries, sports, 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.

The **ESA** is the U.S. association dedicated to serving the business and public affairs needs of companies publishing interactive games for video game consoles, handheld devices, personal computers, and the Internet. The ESA offers services to interactive entertainment software publishers including a global anti-piracy program, owning the E<sup>3</sup> Expo, business and

consumer research, federal and state government relations, and First Amendment and intellectual property protection efforts. For more information, please visit [www.theESA.com](http://www.theESA.com).

**MPAA** is a trade association representing some of the world's largest producers and distributors of motion pictures and other audiovisual entertainment material for viewing in theaters, on prerecorded media, over broadcast TV, cable and satellite services, and on the Internet. MPAA members include Paramount Pictures Corporation, Sony Pictures Entertainment, Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLLP, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment, Inc.

**PACA** is the trade organization in North America that represents the vital interests of stock archives of every size, from individual photographers to large corporations, who license images for commercial reproduction. Founded in 1951, its membership includes over 100 companies in North America and over 50 international members. Through advocacy, education and communication, PACA strives to foster and protect the interests of the picture archive community. Accordingly, we work to develop useful business standards and promote ethical business practices; actively advocate copyright protection; collect and disseminate timely information; and take an active role in the picture community by building relationships with organizations from related industries.

**RIAA** 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.

## **B. Glossary**

These Joint Comments will use the following abbreviations for official materials from the three prior rulemakings and the legislative history of the DMCA:

- 2008 NOI – Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies; Notice of Inquiry, 73 Fed. Reg. 58,073 (Oct. 6, 2008), *available at* <http://www.copyright.gov/fedreg/2008/73fr58073.pdf>;
- NPRM – Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies; Notice of Proposed Rulemaking, 73 Fed. Reg. 79,425 (Dec. 29, 2008), *available at* <http://www.copyright.gov/fedreg/2008/73fr79425.pdf>;
- 2006 Final Rule – Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies; Final Rule, 71 Fed. Reg. 68,472 (Nov. 27, 2006), *available at* <http://www.copyright.gov/fedreg/2006/71fr68472.html>;
- 2006 Rec. – 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 (Nov. 17, 2006), *available at* [http://www.copyright.gov/1201/docs/1201\\_recommendation.pdf](http://www.copyright.gov/1201/docs/1201_recommendation.pdf);

- 2006 Joint Reply Comments – Reply Comments filed on behalf of various associations and alliances of creators and copyright owners in RM 2005-11, *available at* [http://www.copyright.gov/1201/2006/reply/11metalitz\\_AAP.pdf](http://www.copyright.gov/1201/2006/reply/11metalitz_AAP.pdf);
- 2005 NOI – Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Notice of Inquiry, 70 Fed. Reg. 57,526 (Oct. 3, 2005), *available at* <http://www.copyright.gov/fedreg/2005/70fr57526.html>;
- 2003 Rec. – The 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 (Oct. 27, 2003), *available at* <http://www.copyright.gov/1201/docs/registers-recommendation.pdf>;
- 2000 Rec. – Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies; Final Rule, 65 Fed. Reg. 64,556 (Oct. 27, 2000), *available at* <http://www.copyright.gov/fedreg/2000/65fr64555.pdf>;
- House Managers’ Rep. – 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 (Comm. Print 1998), *reprinted in* 46 J. COPYRIGHT SOC’Y 635 (1999);
- Commerce Rep. – Report of House Commerce Committee on H.R. 2281, the Digital Millennium Copyright Act, H.R. Rep. No. 105-551, pt 2 (1998).

In referring to the comments received in response to the 2008 NOI, which are *available at* <http://www.copyright.gov/1201/2008/index.html>, these Joint Comments will refer to the groupings provided in the NPRM (*e.g.*, Comment 3 will refer to the comment filed by Mark Rizik).

### **C. Summary of Joint Comments**

Besides this Introduction and Summary (section I), these Joint Comments have three sections.

Section II discusses the ground rules for this proceeding and the new procedure involving use of an NPRM. Although the triennial rulemaking that took place in 2005 – 2006 began under a well established set of ground rules, those rules shifted somewhat by its conclusion. In particular, the Register and the Librarian altered their interpretation of the statutory phrase “particular class of works” in order to accommodate certain exemption proponents, as discussed in the 2008 NOI. In section II(A), the Joint Creators and Copyright Owners express concerns regarding this new interpretation, as well as their views on how these concerns may be ameliorated in the consideration of whether particular administrative exemptions ought to be recognized, and if so, how they should be drafted. The Joint Creators and Copyright Owners also present our views on how this proceeding, to recognize temporary administrative exemptions to 17 U.S.C. § 1201(a)(1)(A), should treat the statutory exemptions to the same

prohibition that Congress enacted in 1998. Section II(B) raises questions regarding the new administrative process utilized during this proceeding. Finally, section II(C) explains why the radical change to the ground rules proposed in one of the initial comments in response to the 2008 NOI should be rejected.

In section III, the Joint Creators and Copyright Owners provide examples of how technologies that control access to copyrighted works facilitate a broad and expanding range of consumer uses of those materials. Today's "digital cornucopia" benefits both online and offline consumers. Creative works are available in larger numbers, through more distribution channels, to more people, in more formats, and with more flexible terms of use than ever before. Access control technologies play a critical role in making this possible. As Congress directed, the Register of Copyrights, in her recommendation, and the Librarian of Congress, in his decision, should take these facts into account when considering how the prohibition on circumventing access controls affects "the availability for use of copyrighted works." 17 U.S.C. § 1201(a)(1)(C)(i).

Section IV consists of the Joint Creators and Copyright Owners' responses to the proposals put forward for comment in the NPRM, using the 11 categories of proposals established by the Register. The Joint Creators and Copyright Owners do not oppose the renewal of certain existing exemptions (which relate to ebooks, classroom use of audio-visual materials by media studies and film professors, access to wireless telephone networks, and obsolete and malfunctioning dongles) if the Register and the Librarian (1) properly determine that the proponents have met their burdens of persuasion and (2) apply certain limitations, as described in these Joint Comments, in drafting the administrative exemptions. These limitations are needed to avoid excessive confusion and to remain in compliance with the statutory mandate for this proceeding. The Joint Creators and Copyright Owners believe that none of the newly proposed administrative exemptions meet the statutory criteria for approval in this proceeding, and urge that they be rejected, for the reasons stated in Section IV.

The Joint Creators and Copyright Owners thank the Register and the Librarian for their consideration of these Joint Comments, and look forward to participation in further phases of this rulemaking proceeding.

## **SECTION II: GROUND RULES ISSUES**

In this section, the Joint Creators and Copyright Owners offer their views on several critical issues relating to the standards to be applied in this proceeding and the procedures to be followed in carrying it out. In subsection A, we discuss the standards for determining when a temporary administrative exemption to the section 1201(a)(1) prohibition ought to be recognized, and for drafting any such exemptions as are determined to be justified. In subsection B, we comment on the Copyright Office's decision to proceed, for the first time, through a Notice of Proposed Rulemaking. In subsection C, we respond in opposition to the only specific proposal put forward in the initial comment round that calls for adoption of an alternative approach to the established ground rules.

### **A. Standards for recognizing and drafting exemptions**

The Notice of Inquiry that initiated this proceeding stated that “interested parties should assume that the standards developed thus far [in the previous rulemaking proceedings] will continue to apply in the current proceeding.” 2008 NOI at 58,076. While the 2008 NOI invited proponents of exemptions seeking “adoption of alternative approaches” to propose changes to these standards in the initial comment phase, it forbade parties who are not proposing exemptions (such as the Joint Creators and Copyright Owners) from making such arguments until this point in the process. 2008 NOI at 58,076, n. 3. Since the 2008 NOI also indicated that “the initial comments will frame the inquiry throughout the rest of the rulemaking process,” (2008 NOI at 58,075) these procedures foreclosed the possibility for the Joint Creators and Copyright Owners to express their concerns about elements of the standards announced in the last rulemaking proceeding until after the scope of this inquiry had been framed by the initial comments. Nevertheless, in response to footnote 3 of the 2008 NOI, the Joint Creators and Copyright Owners take this opportunity to express these concerns.

#### **1. Application of the modified approach to “particular class of works”**

As the 2008 NOI acknowledges, the Register determined during the last triennial rulemaking to modify her interpretation of the scope of the key statutory phrase “particular class of works.” 17 U.S.C. § 1201(a)(1)(B). Initially, the Register concluded that “classifying a work by reference to the type of user or use (e.g., *libraries, or scholarly research*) seems totally impermissible.” 2000 Rec. at 64,560 (emphasis in original). 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.” 2008 NOI at 58,076. 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 a class partly in terms of particular described categories of uses or users. *See* 2008 NOI at 58,076-77; 2006 Rec. at 15-24. The 2008 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.” 2008 NOI at 58,076. The Joint Creators and Copyright Owners wish to present their views for inclusion in that developmental process now.

We continue to believe that the interpretation the Register and Librarian initially applied to “particular class of works” was more consistent with the plain language of the statute as well as legislative intent. Defining a particular class of works based on who is engaging in circumvention could undermine the “sound conclusion” that a particular class of works should be “primarily” defined by reference to a category of works listed in 17 U.S.C. § 102. 2006 Rec. at 17; *see also* 2008 NOI at 58,076. Once the Librarian grants an exemption for a category of works applicable to a specific educational use (*e.g.*, use of clip compilations for face-to-face teaching) engaged in by a specific subset of educational users (*e.g.*, media and film studies professors), for example, it is inevitable that other educational users will demand similar exemptions for other educational uses. The categories of works at issue will become less and less important, and the exemptions proposed will become “primarily” focused on the type of use and user involved. Indeed, the proposals received in this proceeding bear out this concern. Several of them propose exemptions related to the entirety of multiple section 102 categories of works (rather than a narrow, focused subset of such works (*e.g.*, 4H, 8A, 8B, 10A, 10B), and are only limited by a broad description of the types of users and uses involved.

In essence, the approach adopted by the Register and ratified by the Librarian in 2006 has positioned this proceeding at the edge of a foreseeable slippery slope. Some of the current crop of proposals would push the proceeding headlong down it. If unchecked, this momentum will culminate in demands for exemptions for acts of circumvention of access controls on any and all types of works if carried out by favored groups of users “for fair use purposes.” The Register and the Librarian have consistently rejected such proposals (*see, e.g.*, 2000 Rec. at 64,571), and their approval would be inconsistent with the statute and the legislative intent.

We are also 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.

Despite our concerns about the impact of the Register’s 2006 Recommendation in this regard, we share the view expressed in the 2008 NOI that the altered scope of what qualifies as a “particular class of works” may allow for the crafting of exemptions that are “neither too narrow nor too broad.” 2008 NOI at 58,077. We also appreciate the Register’s attempts to craft precise exemptions during the last rulemaking. We suggest that the risk of the detrimental outcomes summarized above can be ameliorated by conscientiously applying some limiting principles to the drafting of any exemptions for which the Register determines that the proponents have met their burdens of persuasion on all other issues outlined in the 2008 NOI. These suggested limiting principles are based primarily on methods that the Register has 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.

These limiting principles include:

- First, every granted exemption that is “refined” as described in the 2006 Recommendations should *clearly specify* who may carry out acts of circumvention. 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. In this regard, the Register should bear in mind that Congress’ primary concern in designing this proceeding was to ameliorate unforeseen adverse impacts on the noninfringing activities of individual users. Commerce Rep. at 36 (The proceedings are to “allow the enforceability of the prohibition against the act of circumvention to be selectively waived, for limited time periods, if necessary to prevent a diminution in the availability *to individual users* of a particular category of copyrighted materials.”) (emphasis added).
- 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. Whenever alternative means that do not involve circumvention are available (including, but not limited to, through seeking the permission or cooperation of copyright owners) to carry out the use, the exemption should not apply, even to activities of the category of users identified in the exemption.
- Third, as a critical subset of the preceding principle, 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. In fact, in many circumstances, the availability of analog copies will sufficiently serve the needs of users engaging in specific noninfringing uses.
- Fourth, 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.
- Fifth, in drafting every exemption, the Register should consider the *effect* of an act of circumvention as well as its *purpose*. No exemption should apply to acts of circumvention that inherently enable or create a serious risk of unauthorized access to works in circumstances beyond those for which the statutory criteria for an administrative exemption have been proven, even in the absence of proof that a broader scope of unauthorized access was intended.
- Sixth, every exemption must be conformed to the *scope of the evidence* presented to justify it. If a proponent of an exemption meets its burden only in relation to a specific type of access control (*e.g.*, the Content Scrambling System, or CSS) used to protect a particular category of work (*e.g.*, feature films), any exemption granted should apply to circumvention of only that type of access control for that type of work, rather than all access controls used to protect that category of work. Additionally, the exemption should not be extended to any access control protecting a broader statutory category of work (*e.g.*, audiovisual works).

## 2. Relationship of statutory and administrative exemptions

The Joint Creators and Copyright Owners also urge the Register and the Librarian to shift the course that may have been set in the 2006 Recommendation with respect to the interplay between statutory and administrative exemptions, and to return to an approach more consistent with the structure and intent of the statute.

The role of this proceeding within the broader context of the DMCA as a whole must always be borne in mind. Congress established the prohibition on circumvention of access controls in section 1201(a)(1). At the same time, it crafted seven statutory exemptions.<sup>1</sup> In each of these statutory exemptions, codified in sections 1201(d) through (j), Congress carefully delineated certain conditions which must be satisfied before the exemption becomes applicable. To give just one example, the reverse engineering statutory exemption in section 1201(f) sets forth several conditions in paragraph (1), including that the person carrying out the circumvention of an access control applied to a computer program must have lawfully obtained the right to use that program. If this and the other conditions set out in the statute are not met, the statutory exemption does not apply, and the prohibition on circumvention of access controls remains in full force.

Since the section 1201(a)(1) prohibition is enforceable through civil (section 1203) and, in some circumstances, criminal (section 1204) litigation, it is evident that Congress left it to the federal courts to interpret the provisions of the statutory exemptions, including the conditions spelled out in the statute, and to determine whether they applied in the particular factual circumstances at hand. It gave no role to the Copyright Office or the Librarian of Congress in that regard.

As an appendage to this structure of a prohibition and seven statutory exemptions, Congress also created this rulemaking proceeding, which was intended as a “fail-safe mechanism.” 2008 NOI at 58,074, *quoting* Commerce Rep. at 36. Its main focus is to consider claims that the deployment of access control technologies, which the DMCA was enacted to encourage, and in particular the prohibition on circumvention of access controls, is having substantial adverse effects on noninfringing uses of particular classes of works. It also assigned the burden of persuasion to the party asserting such adverse effects, including the burden of showing that any adverse effects that were occurring were due to the prohibition. *See* 17 U.S.C. § 1201(a)(1)(B) (adverse effect must be “by virtue of such prohibition”); House Managers’ Rep. at 6 (“Adverse impacts that flow from other sources ... or that are not clearly attributable to such a prohibition, are outside the scope of the rulemaking”); 2008 NOI at 58,074 (requiring proof of a “causal connection between the prohibition .. and the adverse effect”). It would, of course, be impossible to prove that such effects had occurred “by virtue of [the] prohibition” if the prohibition did not apply, including if the conditions for a statutory exemption had been met.

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<sup>1</sup> Although one would ordinarily refer to a limitation on a statutory prohibition as an “exception” thereto, we will follow the terminology consistently used by the Register in her Recommendations and refer to these as “statutory exemptions.” By contrast, we will refer to the temporary exemptions recognized in this rulemaking proceeding as “administrative exemptions.”

It seems inescapable that the proponent's burden in this proceeding includes demonstrating that the noninfringing activities that the proponent seeks to engage in do not fall within the scope of any statutory exemption to the prohibition, and that it cannot reasonably bring its activities within that scope. If the statutory exemption already applies, or reasonably could be made to apply, that would eliminate any adverse effect on noninfringing use that would be due to the prohibition. If the proponent cannot prove that the circumvention conduct in question falls outside the scope of an existing statutory exemption, the proposal must be rejected.

Furthermore, because Congress set out in detail the conditions under which each of the seven statutory exemptions would apply, and because it relied upon the courts, not upon this proceeding, to apply those conditions to particular facts, the authority of the Librarian to craft an administrative exemption for the type of activity addressed by a statutory exemption is necessarily extremely limited. Clearly the Librarian would exceed his authority under the statute if he were to recognize an administrative exemption for activity that Congress chose to exclude from the statutory exemption because it failed to satisfy a statutory condition. For example, an administrative exemption for circumvention for the purpose of reverse engineering of computer programs could not, consistent with the statute, apply to persons who had not "lawfully obtained the right to use a copy" of the program whose access controls were to be circumvented. There is an important difference between a case in which the full force of the prohibition ought to be temporarily suspended for circumstances that Congress did not anticipate, and one in which the Librarian was seeking to permit activity that Congress, having considered the options, specifically decided to outlaw.

Accordingly, even where the proponent of an administrative exemption has proven that it cannot bring its conduct within the conditions for a statutory exemption, the Register and the Librarian must exercise the highest degree of caution, in order to avoid permitting activity that Congress specifically chose to prohibit. Particular caution must be exercised when the noninfringing use that the prohibition allegedly inhibits closely resembles the activity that the existing statutory exemption seeks to foster (*e.g.*, security testing, encryption research, reverse engineering of computer programs, privacy protection). The fact that Congress, in crafting a statutory exemption to protect such noninfringing conduct, chose not to immunize circumvention in the specific circumstances addressed by the proposed administrative exemption, should weigh heavily against the proposal.

In the first two rulemaking proceedings, the Register appropriately applied these principles. *See* 2003 Rec. at 181-82 ("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."). However, in one aspect of her 2006 Recommendation, the Register seemed to shift the burden to opponents of a proposed exemption to show that a statutory exemption did apply to the conduct at issue. 2006 Rec. at 59. The Joint Creators and Copyright Owners urge the Register to return to her earlier approach, or at least to confine the shift in the burden of persuasion on this issue to the specific factual record at issue in the 2006 rulemaking. In all other cases, she should treat uncertainty regarding the scope of an existing statutory exemption as falling short of 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 exemption already applies; the burden should remain squarely on proponents of exemptions to demonstrate the opposite. And every proposed exemption that concerns an

area already addressed by a statutory exemption to section 1201(a)(1)(A) should receive heightened scrutiny.

**B. The new “NPRM” procedure**

In the three previous rulemaking proceedings, the Copyright Office issued a Notice of Inquiry soliciting proposals for administrative exemptions, and invited comments (pro or con) on these in a reply round. This time, the NOI invited comments only from proponents of administrative exemptions, and the Copyright Office for the first time issued a Notice of Proposed Rulemaking, to which this comment responds. The new procedure, is, of course, a familiar one in other administrative law contexts. Normally, however, the rulemaking agency does not simply reformat the proposals received in response to the NOI and publish them as its own NPRM. Instead, it considers the comments received at the time of the NOI, filters out those it deems inappropriate or unsupported, and synthesizes the others into proposed rules on which it invites public comments. While of course the standard disclaimer that the agency has not decided to adopt the rules proposed in the NPRM is relevant here, in practice the affected public tends to treat the proposed rules as those which the agency has tentatively decided to adopt, or at least is inclined to adopt, subject of course to further input in response to the NPRM, which could lead the agency to modify the proposed rules, or to abandon them altogether.

The 2008 NOI was unclear about whether the Copyright Office would follow the same procedure in this case. It stated that the NPRM would “identify[] the classes of works proposed,” but also stated that the “classes proposed in the initial comment period ... may be further refined in the ensuing rulemaking process,” which could, of course, include refinement reflected in the NPRM. 2008 NOI at 58,075. In fact, virtually no such refinements occurred, and the classes proposed in response to the 2008 NOI were simply restated verbatim (with a couple of minor modifications), re-organized into categories, and published as the Copyright Office’s “proposed classes.” As a result, the public may well perceive these proposals as enjoying the imprimatur of the Office to an extent that the proposals at the comparable stage (before the reply comments round) in earlier rulemaking proceedings did not. The Joint Creators and Copyright Owners urge the Office to take appropriate and timely steps to dispel this impression.

**C. The Proposal to permit circumvention for uses that a court might find to be noninfringing should be rejected.**

In part II of Comment 11A the, Electronic Frontier Foundation (“EFF”) proposes a radical shift in the ground rules for this proceeding. It constitutes an invitation to the Copyright Office to launch itself down the slippery slope referred to in subsection A above. We urge the Office to decline this invitation.

The proponent asserts that “this rulemaking must grant exemptions for activities that a court *might* find to be noninfringing.” Comment 11A at 3 (emphasis in original). Indeed, the proponent proposes that a particular use enabled by circumvention of access controls should be disqualified from consideration to support a proposed exemption only “if the Librarian concludes that no reasonable court could find that the activity in question would constitute a fair use or fall within any other statutory exception.” *Id.* at 4. This proposal should be rejected for a number of

reasons, but primarily because it would be contrary to the statute on which this rulemaking is founded, as that statute has been consistently interpreted by the Register and the Librarian.

Section 1201(a)(1)(B) provides the authority for the recognition of temporary exemptions to the prohibition on circumvention of access controls if users of a “particular class of works ... 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 of that particular class of works...” Section 1201(a)(1)(D) directs the Librarian to determine, pursuant to this rulemaking, “that noninfringing uses by persons who are users of a copyrighted work [falling within a “particular class”] are, or are likely to be, adversely affected” by the prohibition, and then to publish the “particular classes” to which this determination has been made. It is clear from this language that, in order to recognize an exemption, the Librarian must determine that the uses that would be enabled by circumvention of access controls of works within the particular class are, in fact, noninfringing uses. It is not enough, under this statutory directive, that the Librarian determine that a particular use “might plausibly be a fair use or be protected by any other statutory exception.” Comment 11A at 3.

Nor would it be permissible for the Librarian to define a “particular class of works,” as the proponent suggests, so that the label would apply “only so long as the activity in question is noninfringing,” without the Librarian having determined that the activity is “in fact noninfringing.” 2008 NOI at 58,075. To do so would be to define a particular class “primarily ... by reference to the intended use or user,” an approach that the Register properly branded as “inconsistent with the legislative language and intent.” It would also have the effect of turning the statutory defenses to copyright infringement (such as fair use) into administrative exemptions to the prohibition on circumvention of access controls. This is an option that Congress considered, but ultimately rejected, when it adopted the DMCA. *See* 17 U.S.C. § 1201(c)(1); *Universal City Studios v. Corley*, 273 F.3d 429, 443 n. 13 (2001). Instead, Congress adopted a more targeted approach, empowering the Librarian to recognize time-limited exemptions to the statutory prohibition when necessary to enable uses of particular classes of works that the Librarian had determined to be noninfringing uses.

EFF’s proposal bears no resemblance to the way in which the Register has consistently interpreted the statute and the rulemaking standards since their inception. As the 2008 NOI specifies, the evidence in support of a proposed exemption based on actual adverse impact “must... reasonably demonstrate ... that the adversely affected use was, *in fact*, noninfringing.” 2008 NOI at 58,075 (emphasis added). The 2008 NOI contains no different standard for determining the noninfringing status of uses which the anti-circumvention prohibition has not yet substantially adversely affected but for which the proponents assert that future adverse effects are “likely.” Considering the caution with which Congress directed the Librarian to evaluate such claims (House Managers’ Rep. at 6, 2008 NOI at 58,075), it would be illogical to conclude that the standard for determining the noninfringing character of the use would be any more relaxed in that context. Whether or not the claim is based on an adverse effect that has already occurred, the proponents’ burden clearly includes proving that the activity allegedly affected is, in fact, noninfringing activity – not that it might be, could be, should be, or ought to be, nor that some court might in the future find it to be.

The same standard is consistently found in the recommendations that the Register has issued in previous cycles. While the test has been formulated in various ways, all are consistent with the statutory test that the adversely affected activities must be shown to be “in fact noninfringing.” For instance, in the 2006 Recommendation, the Register called for exemptions when she concluded that it had been shown that the statutory prohibition was preventing activities that “would generally constitute a noninfringing use,” (2006 Rec. at 13); when the activity “without question” fell within the scope of a statutory limitation (*id.*); when the activity was “in general, noninfringing” (*id.* at 29); or when there was “no evidence . . . that demonstrates or even suggests that [the activity is] an infringing act” (*id.* at 50). Comment 11A makes no serious argument that this long-standing statutory interpretation by the expert agency entrusted with administration of the statute should be disturbed.

The radical shift proposed by Comment 11A should be rejected on policy and practical grounds as well, particularly when the fair use doctrine is the basis upon which the noninfringing character of the adversely affected use is asserted. The Register was correct in 2003 when she ruled that “this rulemaking is not the forum in which to break new ground on the scope of fair use.” 2003 Rec. at 106. The case by case nature of the defense renders it incapable of complete codification, lacking in “bright-line” rules, and dependent on the precise circumstances involved. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994). There is not a scintilla of evidence that Congress wanted to shift the locus for application and interpretation of that doctrine, as codified in section 107, from the courts to this proceeding. *See* Commerce Rep. at 26 (“fair use principles certainly should not be extended beyond their current formulation” by enactment of Section 1201). Even Comment 11A acknowledges that “Congress has entrusted the courts with the task of adjudicating the scope of fair use” (Comment 11A at 3); but it then proffers the disingenuous argument that the dramatic change it proposes is necessary to allow “circumventers to bring their fair use or other statutory defenses to the courts for resolution.” *Id.* at 4. To the contrary, nothing is preventing litigants from asserting fair use defenses to infringement claims or courts from continuing “to develop the jurisprudence of fair use and other statutory exceptions.” *Id.* Inviting the “litigation” of fair use claims in this proceeding is not only outside the scope of the statute but could also lead to mass consumer confusion.

The suggestion that the current standards in this proceeding are “foreclosing the courts from breaking new ground in fair use cases” (Comment 11A at 3) is entirely unsupported, lacking even a single case reference or example. To the contrary, as the proponent points out, the fair use doctrine is “continuing to evolve in light of new technologies and practices,” and the courts are actively engaged in addressing the scope of fair use in light of this evolution. Comment 11A at 3, n.7, *citing Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007). The same is true of other copyright defenses in which the courts continue to “grappl[e] with novel issues.” *Id.* at 3, n. 10. Nothing in the way that this rulemaking proceeding is carried out has hindered or retarded the courts in carrying out the role assigned to them – and not to the Register or Librarian – with respect to the development of copyright law in general, or the scope of copyright limitations in particular. EFF’s suggested change to the ground rules of this proceeding must be rejected.

**SECTION III: THE DIGITAL CORNUCOPIA**  
**HOW WIDESPREAD USE OF ACCESS CONTROLS HAS LED TO**  
**INCREASED ACCESS TO COPYRIGHTED WORKS**

The “availability for use of copyrighted works” is perhaps the most important statutory factor for the Register and the Librarian to consider during this rulemaking process. 17 U.S.C. § 1201(a)(1)(C)(i). It is essential for the Register and the Librarian to “consider the *positive* as well as the adverse effects” of access control technologies on the availability of copyrighted works because access controls have the ability “to support new ways of disseminating copyrighted materials to users, and to safeguard the availability of legitimate uses of those materials by individuals.” House Manager’s Rep. at 6 (emphasis added). Congress predicted that “[t]hese technological measures may make more works more widely available, and the process of obtaining permissions easier.” *Id.* As described below, that prediction is now being proven true at an even more rapid pace than three years ago. When the increased availability of works in digital formats protected by access controls is balanced against the relatively small number of complaints received in the initial round of comments, it is almost undeniable that “the DMCA has been a stunning success, providing consumers with an amazing abundance of choices as to when, where and how they access entertainment content like movies and information.”<sup>2</sup>

The digital marketplace is replete with new and innovative services that provide copyrighted works to consumers in quick, inexpensive, efficient, flexible and secure ways. While we cannot possibly cover all of them, we provide below some examples of the cornucopia of digital material that is available in America today through legitimate services, facilitated by access controls:

- Motion pictures and television programs: Some of the most exciting developments of the last three years in terms of the availability of copyrighted material are in the motion picture and television sector. Even the traditional method of viewing motion pictures, going to the theatre, is being transformed by access controls. Through the Digital Cinema Initiative,<sup>3</sup> MPAA member companies are making deals to equip thousands theatre screens with digital cinema equipment that improves the viewing experience while also protecting content.

Access controls are also revolutionizing at-home viewing of audio-visual material. On-demand viewing of television programs and movies has increased through cable and satellite providers thanks to innovative new services.<sup>4</sup> And IPTV, which is provided over

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<sup>2</sup> Dan Glickman and Robert Holleyman, *The Copyright Act a Decade Later*, Broad. & Cable, Nov. 11, 2008, [http://www.broadcastingcable.com/article/116226-The\\_Copyright\\_Act\\_a\\_Decade\\_Later.php](http://www.broadcastingcable.com/article/116226-The_Copyright_Act_a_Decade_Later.php).

<sup>3</sup> <http://www.dcinovies.com/>.

<sup>4</sup> See, e.g., Mansha Daswani, *ABC Unveils Fast-Forward-Disabled VOD Model*, WorldScreen, Feb. 25, 2008, <http://www.worldscreen.com/newscurrent.php?filename=abc022507.htm>.

phone lines, is becoming a viable alternative to cable and satellite.<sup>5</sup> Moreover, websites that encrypt some content, such as Hulu<sup>6</sup> and abc.com,<sup>7</sup> have dramatically increased the number of consumers viewing programs and movies through digital streams. Nielsen Media Research reported in October of 2007 that one in four U.S. Internet users streamed full-length television episodes online during a three month period.<sup>8</sup> This has led to an increase of millions of viewers for certain shows.<sup>9</sup>

Television programs and movies are also increasingly available for download and viewing on mobile devices, including wireless telephone handsets.<sup>10</sup> For example, AT&T is debuting its MobileTV service with channels from various television programming providers as well as a new movie channel, PIX, from Sony.<sup>11</sup> Television programs and movies can be accessed through services<sup>12</sup> such as Amazon.com Video On Demand,<sup>13</sup> the Sony Playstation Network,<sup>14</sup> Netflix,<sup>15</sup> TiVo,<sup>16</sup> Sling.com,<sup>17</sup> the Zune marketplace<sup>18</sup> and iTunes,<sup>19</sup> which is now offering rentals and downloads that become

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<sup>5</sup> Marguerite Reardon, *AT&T to Ramp Up IPTV's Expansion*, CNet, Jan. 25, 2007, [http://news.cnet.com/ATT-to-ramp-up-IPTVs-expansion/2100-1037\\_3-6153354.html](http://news.cnet.com/ATT-to-ramp-up-IPTVs-expansion/2100-1037_3-6153354.html).

<sup>6</sup> <http://www.hulu.com/>.

<sup>7</sup> <http://abc.go.com/player/index?pn=index>.

<sup>8</sup> Brian Stelter, *Serving Up Television Without a TV Set*, N.Y. Times, Mar. 10, 2008, [http://www.nytimes.com/2008/03/10/technology/10online.html?\\_r=2&ref=bus](http://www.nytimes.com/2008/03/10/technology/10online.html?_r=2&ref=bus).

<sup>9</sup> Brian Stelter, *Online Streaming Adds Millions of Viewers for 'Heroes,' 'The Office'*, N.Y. Times, Oct. 17, 2008, <http://tvdecoder.blogs.nytimes.com/2008/10/17/online-streaming-adds-millions-of-viewers-for-heroes-the-office/>. abc.com has had over 500,000,000 episode starts since September of 2006.

<sup>10</sup> Cynthia Littleton, *Networks Nab Mobile Deals*, Variety, Mar. 31, 2008, <http://www.variety.com/article/VR1117983247.html?categoryid=14&cs=1>.

<sup>11</sup> Mansha Daswani, *Sony Launches Film Service for Mobiles*, WorldScreen, Mar. 31, 2008, <http://www.worldscreen.com/newscurrent.php?filename=spt033107.htm>.

<sup>12</sup> Additional examples are provided in other submissions, including the submissions of the National Association of Broadcasters and Time Warner Inc.

<sup>13</sup> [http://www.amazon.com/b/?ie=UTF8&node=16261631&tag=googhydr-20&hvadid=2421641721&ref=pd\\_sl\\_15356wjtq3\\_b](http://www.amazon.com/b/?ie=UTF8&node=16261631&tag=googhydr-20&hvadid=2421641721&ref=pd_sl_15356wjtq3_b).

<sup>14</sup> <http://www.us.playstation.com/PSN>.

<sup>15</sup> <http://www.netflix.com/NetflixReadyDevices>.

<sup>16</sup> <http://www3.tivo.com/tivo-tco/cds/index.do>.

<sup>17</sup> <http://beta.sling.com/>.

<sup>18</sup> <http://social.zune.net/video/>.

<sup>19</sup> [http://www.apple.com/itunes/home/includes/itunesmodule\\_movies.html](http://www.apple.com/itunes/home/includes/itunesmodule_movies.html).

available the same dates as DVD releases.<sup>20</sup> The flexible access controls used by iTunes enable consumers to enjoy the audiovisual works they download on multiple computers and portable devices.

DVDs themselves continue to represent a successful access control based platform, and Blu-ray disks are grabbing an increasing market share.<sup>21</sup> Some DVDs are being sold with digital copies of movies included for use on computers and portable devices.<sup>22</sup> And consumers can increasingly purchase and burn DVDs at kiosks in retail outlets.<sup>23</sup> Thus, access controls are providing consumers with a plethora of choices when it comes to how, when and where they view movies and programs.

- Entertainment software: The entertainment software industry continues to grow at a rapid pace due in part to the successful use of access controls. During 2007-2008, publishers of entertainment software released over 1,300 console game titles, 800 portable game titles, and 1,250 PC game titles in North America.<sup>24</sup>

Trial software that enables a “try before you buy” experience is one example of access controls benefiting consumers. Some trial software is time-limited, while other trial software permits play in limited areas of a game’s universe. Trial software is an important aspect of Xbox LIVE Arcade, an online marketplace that features downloadable casual and arcade games for play on the Xbox and Xbox 360 consoles for Xbox LIVE subscribers. To date, gamers have downloaded 110 million trial copies of games using Xbox LIVE Arcade.<sup>25</sup> Importantly, trial games not only benefit consumers but also enthusiasts and small, independent game developers. Beginning in late 2008, Microsoft began offering both trial and for-purchase versions of independently-created casual and arcade games through the “Community Games” section of Xbox LIVE

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<sup>20</sup> Diane Garrett, *Studios in Tune With iTunes*, Variety, May 1, 2008, <http://www.variety.com/article/VR1117984935.html?categoryid=20&cs=1>.

<sup>21</sup> Rick Hodgin, *Blu-ray Sales Quadrupled in 2008*, TG Daily, <http://www.tgdaily.com/content/view/41003/98/>.

<sup>22</sup> See, e.g., Ned Berke, *Lionsgate, Apple to Deliver iTunes Copy on DVD and Blu-ray Offerings*, Mar. 10, 2008, WorldScreen, (“Just like movies purchased from the iTunes store, an iTunes Digital Copy can be transferred to iTunes and then viewed on a PC or Mac, iPod with video, iPhone or streamed to a television set with devices such as the Apple TV. The transfer from disc to computer requires a unique code that can only be used once, meaning each DVD and Blu-ray disc will only transfer to one iTunes library.”).

<sup>23</sup> Jennifer Netherby, *Visions of an MOD World*, Content Agenda, <http://www.contentagenda.com/info/CA6535979.html>.

<sup>24</sup> The source of these numbers is a proprietary study by the NPD Group.

<sup>25</sup> *Tis the Season to be Jolly: 2008 a Stellar Year for Xbox LIVE Arcade*, Xbox 360 Press, [http://gamerscoreblog.com/press/archive/2008/12/22/Bst\\_Of\\_09\\_XBLA.aspx](http://gamerscoreblog.com/press/archive/2008/12/22/Bst_Of_09_XBLA.aspx).

Arcade. Creators share in the revenue from the sales, and access controls serve to protect their interests as well.<sup>26</sup>

Today's entertainment software access controls continue to become more flexible.<sup>27</sup> For example, new download services enable greater portability of game content. Valve Corp.'s Steam service tethers downloads to an online account rather than to a particular computer or device.<sup>28</sup> This enables a consumer to access games at convenient times and locations (such as when traveling).<sup>29</sup> And Microsoft now makes a tool available to Xbox 360 users that enables the users to "migrate" licenses and associated content to a new console in the event of hardware malfunction or failure, or the purchase of a new console.<sup>30</sup>

In the past, users of PC-based games had to insert the game disc into the PC drive bay to access the game. Publishers are experimenting with more convenient systems, such as online authentication, which allows more portability by permitting consumers to install and authenticate a game on more than one computer and play on those computers without requiring the disc in the drive.<sup>31</sup> This move is particularly timely given the rapid growth of netbook laptops, some of which do not include optical drives. Some download services offer additional consumer-oriented benefits, such as automatic software updates, free or minimal-cost re-downloads, and embedded community features. These benefits will continue to multiply during the coming years.

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<sup>26</sup> *New Xbox Experience Bringing Community Games Channel*, <http://www.1up.com/do/newsStory?cId=3170751> and [http://creators.xna.com/en-US/play\\_detail](http://creators.xna.com/en-US/play_detail).

<sup>27</sup> One example of this flexibility is an innovative new use of access controls to encourage consumers to try games recommended by friends and family. For example, *Sacred 2: Fallen Angel* is a role-playing game ("RPG") available for the PC and other platforms. Users may pass along their PC game disc to friends and family. Subsequent installs of the game will revert to a "trial software" mode that allows the user to play the game for one day before requiring purchase. Andy Chalk, *Sacred 2 DRM: Try Before You Buy*, *The Escapist*, Nov. 17, 2008, <http://www.escapistmagazine.com/news/view/87292-Sacred-2-DRM-Try-Before-You-Buy>.

<sup>28</sup> <http://store.steampowered.com/>.

<sup>29</sup> In November of 2008, Valve Corp. introduced new functionality to its service that will afford consumers further convenience when accessing games from multiple computers. The new "Steam Cloud" service will store user changes to game options (such as keyboard/mouse configurations and multiplayer settings) and will apply those across all computers that the gamer uses to play that game. See Press Release, Steam News, Steam Cloud Rolling in This Week, Nov. 3, 2008, <http://store.steampowered.com/news/1968/>.

<sup>30</sup> Transferring Content Licenses to a New Console, <http://www.xbox.com/en-US/support/systemuse/xbox360/licensemigration/>.

<sup>31</sup> See EA Customer Support, Frequently Asked Questions, [http://support.ea.com/cgi-bin/ea.cfg/php/enduser/std\\_adp.php?p\\_sid=dJ6rS9pj&p\\_faqid=20763#more](http://support.ea.com/cgi-bin/ea.cfg/php/enduser/std_adp.php?p_sid=dJ6rS9pj&p_faqid=20763#more) (noting that users may install and authenticate the game on up to 5 computers).

- Music: While the past year has seen a movement towards the commercial sale of permanent audio downloads in DRM-free formats,<sup>32</sup> access controls nonetheless still play a large part in facilitating the legal digital music marketplace. Indeed, as consumers continue to seek out digital music products and services in record numbers, copyright owners and their third party licensees continue to rely on various forms of access control technology to make it possible to bring to market new and exciting digital music products and services that provide consumers with affordable access to large catalogs of music in return for terms of service that place some sort of limit on their use of or access to the music (e.g., limited or “timed out” downloads, on-demand streaming services). Thanks to access control technologies, today’s music consumers are able to access music at a greater variety of price points, on a greater variety of devices, from a greater variety of locations, and under more varied terms of service than ever before.

Millions of consumers currently enjoy subscription services from companies such as Rhapsody,<sup>33</sup> Napster<sup>34</sup> and Microsoft.<sup>35</sup> For a low fixed monthly fee, these services (and others like them) allow subscribers to obtain access millions of songs,<sup>36</sup> stream or download them on demand and even transfer these files to a wide variety of portable devices. Without digital rights management and the ability to ensure that these files are no longer available if a subscription lapses, such a product offering simply would not be possible, certainly not for a price that the average consumer would be able to afford.

Satellite radio (*i.e.*, Sirius XM) offers consumers yet another way to access large quantities of music by providing subscribers with access to a large number of professionally programmed, commercial-free music channels that cover a vast array of musical genres and subgenres that offer something for nearly everyone. Satellite radio, too, uses access control technology to ensure that only paying subscribers are able to listen to a huge variety of music channels on a 24/7 basis. No subscription service would be commercially viable if the service provider did not have a means of preventing non-subscribers from accessing the service (and the copyrighted works that are made available through the service).

One variation on the subscription model is a model where consumers pay a monthly fee to “rent” unlimited amounts of protected music but receive a fixed amount of unprotected music as part of their monthly subscription. Another variation beginning to emerge is where a portable device or handset “comes with music” such that the

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<sup>32</sup> See, e.g., Dawn C. Chmielewski, *iTunes Embraces 3-tier Pricing, Will Remove Anti-copy Software*, L.A. Times, Jan. 7, 2009, <http://www.latimes.com/business/la-fi-itunes7-2009jan07,0,4241351.story>.

<sup>33</sup> <http://www.rhapsody.com/home.html>.

<sup>34</sup> [http://www.napster.com/index.html?darwin\\_ttl=1232979505&darwin=1208ABBY](http://www.napster.com/index.html?darwin_ttl=1232979505&darwin=1208ABBY).

<sup>35</sup> <http://www.zune.net/en-US/>.

<sup>36</sup> For example, Rhapsody offers access to 6 million songs.

consumer automatically gains access to a library of music, either through rental or permanent downloads tied to a particular device.

Like subscription services, fan clubs and “Connected CDs” both require some form of access control in order to be commercially viable. Fan clubs generally provide password-protected access to premium content in return for a fee. Some Connected CDs provide users with a computer “key” that allows them to access bonus content such as additional audio, audiovisual and graphical materials.

Another use of access controls in the music sector enables digital cable and satellite television subscribers to enjoy dozens of genre-specific audio-only music channels from providers like Music Choice and Sirius XM, through their television sets. Because access to these music services is bundled with television programming, consumers are able to enjoy a wide variety of music channels at very little cost.

Newer business models – including some already being offered and some still in various stages of product development – almost without exception, require some form of access control in order to be commercially viable.<sup>37</sup> Many of these examples involve the mobile space, where music has long led the way. Examples of these newer business models include the following:

- Music streamed on handheld wireless phones, such as Verizon’s V Cast Music with Rhapsody,<sup>38</sup>
- Locked content models, such as SanDisk’s slotRadio<sup>39</sup> and Slacker;<sup>40</sup>
- Sampling services, “pay-per-play” and “try before you buy” models, such as Zune’s sharing service; and

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<sup>37</sup> Many other services use a combination of technologies to ensure that consumers are only able to use the music in the manner in which it is intended to be used. For example as ad-supported, on-demand streaming becomes more widespread, many content owners are looking to secure streaming technologies such as Flash Media Server 3.0 and Microsoft’s Silverlight to help prevent streams from being permanently captured. Likewise, in the mobile space, music content is frequently protected by “forward-lock” technology, which prevents users from forwarding content to other unauthorized handset owners.

<sup>38</sup> V Cast Music with Rhapsody, [http://products.vzw.com/index.aspx?id=music\\_vcast](http://products.vzw.com/index.aspx?id=music_vcast).

<sup>39</sup> slotRadio is a new product/service where the consumer buys a player for \$99 that comes with 1,000 songs preloaded onto a tiny microSD card with handcrafted playlists that include hundreds of handpicked artists. Like FM radio, songs are played in sequence and cannot be rewind or rearranged. However, the listener can skip individual songs, switch between playlists with a touch of a button or put all 1,000 songs on shuffle mode. <http://www.slotradio.org>.

<sup>40</sup> See, e.g., Press Release, Slacker, Slacker Launches Personal Radio Mobile Application for iPhone, Jan. 14, 2009, <http://www.slacker.com/press/release/01142009-iphone>.

- Home domain models, such as the initiative being developed by the Digital Entertainment Content Ecosystem (“DECE”) consortium.<sup>41</sup>

The facts that there are so many different business models and that copyright owners and third party licensees are doing so much experimentation in the digital music space demonstrate that consumers are continuing to benefit from the existence of access controls and the multitude of legitimate distribution platforms and devices that they make possible.

- Books: Audiobook sales have increased substantially during the last three years. Sales of audiobooks now account for over one billion dollars a year in revenue.<sup>42</sup> E-book downloads and purchases have also increased significantly during the last three years.<sup>43</sup> This increase is due in part to the release of exciting new portable reading devices, such as the Kindle<sup>44</sup> and the iPhone.<sup>45</sup> The success of these new readers has led to dramatic increases in the number of available titles, and projections indicate that these increases will continue.<sup>46</sup>

In addition, publishers such as Random House and HarperCollins have reached deals with libraries that enable library users to download digital copies of books from library websites that remain on the users’ computers or portable devices for a limited period of

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<sup>41</sup> Unlike current models that allow users to access their digital content on a single device or limited number of covered devices (*i.e.*, the current iTunes model of 5 PCs), the home domain model would make it possible for digital content to flow to any device in a single domain, typically a household, and the number of users or copies made would not be limited. *See, e.g.*, Gina Keating, *Media Group to Create New Digital “Eco-System”*, Reuters, Feb. 2, 2008, <http://www.reuters.com/article/technologyNews/idUSN1234778920080912>.

<sup>42</sup> Press Release, Audio Publishers Association, *More American Are All Ears to Audiobooks*, Sept. 15, 2008, <http://www.audiopub.org/resources-industry-data.asp>.

<sup>43</sup> *See* Press Release, Association of American Publishers, *AAP Reports Book Sales Rose to \$ 25 Billion in 2007* (Mar. 31, 2008), [http://www.publishers.org/main/IndustryStats/indStats\\_02.htm](http://www.publishers.org/main/IndustryStats/indStats_02.htm) (“E-books saw a 23.6 percent increase from last year with \$67 million in sales and a compound growth rate of 55.7 percent since 2002.”).

<sup>44</sup> *See* Zach Pontz, *A Year Later, Amazon’s Kindle Finds a Niche*, CNN.com, Dec. 4, 2008, <http://www.cnn.com/2008/TECH/12/03/kindle.electronic.reader/index.html> (reporting that nearly 250,000 Kindles have been purchased since November of 2007, and e-book sales are now ten percent of Amazon’s book sales).

<sup>45</sup> Chris Snyder, *E-books Have a Future in iTunes*, Wired, Nov. 25, 2008, <http://blog.wired.com/business/2008/11/e-books-have-a.html>.

<sup>46</sup> *See id.* (reporting that Random House and Simon & Schuster are doubling the number of digital books offered and that ninety-five percent of textbooks published by McGraw Hill are also available as e-books).

time (e.g., one to three weeks) before becoming inaccessible.<sup>47</sup> Such innovative services increase affordable (actually free) access to a large number of titles in a manner that never would have been possible without the access controls that prevent the copies loaned by libraries from replacing copies purchased from stores. Moreover, libraries save valuable shelf space and readers can learn from and enjoy their favorite authors on the go.

These improvements to library loaning of literary works supplement the educational access to books that access controls have facilitated for some time. Access controls continue to constitute an important component of the provision of online access to and distribution of publications by university presses, scientific and other scholarly journals, and for a variety of educational publishers at all levels of elementary, secondary and higher education publishing. This is particularly true of the many variations of electronic subscription models that enable access and usage under diverse terms.

Even many of the benefits of the Google Books settlement<sup>48</sup> will depend on access controls to distinguish between various levels of access to millions of works that are otherwise unavailable. This example of access controls facilitating widespread use is demonstrative of the ability of technological protection measures to increase access while also protecting authors and publishers.

- Business Software: Access controls continue to be a key feature of the flexible distribution choices available to American consumers, businesses and institutions of all sizes that rely on computer programs daily. Access control technologies also play a critical role in the ongoing task of upgrading the security of computer networks and resources and reducing their vulnerability to viruses and other attacks. Thanks to access controls, virtually all commercial software applications can be accessed, downloaded and/or updated online, whether directly from the developer or through third parties.

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<sup>47</sup> Paul Thomasch, *Libraries Step Into the Age of iPod*, Reuters, Aug. 7, 2008, <http://www.reuters.com/article/technologyNews/idUSN0729441420080807>.

<sup>48</sup> <http://books.google.com/booksrightsholders/>.

## **SECTION IV: RESPONSES TO PROPOSED PARTICULAR CLASSES OF WORKS**

**1. Proposed class or classes of copyrighted work(s) to be exempted:** “Literary works” [distributed in ebook format when all existing ebook editions of the work (including digital text editions made available by authorized entities) contain access controls that prevent the enabling either of the book’s read-aloud function or of screen readers that render the text into a specialized format].

### **Summary of Joint Creators and Copyright Owners’ Response:**

The Joint Creators and Copyright Owners do not oppose renewal of the exemption related to literary works in ebook format if the Register and the Librarian conclude that the proponent meets its burden of persuasion during this proceeding. However, Comment 1 leaves many unanswered questions regarding the need for renewal.

### **Argument:**

The American Foundation for the Blind (“AFB”) proposes “continuation” of the existing exemption applicable to literary works distributed in ebook format. Comment 1 at 1. The Joint Creators and Copyright Owners agree (as they did three years ago) that blind and visually impaired people enjoy less comprehensive access to literary works than do the fully sighted. 2006 Joint Reply Comments at 16. Thus, the Joint Creators and Copyright Owners do not oppose the renewal of the exemption if the Register and the Librarian conclude that AFB meets its burden of persuasion during this proceeding.

However, questions still remain regarding whether section 1201(a)(1) is to blame for the discrepancy between access for the fully sighted and access for the visually impaired. Once again, the AFB only reviewed a “tiny sample of 5 titles” (2006 Rec. at 39) in one format each in support of its proposal (Comment 1 at 7), in effect ignoring the warning of the Register in 2006 that AFB “would be well advised to review a larger, more representative sample of titles and ascertain the availability and accessibility of those titles in all ebook formats” during this proceeding. 2006 Rec. at 39. In addition, the AFB again failed to produce any evidence that the exemption has been used during the last three years despite the Register’s warning that “[o]ne could well conclude that the fact that a class of works has enjoyed an exemption for the past three years but nobody appears to have taken advantage of that exemption is proof that the prohibition on circumvention is unlikely to have any adverse effect on the ability of users of that class of works to make noninfringing uses during the next three years.” 2006 Rec. at 39-40.

For whatever reason, the AFB chose to spend far more time on mostly undisputed “legal and policy arguments” (Comment 1 at 1-7) that are insufficient to “warrant an exemption in this rulemaking” than it did on satisfying the Register’s repeated requests for specific evidence of need and use. 2006 Rec. at 36. The Joint Creators and Copyright Owners hope that AFB or other proponents will provide additional support for the proposal during future comments and hearings given that every proponent must equally satisfy its burden of proof in order to justify renewal of an exemption. 2008 NOI at 58,075.

**2. Proposed class or classes of copyrighted work(s) to be exempted:** “Subscription based services that offer DRM–protected streaming video where the provider has only made available players for a limited number of platforms, effectively creating an access control that requires a specific operating system version and/or set of hardware to view purchased material.”

**Summary of Joint Creators and Copyright Owners’ Response:**

The Joint Creators and Copyright Owners oppose the exemption proposed by Comment 2. First, the Register has consistently rejected proposals like this one aimed at enabling device and platform shifting. Like others that have come before it, this proposal would threaten the viability of “use facilitating” access controls. Second, the proponent has failed to provide enough detail to determine whether access controls are in fact preventing her from viewing any audiovisual works. At most, Comment 2 complains of “mere inconveniences” that do not justify an exemption.

**Argument:**

Megan Carney seeks an exemption applicable to circumvention aimed at accessing online streaming video services without an approved and/or compatible device or software application. Such proposals have been rejected in prior proceedings (*see, e.g.*, 2003 Rec. at 138), and hers should meet the same fate.

As the Register has repeatedly recognized,

tethering and DRM policies serve a legitimate purpose for limiting access to certain devices in order to protect the copyright owners from digital redistribution of works. Tethering works to particular platforms ... provides copyright owners with some assurance that these works will not be easily placed on peer-to-peer networks. The fact that copyright owners are able to tether works to particular platforms is likely to encourage some copyright owners to make their works available in digital format. 2003 Rec. at 138.

The movies and television programs that Ms. Carney wishes to enjoy are not unavailable to her. They are instead accessible in a variety of formats. On this basis alone, the proposed exemption should be rejected.

If Ms. Carney dislikes streaming video services or finds them lacking in certain content, she has many options available to her that do not require circumvention in violation of section 1201(a)(1). For instance, she is free to rent or purchase DVDs instead. All, or nearly all, of the motion pictures listed in her exhibit of works that are not available on Hulu, and many more titles as well, are undoubtedly available in the DVD format. In addition, she can acquire a cable or satellite television subscription with video-on-demand. The fact that so far she has been unable to find any one service that can satisfy her plethora of viewing wants at virtually no cost to her does not justify an exemption that would undermine the integrity of some of the most exciting Internet services available (such as the services discussed above in Section III). Her assertion that consumers are prevented from accessing lawfully purchased works because they

lack the proper equipment is questionable at best; consumers are unlikely to purchase streams of video from services they are technologically unable to access in the first place.

Moreover, Ms. Carney has failed to establish that all (or any) of the services she references are in fact using operating systems or other mechanisms as access controls. In 2006, the Register rejected a proposal made by the Internet Archive because it failed to establish that operating systems “designed to permit access” to works qualify as technological protection measures. 2006 Rec. at 31 (“[t]echnological incompatibility is not the same thing as” an access control). Ms. Carney ignores her burden on this point, and instead argues that service providers that only make available a limited number of players “effectively” create access controls. This is insufficient.

The comment also ignores the benefits provided by the impressive array (described above in section III) of digital streaming video services made possible by “use facilitating” access controls (2008 NOI at 58,076) and/or technological developments. Instead, it complains about “mere inconvenience[s]” (*id.* at 58,077) that do not adequately support the proposed exemption. Because the submission does not show that section 1201(a)(1) is likely to have a substantial adverse effect on the ability of consumers to view streaming video services in the next three years, and because granting an exemption in this context would jeopardize the currently expanding availability of copyrighted material online, this proposal should be rejected.

**3. Proposed class or classes of copyrighted work(s) to be exempted:** “Motion pictures protected by anti-access measures, such that access to the motion picture content requires use of a certain platform.”

**Summary of Joint Creators and Copyright Owners’ Response:**

The Joint Creators and Copyright Owners oppose the exemption proposed by Comment 3 for three reasons. First, there are Linux based players currently available in the marketplace. Second, there are a variety of non-Linux based devices available to the proponent for viewing DVDs. Third, there are a variety of audiovisual formats available other than DVDs. The issues raised in Comment 3 are “mere inconveniences” that do not justify an exemption.

**Argument:**

Mr. Rizik rehashes arguments made during the three previous triennial rulemakings regarding the ability of Linux users to view DVDs. He puts forward nothing new. The Register and the Librarian have rejected these proposals in the previous proceedings (2000 Rec at 64566-69; 2003 Rec. at 143-45; 2006 Rec. at 72), and they should do so again here. The Register gave three primary reasons for rejecting this proposal in 2006:

First, there is evidence in the record that Linux-based DVD players currently exist. Second, it remains true that there are many readily available ways in which to view purchased DVDs. ... Third, there are alternative formats in which to purchase the motion pictures contained on DVDs. 2006 Rec. at 72.

These points are even more valid today. There are more Linux players on the market. There are a plethora of devices on which to view DVDs. And new services that make audiovisual works available are sprouting nearly every day (as described above in section III). Moreover, “the threat of increased piracy” (2003 Rec. at 146) that exemptions to CSS entail weighs against the exemption.

**A. Linux-based players already exist.**

DVD Copy Control Association (“DVD CCA”) makes the decryption keys necessary for creating CSS-compatible DVD players available for license on a nondiscriminatory basis. 2006 Rec. at 73. In fact, Mr. Rizik admits that at least “two commercial, Linux DVD players *do* exist.” Comment 3 at 7 (emphasis in original). However, he claims that the “particular distributions of Linux” involved, Linspire and Turbolinux, “are relatively obscure and unpopular compared to other Linux distributions such as Ubuntu and Debian.” *Id.* If true, this fact indicates a lack of desire for Linux DVD players, not a need for an exemption to the prohibitions of 1201(a)(1).<sup>49</sup> Moreover, it is further evidence that the relative scarcity of Linux-based DVD players is due to the “incompatibility between open source philosophy and the nondisclosure

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<sup>49</sup> Comments filed separately by the DVD Copy Control Association (“DVD CCA”) point to additional licensed Linux DVD players.

agreements required by DVD CCA” (2003 Rec. at 144), not to section 1201(a)(1). In fact, Mr. Rizik admits as much when he states that the “‘spirit of Linux,’ ... is fundamentally at odds with a closed-source, proprietary operating system ...” Comment 3 at 9. As the Register has previously concluded, motion picture distributors and DVD CCA “cannot be held responsible for the hostility in the Linux community to nondisclosure agreements.” 2003 Rec. at 144-45.

**B. Alternative players are readily available.**

Even if we assume that no Linux players are available, Mr. Rizik fails to adequately support his proposal, because many alternative DVD players exist that enable consumers to view DVDs. The objections voiced by Mr. Rizik to the costs associated with purchasing lawful players and the space taken up by televisions (Comment 3 at 10) fall into the category of “mere inconveniences” that the Register has repeatedly concluded to be inadequate justifications for exemptions. 2003 Rec. at 145. Requiring Linux users to rely on “the consumer electronics devices used by most consumers to view [] DVDs” is not “a substantial burden.” *Id.* This is especially true given that “portable DVD players have decreased in price.” 2006 Rec. at 6.<sup>50</sup> Thus, with one relatively small purchase, Linux users can obtain a device capable of playing DVDs that will avoid the inconveniences that Mr. Rizik complains of.

**C. Alternative formats are readily available.**

Even if no Linux players were available, and no alternative DVD players were available, many motion pictures, television shows and other types of audiovisual material are available in formats other than DVD, such as cable and satellite video-on-demand, and online streaming services and download services (as described above in section III). Many such services are compatible with Linux. Thus, there is no need for the proposed exemption, which would authorize circumvention for the purpose of “decrypting and extracting the contents of DVDs” in order to convert the resulting files to a viewable format. Comment 3 at 3. Such “platform-shifting” has never been held to equate to fair use, and the Register has repeatedly refused to grant exemptions on that basis. *See, e.g.*, 2003 Rec. at 138 (“there is no unqualified right to perform a copyrighted work on any device or platform”); 2006 Rec. at 70 (“Although, for example, Professor Felten’s comment argued that device and format-shifting is ‘unquestionably fair use,’ there is no case that remotely reaches such a holding and the Register is skeptical that such conduct would be considered fair use.”). Mr. Rizik’s comment has offered no new citations or arguments that should alter this sound reasoning. Thus, this proposal should be rejected.

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<sup>50</sup> As of January 31, portable DVD players were available through Wal-Mart for as little as \$69.00. [http://www.walmart.com/browse/DVD-Players-Recorders/Portable-DVD-Players/\\_/N-2s3yZaq90Zaqce/Ne-2p4j?ic=48\\_0&ref=125875.129742&tab\\_value=210003\\_All&tab\\_value=210003\\_All&fromPageCatId=62055&catNavId=62055](http://www.walmart.com/browse/DVD-Players-Recorders/Portable-DVD-Players/_/N-2s3yZaq90Zaqce/Ne-2p4j?ic=48_0&ref=125875.129742&tab_value=210003_All&tab_value=210003_All&fromPageCatId=62055&catNavId=62055)

**4A. Proposed class or classes of copyrighted work(s) to be exempted:** “Commercially produced DVDs used in face-to-face classroom teaching by college and university faculty, regardless of discipline or subject taught, as well as by teachers in K-12 classrooms.”

**4B. Proposed class or classes of copyrighted work(s) to be exempted:** “Audiovisual works used by instructors at accredited colleges or universities to create compilations of short portions of motion pictures for use in the course of face-to-face teaching activities.”

**4C. Proposed class or classes of copyrighted work(s) to be exempted:** “Audiovisual works that illustrate and/or relate to contemporary social issues used for the purpose of teaching the process of accessing, analyzing, evaluating, and communicating messages in different forms of media.”

**4D. Proposed class or classes of copyrighted work(s) to be exempted:** “Audiovisual works that illustrate and/or relate to contemporary social issues used for the purpose of studying the process of accessing, analyzing, evaluating and communicating messages in different forms of media, and that are of particular relevance to a specific educational assignment, when such uses are made with the prior approval of the instructor.”

**4E. Proposed class or classes of copyrighted work(s) to be exempted:** “Audiovisual works contained in a college or university library, when circumvention is accomplished for the purpose of making compilations of portions of those works for educational use in the classroom by media studies or film professors.”

**4F. Proposed class or classes of copyrighted work(s) to be exempted:** “Audiovisual works contained in a college or university library, when circumvention is accomplished for the purpose of making compilations of portions of those works for coursework by media studies or film students.”

**4G. Proposed class or classes of copyrighted work(s) to be exempted:** “Audiovisual works included in a library of a college or university, when circumvention is accomplished for the purpose of making compilations of portions of those works for educational use in the classroom by professors.”

**4H. Proposed class or classes of copyrighted work(s) to be exempted:** “All audiovisual works and sound recordings ‘used in face-to-face classroom teaching by college and university faculty, regardless of discipline or subject taught’ and regardless of the source of the legally acquired item.”

#### **Summary of Joint Creators and Copyright Owners’ Response:**

The Joint Creators and Copyright Owners do not oppose renewal of the existing exemption related to film and media studies professors if the Register and the Librarian conclude that the proponents have met their burden of persuasion and if the exemption is narrowed in several respects to conform to the evidence presented. In particular, the exemption, if granted, should be narrowed:

- to cover only audiovisual works distributed in DVD format and protected by CSS;
- to circumstances in which circumvention is truly “*necessary*” to create clip compilations sufficient for use by film or media studies professors in colleges or universities (*e.g.*, where the material is not reasonably available through a consensual path);
- to circumstances in which “all existing digital copies of a work contain access controls that prevent” the creation of clip compilations;
- to circumstances in which “circumvention is accomplished *solely for the purpose*” of creating clip compilations for educational use in the classroom by media studies or film professors in colleges or universities;
- to clearly specify who is able to engage in circumvention within the scope of the exemption.

In addition, the proposals to expand the existing exemption should be rejected. The proponents have failed to establish:

- that methods other than circumvention are inadequate to accomplish the particular pedagogical needs of professors outside of the film and media studies departments of colleges and universities;
- that circumvention of any category of works outside of audiovisual works distributed in DVD format and encrypted by CSS is necessary to accomplish the particular pedagogical needs of any teacher or professor;
- that the exemption should be expanded to cover activities other than creating clip compilations for classroom use;
- that circumvention is necessary for students in any course to accomplish a specific noninfringing use; or
- that an exemption could be properly tailored to allow students to circumvent without resulting in confusion among students regarding when circumvention is allowed and exposing more works to peer-to-peer infringement.

**Argument:**

The Joint Creators and Copyright Owners take this opportunity to respond to all of the comments that proposed renewing and/or expanding the current exemption related to use of audiovisual works by media studies and film professors.

**A. Proposed Class 4E**

We begin with proposed class 4E, which essentially duplicates the exemption recognized in the 2006 Rulemaking. Comment 4E provides several examples of how the exemption has been used to facilitate film and media studies teaching since it was recognized in 2006, and also

argues that some of the alternative means of enabling noninfringing uses in this context are insufficient, and in some cases, even less available than they were during the previous rulemaking. Comment 4E at 6-7. Recognizing that the burden of persuasion remains on proponents of an exemption, including one that seeks to renew an exemption previously recognized (2008 NOI at 58,075), the Joint Creators and Copyright Owners do not oppose recognition of an exemption along the same lines as the 2006 exemption, if the Register and the Librarian conclude that the proponents have met their burden of persuasion.<sup>51</sup>

However, the Joint Creators and Copyright Owners also agree with the Register that “the scope of the exemption is extremely important.” 2006 Rec. at 24. The circumvention of access controls on digital versions of audiovisual works could have an enormous detrimental impact on the market for or value of those works. To minimize the risk of these detrimental impacts, any exemption in this area must be drawn narrowly, and in particular, the exemption recognized must not exceed the scope of the evidence presented in support of it. The Joint Creators and Copyright Owners suggest that the principles described in section II(A)(1) above must be applied to any exemption recognized in this area. Specifically, the exemption should be explicitly narrowed:

- To cover only audiovisual works distributed in DVD format and protected by CSS. The record in this proceeding, as well as the record in 2006 focuses almost solely on the DVD format, and there is nothing that demonstrates that the DVD format is insufficient to provide film and media studies professors with the content and quality they require, nor that access to any other format is required.
- To circumstances in which circumvention is truly “*necessary*” to create clip compilations sufficient for use by film or media studies professors in colleges or universities (*e.g.*, where the material is not reasonably available through a consensual path).
- To circumstances in which “all existing digital copies of a work contain access controls that prevent” the creation of clip compilations. This condition takes on even greater importance now that the ability to mark and play clips in digital format from legitimate online streaming services has been enhanced (*see* discussion below regarding Hulu).

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<sup>51</sup> The Joint Creators and Copyright Owners emphatically disagree with the proponents’ contention that “licensing cannot constitute an alternative to circumvention when the circumvention is completed for the purposes of teaching, scholarship and research, three core principles codified in Section 107 of the Copyright Act describing fair use.” Comment 4E at 9. This proceeding is not directed simply at identifying adverse impacts on fair use, but on “noninfringing use,” a category that includes licensed use. The proponents’ argument on this issue consists almost entirely of hypothetical questions, and lacks any demonstration that educators of any type are unable to obtain, or have ever attempted to obtain, clips from copyright owners for the classroom use they seek to make. Thus, on this point it is far from clear that proponents have carried their burden of persuasion that the 1201(a)(1) prohibition is actually having any substantial adverse effect on the lawful use at issue.

- To circumstances in which “circumvention is accomplished *solely for the purpose*” of creating clip compilations for educational use in the classroom by media studies or film professors in colleges or universities.
- To clearly specify who is able to engage in circumvention within the scope of the exemption. This is necessary to diminish confusion regarding the scope of the exemption that the proponents assert is prevalent,<sup>52</sup> and to dispel any implication that the exemption might have any affect on liability for providing circumvention services under section 1201(a)(2).<sup>53</sup>

These changes are necessary to properly craft “a narrow and focused subset” (Commerce Rep. at 38) of audiovisual works that will alleviate the risk that “the effect of the circumvention that would be authorized by the exemption would be potentially harmful to copyright owners and would adversely affect the public by undermining the incentive for the distribution of digital copies of motion pictures and audiovisual works.” 2006 Rec. at 16.

Thus, if the Register and the Librarian conclude that the proponents have met the burden of persuasion on proposed class 4(E), the Joint Creators and Copyright Owners suggest that the exemption should read substantially as follows:

*“Audiovisual works distributed in a DVD format protected by the Content Scrambling System (“CSS”) and included in the educational library of a college or university, when circumvention is accomplished by media studies or film professors solely for the purpose of making compilations of portions of those works for educational use by media studies or film professors in the classroom, but only if circumvention is necessary for that particular pedagogical purpose and all existing digital editions or copies of a work contain access controls that prevent making such compilations.”<sup>54</sup>*

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<sup>52</sup> One commenter stated that professors outside of the film and media studies disciplines “simply do not know whether they are entitled to avail themselves of the exception as it now exists ...” Comment 4B at 2. This demonstrates a need to more precisely and explicitly articulate the scope of the exemption, if it is renewed.

<sup>53</sup> See 17 U.S.C. § 1201(a)(1)(E).

<sup>54</sup> If the Register and the Librarian determine that the record supports renewal of the exemption, the Joint Creators and Copyright Owners do not object to the proposal to expand the exemption to cover titles “in the educational library of a college or university” rather than a limitation to media studies or film department libraries. Comment 4E, among others, claims that most institutions do not segregate library copies by academic department. See Comment 4E at 14 (“most universities do not have a dedicated film and media studies library”).

**B. Other Proposed New Exemptions**

In addition to narrowing the existing exemption, the Register and the Librarian should reject the proposals to expand the exemption. The proponents have failed to demonstrate:

- that methods other than circumvention are inadequate to accomplish the particular pedagogical needs of professors outside of the film and media studies departments of colleges and universities;
- that circumvention of any category of works outside of audiovisual works distributed in DVD format and encrypted by CSS is necessary to accomplish the particular pedagogical needs of any teacher or professor;
- that the exemption should be expanded to cover activities other than creating clip compilations for classroom use;
- that circumvention is necessary for students in any course to accomplish a specific noninfringing use; or
- that an exemption could be properly tailored to allow students to circumvent without resulting in confusion among students regarding when circumvention is allowed and exposing more works to peer-to-peer infringement.

1. The exemption should not be expanded beyond media studies and film professors teaching in colleges or universities.

The Register recommended the current exemption related to film and media studies professors because she concluded that “they have demonstrated that the encrypted DVD versions of motion pictures often are of higher quality than copies in other available formats and contain attributes that are extremely important to teaching *about film* for a number of reasons.” 2006 Rec. at 20 (emphasis added). These reasons included, for example, preservation of the color balance and aspect ratio to accurately reflect how the original work would have appeared when it was originally released in theatres.” *Id.* Finding that the record indicated that alternative methods of creating clip compilations, such as recording screen shots with a digital video recorder, resulted in color distortions and reduced picture quality, the Register concluded that the professors demonstrated it was “necessary” (2006 Rec. at 27) to circumvent CSS in order to accomplish a particular pedagogical purpose that could not otherwise be accomplished.

However, the Register also stated that this demonstration of need was unique to film and media studies professors that engage in the study of film itself, as opposed to “those wanting to comment on the historical context of a film or create a parody, or to show a film clip in class unrelated to cinematographic significance.” *Id.* As support for this point, the Register relied on (2006 Rec. at 23) a letter from Professor Decherney, which stated that “in some courses, moving

images are used as illustrations rather than as a text to be studied. It might be possible in these instances that analog quality is acceptable.” Decherney Letter of June 2, 2006 at 3.<sup>55</sup>

The comments filed in this proceeding that seek to expand the current exemption beyond teaching the disciplines of film and media studies at the college and university level fail to provide any cogent evidence to call these points into question. A review of the examples provided in these comments provides no indication that professors outside of the film and media studies disciplines share the same extraordinary need for high quality images that the Register found to exist for film and media studies professors. *See, e.g.*, Comment 4C at 9; Comment 4B at 2, 5; Comment 4A at 1-2; Comment 4H at 3-4; Comment 4G at 5-12. While certainly there are valid pedagogical uses for film clips to show “how Hollywood has shaped the mythology of war” (Comment 4G at 7) or to “illustrate the transformative impact of U.S. media on finance in recent decades,” (Comment 4B at 2) there is simply no evidence that circumvention of access controls is necessary to carry out these uses. Using a digital video recorder to capture screen images, for example, will not diminish a professor’s ability to “illuminate the multi-layered approach needed when dealing with issues such as AIDS.” Comment 4H at 3. Nor will it impair a professor’s ability to instruct students in how to conduct a “critical analysis of media.” Comment 4C at 6.<sup>56</sup> Taken as a whole, the submissions indicate that the ability of professors in disciplines other than film and media studies to make noninfringing uses of audiovisual materials is not substantially affected in an adverse manner by section 1201(a)(1).

Although some proponents claim that “[t]he request [they] are making to expand the current circumvention exemption is basically a plea for restoring to educators in schools, colleges, and universities the powerful teaching tools and capabilities available to them before the advent of the DMCA[,]” (Comment 4A at 2) this is simply inaccurate. Prior to the DMCA, digital versions of audiovisual works were not widely available for educational uses. It is the DMCA that encouraged copyright owners to invest heavily in distributing DVDs and audiovisual works in other digital formats, and the access controls involved do not place educators in a more difficult position than they were in prior to the DMCA. Indeed the contrary is true; digital copies of works that facilitate classroom use are now much more widely available in ways that facilitate classroom use. For example, an educator can use the Hulu website to (in effect) create and share high resolution clips from television programs by marking start and end points of a video for playback (including in a classroom setting) via an embedded link.<sup>57</sup>

As in the last rulemaking, at most, “it has not been shown that the [section 1201(a)(1)] prohibition affects teaching generally, but only that it affects a particular form of teaching.” 2006 Rec. at 23. Limiting the exemption to the types of professors that demonstrate a need for it is not “arbitrary” as one commenter repeatedly asserted (Comment 4B at 2); it is required by the

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<sup>55</sup> The letter is available at <http://www.copyright.gov/1201/2006/posthearing/decherney-6-8-06.pdf>.

<sup>56</sup> Proponents must also address evidence to be provided by other commenters about improvements in the “DVD jukebox” devices available for performing clips from multiple DVDs seriatim in the classroom.

<sup>57</sup> <http://www.hulu.com/watch/53240/the-office-the-duel>.

statute. See Comment 4E at 14 (a narrowly tailored class is “required by Section 1201”). Thus, the proposals to expand the exemption beyond film and media studies professors at the college and university level should be rejected.<sup>58</sup>

2. The exemption should not be expanded to cover activities other than creating clip compilations.

Three proponents proposed expanding the current exemption beyond creating clip compilations. Gary Handman (4A) and Gail Fedak (4H) proposed exemptions applicable to all “face-to-face classroom teaching” activities, while Professor Renee Hobbs (4C) proposed an exemption that would apply in a broad set of vague circumstances involving “teaching the process of accessing, analyzing, evaluating, and communicating messages in different forms of media.” Comment 4C at 1. The parameters of these proposals are so unclear that in essence they would constitute exemptions applicable to any educational activity.<sup>59</sup> Thus, the proposals suffer from the flaws discussed above in section II(B). Granting either exemption in its current form would result in a “class of works” that is primarily based on a type of use or user rather than a category of works. Furthermore, while the pedagogical use to be achieved by the existing exemption would “without question” fall within an existing statutory limitation on copyright, 17 U.S.C. § 110(1), (2006 Rec. at 13-14) it would be much more difficult to conclude that this would always be the case for a broader category of educational uses. There are very few cases related to educational uses in general that teachers can use to guide them as to whether a particular use is in fact noninfringing.<sup>60</sup> Expanding the exemption beyond the creation of clip compilations would inject too much uncertainty into any granted exemption.

Given that the proponents have failed to demonstrate that circumvention is necessary to accomplish any particular pedagogical use other than creating clip compilations, the exemption, if granted, should be confined to that activity.

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<sup>58</sup> Two commenters seek to expand the exemption to apply to all teaching activity, including K-12. However, Mr. Handman fails to provide any examples of educational activities below the college or university level that require the type of quality that the film and media studies professors have established is necessary to accomplish particular pedagogical purposes. And Professor Hobbs does not even discuss the use of screen shots as an alternative to circumvention. Moreover, the extraordinarily broad nature of her proposed “class of works” renders it an example of a class defined primarily by the type of user rather than a category of works. See section II(B) above. These comments have failed to justify the requested expansion.

<sup>59</sup> Comment 4H claims that the exemption should be broadened beyond the creation of clip compilations because professors need to circumvent in order to use audiovisual material for professional training. The proponent fails to show that circumvention is necessary given that original material could be used to teach digital video editing methods.

<sup>60</sup> See The American University Center for Social Media, *The Code of Best Practices for Media Literacy Education* 17 (2008) (“We don’t know of any lawsuits actually brought by an American media company against an educator over the use of media in the educational process.”).

3. The exemption should not be expanded to cover students.

Two proponents (4D & 4F) proposed exemptions that would allow students to circumvent access controls for educational purposes. The most troubling aspect of these proposals is that they would expand by orders of magnitude the number of persons authorized to circumvent, and consequently would dramatically increase the risk that the exemption would lead to piracy. The Joint Creators and Copyright Owners have engaged in extensive educational campaigns designed to instill a respect for copyright in young people. Granting the proposed exemption would work at cross purposes to that effort. It is unrealistic to assume that the circumvention activities of students could be as carefully limited and restricted to specified pedagogical ends as those of their professors.

These proposals also suffer from other and perhaps more fundamental flaws. Professor Hobbs' proposal for an exemption for students to circumvent "for the purpose of studying the process of accessing, analyzing, evaluating and communicating messages in different forms of media" is so vague that it would constitute an exemption applicable to any educational activity of a student. This would constitute a "class of works" that is primarily based on a type of use or user rather than a category of works. Moreover, the broad activities referred to could include many infringing uses. Despite Professor Hobbs' assertion that an instructor can "make sure" that a student's "proposed use of the underlying material to which access is sought would, in fact, constitute fair use[.]" (Comment 4D at 18) there is no way for an instructor to do so.

Furthermore, Professor Hobbs' proposal does not establish that circumvention is necessary for students to accomplish the range of educational uses that her proposed exemption would cover. As discussed above, nearly all such uses can be accomplished by off-screen recording, use of analog materials, and other methods. While it may be true that such methods involve greater "tediousness" than might be the case with methods enabled by circumvention, (Comment 4F at 17) the evidence presented does not demonstrate that the resulting "frustration" felt by students rises above the level of an "inconvenience" that is insufficient to justify an exemption. See 2006 Rec. at 22; *Universal City Studios v. Corley*, 273 F.3d 429, 459 (2001) ("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 techniques, or in the format of the original").

Especially given the risks associated with encouraging circumvention by students, the proponents have failed to adequately support any exemption that extends beyond professors to their pupils.

4. The exemption should not be expanded beyond audiovisual works on DVDs protected by CSS.

One commenter, Gail Fedak (4H), proposed expanding the current exemption beyond audiovisual works to sound recordings. However, she failed to provide any examples of circumstances in which sound recordings are only available in formats that contain access controls. Nearly all sound recordings released in CD format lack access controls altogether. In addition, many online music stores now distribute sound recordings without access controls or

copy controls.<sup>61</sup> To the extent that Ms. Fedak seeks an exemption related to specific access controls used in connection with specific types of sound recordings, she has failed to articulate those specifics in a manner sufficient to demonstrate that the section 1201(a)(1) prohibition is likely to have a substantial adverse effect on educational uses of sound recordings in the next three year period. *See* House Manager's Rep. at 6 ("evidence of likelihood [must be] highly specific, strong and persuasive"); 2008 NOI at 58,075 (same).

A similar lack of evidence exists to justify renewing the current exemption without narrowing it to only apply to audiovisual works in DVD formats that are protected by CSS. Despite the narrow focus of the record from the previous rulemaking on this subset of audiovisual works, the exemption was not explicitly limited in a manner that reflected the record. Thus, for example, although there was no evidence in 2006 (and appears to be none this year) that the circumvention prohibition is inhibiting noninfringing educational uses with respect to videogames, the proponents of the existing exemption assert that the exemption allows circumvention of access controls used to protect videogames.<sup>62</sup> Given the scarcity in the record of any evidence that the proponents need to circumvent anything other than DVDs protected by CSS in order to obtain the content they require in a format of suitable quality, any exemption granted should be limited to circumvention of that specific access control.

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<sup>61</sup> *See* Brad Stone, *Want to Copy iTunes Music? Go Ahead, Apple Says*, N.Y. Times, Jan. 7, 2009.

<sup>62</sup> *See* Frequently Asked Questions, <http://www.asc.upenn.edu/dmca/faq.htm> ("Does this cover video games? This covers all audiovisual digital media, not just DVDs.").

**5A. Proposed class or classes of copyrighted works to be exempted:** “Computer programs that enable wireless telephone handsets to execute lawfully obtained software applications, where circumvention is accomplished for the sole purpose of enabling interoperability of such applications with computer programs on the telephone handset.”

**Summary of Joint Creators and Copyright Owners’ Response:**

The Joint Creators and Copyright Owners oppose the exemption proposed by Comment 5A. In order to justify an exemption, the proponent must demonstrate that the statutory exemption in 17 U.S.C. § 1201(f) is inapplicable to the conduct at issue. The proponent completely fails to meet this burden. In addition, even if the proponent had shown that the conduct involved did not fall within section 1201(f), the existence of a statutory exemption addressing the same area of activity – interoperability of computer programs -- should weigh heavily against granting the exemption. Moreover, the proponent’s description of the conduct involved in hacking computer programs that operate telephone handsets is too vague for the Register and the Librarian to determine whether it is noninfringing. And even if it is noninfringing, granting the exemption may increase piracy on mobile devices. The “mere inconveniences” discussed in Comment 5A do not justify such risks.

**Argument:**

Comment 5A’s proposed exemption related to enabling interoperability of computer programs with wireless telephone handsets should be rejected.<sup>63</sup>

In enacting the DMCA, Congress considered at some length the precise issue raised by the proponent: whether, and if so under what conditions, it would be permissible to circumvent access controls in order to achieve interoperability of computer programs. Its answers to these questions are codified in 17 U.S.C. § 1201(f). This section sets certain preconditions that must be satisfied in order for circumvention of access controls to be immunized from liability under section 1201(a)(1), and also provides limited exemptions to other provisions of the DMCA to allow the development and sharing of tools to accomplish circumvention for the purpose of achieving interoperability.

Astonishingly, the EFF submission does not even mention section 1201(f). Where Congress has already legislated comprehensively and in detail on the circumstances in which circumvention should be allowed, this rulemaking, which is focused on making temporary adjustments and applying the prohibition flexibly in circumstances not anticipated by Congress, has little if any role to play. *See* 2000 Rec. at 64,571 (“When Congress has specifically addressed the issue by creating a statutory exemption ... in the same legislation that established the rulemaking process, the Librarian should proceed cautiously before, in effect, expanding the

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<sup>63</sup> The proponent calls this activity “jailbreaking.” This label seeks to surround certain probably illegal behavior with a romantic “outlaw” aura, as well as casting creators and copyright owners in an unattractive authoritarian light; but it actually tells us nothing about what noninfringing use is allegedly impeded by section 1201(a)(1). The Joint Creators and Copyright Owners will accordingly avoid the term, except when quoting Comment 5A.

... statutory exemption by creating a broader exemption ...”); 2003 Rec. at 181-82 (even when proponents “provide evidence why the statutory exemption is unavailable to accomplish a noninfringing use ... they must justify issuance of any exemption that would appear to permit more than Congress intended when it enacted the statutory exemptions covering the same type of conduct.”). If the Librarian, through an administrative exemption, were to allow circumvention for the purpose of interoperability of computer programs under conditions that fall outside those approved by Congress in section 1201(f), serious questions would arise about his fidelity to Congress’ clearly expressed intent.

At a minimum, the proponent of such an exemption must fully bear the burden of demonstrating the inapplicability of any existing statutory exemptions, as an indispensable prerequisite to justify the creation of an administrative exemption. Here, the proponent has not even attempted to meet that burden. Moreover, particular caution must be exercised when the noninfringing use that the 1201(a)(1) prohibition allegedly inhibits is within the subject area addressed by the activity that an existing statutory exemption seeks to foster. Here, the proposed exemption has been explicitly phrased for activity “enabling interoperability,” which is the very subject matter of section 1201(f). the proponent must bear the burden of proving otherwise.<sup>64</sup>

The proponent has also failed to provide any evidence that wireless phone manufacturers or other persons have threatened legal action pursuant to 1201(a)(1) against individuals engaged in enabling third party applications to operate on “locked” handsets. Although it is not necessary to demonstrate that specific threats or legal actions have taken place, the absence of such threats or actions diminishes the claim that 1201(a)(1) is likely to have a substantial adverse effect on the conduct at issue during the next three year period. *See* 2008 NOI at 58,075 (“purely theoretical critiques of section 1201 cannot satisfy the requisite showing”).

In addition, the proponent’s description of the conduct involved is too vague to enable the Register and the Librarian to conclude that the circumvention at issue would enable only noninfringing activity. 2008 NOI at 58,077 (“[A] proponent should establish that the prevented activity is, in fact, a noninfringing use under current law.”). Although Comment 5A states that “some jailbreaking methods *may not*” involve adapting software programs, it admits that methods may require “the reproduction or adaptation beyond the scope of any existing license or other authorization by the copyright owner.” Comment 5A at 8 (emphasis added).<sup>65</sup> The arguments put forward by the proponent as to why the conduct that would be enabled by its proposed exemption would be noninfringing involve difficult issues regarding the licensing of

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<sup>64</sup> If the proponent demonstrates that the 1201(f) exemption is inapplicable to the conduct that the proposal seeks to enable, it must also demonstrate that Congress’ policy choices reflected in 1201(f) do not conflict with granting an exemption in this area.

<sup>65</sup> The proponent claims that the most popular circumvention device for the iPhone, Pwange tool, “decrypts and creates a modified version of the iPhone firmware.” Comment 5A at 7. It also states that “decryption and modification of the iPhone firmware appears to be necessary for any jailbreak technique to succeed on a persistent basis.” *Id.*

software and the applicability of sections 107 and 117 in that context.<sup>66</sup> The Joint Creators and Copyright Owners submit that the proponent has not come close to meeting its burden of demonstrating that the circumvention it proposes to exempt would not enable infringing activity. At a minimum, this would require it to provide a more detailed description of the conduct involved and to analyze all applicable license agreements.<sup>67</sup>

The Joint Creators and Copyright Owners are also concerned that granting the proposal may expose copyrighted content protected by access controls resident on wireless handsets to unlawful copying and distribution. It could also enable the interoperability of pirated content, such as videogames, thereby increasing the incentive for piracy.<sup>68</sup> Although the proposed exemption is limited to “lawfully obtained software applications,” this language could create confusion. The same circumvention tools used to place lawful third party applications on handsets could readily be abused for this purpose. Piracy of mobile games is a growing problem for the entertainment software industry, and the use of restricted platforms for games is a valuable tool to deter conduct that has a significant adverse effect on the market for and value of copyrighted works.

The Joint Creators and Copyright Owners are also concerned that this proposal, as well as proposal 11A from the same commenter, rely on the assertion that individuals appear to be currently breaking the law in large numbers, as if this provided support for the proposed exemption. Comment 5A at 5-7. Congress could not have intended for widespread violation of the statute to justify granting an exemption, wholly apart from the other factors listed in the

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<sup>66</sup> The Register has previously cautioned that “it is improper in this context to generalize about the parameters of § 107.” 2006 Rec. at 29; 2003 Rec. at 55 (same). The same is true about the applicability of section 117 in this context. The proponent acknowledges that it has to show that persons in possession of copies of software in wireless telephone handsets qualify as “owners” under the statute, since section 117 benefits only “owners” of copies of software. But several additional hurdles need to be surmounted, and the proponent makes no effort to do so. For example, it must be demonstrated that the “owner” of the copy had not waived, in its agreement with the handset provider, any privilege to make some or all of the adaptations covered by section 117. This proceeding should not create exemptions designed to circumvent licensing restrictions rather than access controls. The proponent also fails to demonstrate that the adaptations in this scenario are made by the owner of the copy, or on his or her explicit authorization, and are not simply the result of third-party hacking of the program, to which section 117 would not apply.

<sup>67</sup> Congress took great pains to deny the interoperability statutory exemption under section 1201(f) to any conduct that “constitute[s] infringement under this title.” See 17 USC 1201(f)(1), (f)(2), (f)(3). This underscores the burden that EFF must shoulder to demonstrate that the conduct its proposed exemption enables would clearly, consistently, and indeed invariably be noninfringing.

<sup>68</sup> See Elinor Mills, *Developer Considers Charges After iPhone App is Pirated*, CNet, [http://news.cnet.com/8301-1009\\_3-10144862-83.html](http://news.cnet.com/8301-1009_3-10144862-83.html) (explaining that “[a] jailbroken iPhone, in which the operating system has been hacked, is needed to run [certain pirated] cracked apps.”).

statute. The Librarian should avoid increasing consumer confusion by encouraging unlawful behavior. The fact that a lot of consumers are engaging in an activity does not make it noninfringing.

In its essence, this proposal bears a close resemblance to other proposals that the Register and the Librarian have consistently rejected in the past: a group of users who are able to access content on one device are frustrated because they wish to access it on another device, an outcome that requires circumvention. Some application providers have chosen to license their works exclusively for use on one platform; some platform providers have chosen not to make their devices interoperable with certain other applications. These market decisions in no way impede the ability of consumers to access the applications they choose, but simply require them, in some circumstances, to employ different platforms to do so.<sup>69</sup> The complaint that consumers are unable to engage in platform shifting wireless handset applications that could be utilized with other devices falls squarely within the category of “mere inconveniences” (2003 Rec. at 145, 157) that the Register and the Librarian have previously rejected as justifications for exemptions. *See* 2003 Rec. at 138 (“there is no unqualified right to [use] a copyrighted work on any device or platform”). The proposal should be rejected.

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<sup>69</sup> *See* House Manager’s Rep. at 6 (“Adverse impacts that flow from other sources—including marketplace trends ...—or that are not clearly attributable to such a prohibition, are outside of the scope of the rulemaking.”).

**5B. Proposed class or classes of copyrighted works to be exempted:** “Computer programs that operate wireless telecommunications handsets when circumvention is accomplished for the sole purpose of enabling wireless telephones to connect to a wireless telephone communication network.”

**5C. Proposed class or classes of copyrighted works to be exempted:** “Computer programs in the form of firmware or software that enable mobile communication handsets to connect to a wireless communication network, when circumvention is accomplished for the sole purpose of lawfully connecting to a wireless communication network.”

**5D. Proposed class or classes of copyrighted works to be exempted:** “Computer programs in the form of firmware that enable wireless telephone handsets to connect to a wireless telephone communication network, when circumvention is accomplished for the sole purpose of lawfully connecting to a wireless telephone communication network, regardless of commercial motive.”

### **Summary of Joint Creators and Copyright Owners’ Response:**

The Joint Creators and Copyright Owners neither oppose nor support renewal of the existing exemption related to wireless telephone networks. However, the Joint Creators and Copyright Owners oppose the proposals to expand the existing exemption made by Comments 5B, 5C and 5D. These proposals are too broad, and would facilitate unlawful conduct. The proponents fail to demonstrate a justifiable need for the expansions.

### **Argument:**

In 2006, the Copyright Office provided an exemption for “Computer programs in the form of firmware that enable wireless telephone handsets to connect to a wireless telephone communication network, when circumvention is accomplished for the sole purpose of lawfully connecting to a wireless telephone communication network.” Three comments (5B, 5C, and 5D) have been made proposing to reinstitute a similar but somewhat broader exemption in the current rulemaking. Although the Joint Creators and Copyright Owners do not take a position in favor of, or in opposition to, the renewal of the existing exemption, these proposed exemptions as submitted are too broad. In particular, any adopted exemption should maintain the requirement of “lawfully” connecting to the wireless communication network, should not be broadened by the phrase “regardless of commercial motive”, and should continue to apply only to telephones and telephone networks.

#### **A. Lawful access should clearly be required.**

Proposals 5B and 5C each eliminate the requirement of the 2006 exemption that the circumvention be solely for “lawfully” connecting to a wireless communication network. The proposals do not attempt to justify its removal. The legislative history of section 1201(a)(1)(B) makes clear that “the focus must remain” on only granting exemptions for “*lawful uses*” of copyrighted works. Commerce Rep. at 37 (emphasis added). The Joint Creators and Copyright Owners see no reason why the proceeding should stray from its focus on facilitating lawful activity by expanding this exemption to allow unlawful access to wireless telephone networks.

There are obvious policy reasons why no exemption should be granted that facilitates unlawful activity of any kind.

**B. The exemption should be confined to individual consumers.**

Submission 5D proposes the addition of the phrase “regardless of commercial motive” to the 2006 exemption. Comment 5D at 3. The proponents justify the addition so as to have the exemption cover third parties who sell unlocked, used phones for a profit. *Id.* However, Congress intended the proceeding to create exemptions only for individual acts of individual noninfringing end users. Commerce Rep. at 36 (The proceedings are to “allow the enforceability of the prohibition against the act of circumvention to be selectively waived, for limited time periods, if necessary to prevent a diminution in the availability *to individual users* of a particular category of copyrighted materials.”) (emphasis added); *id.* at 37 (“The goal of the proceeding is to assess whether the implementation of technological protection measures that effectively control access to copyrighted works is adversely affecting the ability of *individual users* to make lawful uses of copyrighted works.”) (emphasis added).

Although the proponents of expanding the exemption criticize the numerous district court decisions from the Tracfone Wireless cases, it was entirely appropriate for the courts to interpret the current exemption as targeted only to acts by individual owners of handsets who circumvent their phones’ locks to enable their personal use of their own handsets on alternative wireless networks. It was personal use of the phone that was the noninfringing act that the Copyright Office found to justify the exemption in the first place. 2006 Final Rule at 68,476.

Finally, section 1201(a)(1)(E) of the copyright statute provides that the rulemaking exemptions may not be used as a defense to any prohibition other than that of section 1201(a)(1). What the proponents are really seeking here is to have the exemption cover the sale of circumvention devices by third party resellers, or the provision of circumvention services to others, both of which are prohibited by section 1201(a)(2). Congress has already delineated when section 1201(a)(2) is inapplicable, and the Librarian lacks authority to add to that list. *See* Commerce Rep. at 38 (“The Secretary’s determination [regarding an exemption] is inapplicable in any case seeking to enforce any other provision of this legislation, including the manufacture or trafficking in circumvention devices that are prohibited by section 102(a)(2) or 102(b)(1).”).

**C. If an exemption is granted, it should be narrowly tailored.**

If an exemption is granted, the Joint Creators and Copyright Owners urge the Office to craft the exemption consistent with section II(A)(1) above, and to define as specifically as possible the permissible purpose for which circumvention may be undertaken. For example, any granted exemption should continue to explicitly state that it is only applicable to “wireless *telephone* handsets” and “wireless *telephone* communication networks” rather than the broader terminology proposed by Comment 5C.<sup>70</sup> Uncertainty regarding this point would undermine the

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<sup>70</sup> Indeed, it would be important to define all relevant terms and phrases in the exemption. Otherwise, an exemption to apply only in the telephone context could be read to sweep much more broadly and to apply to mobile game platforms or access to WiFi networks.

purpose of this proceeding, which is to provide narrowly tailored exemptions upon which users can rely during the three-year period during which they are in force.

**6. Proposed class or classes of copyrighted works to be exempted:** “Computer programs protected by dongles that prevent access due to malfunction or damage or hardware or software incompatibilities or require obsolete systems or obsolete hardware as a condition of access.”

**Summary of Joint Creators and Copyright Owners’ Response:**

The Joint Creators and Copyright Owners oppose the exemption proposed by Comment 6. The proponent fails to justify discarding the narrow tailoring of the existing exemption.

**Argument:**

Rather than requesting renewal of the existing exemption applicable to “computer programs protected by dongles that prevent access due to malfunction or damage and which are obsolete,”<sup>71</sup> Joseph Montoro Jr. proposes an expanded exemption identical to a proposal he put forward at the hearing stage of the last triennial rulemaking proceeding. This proposal lacks the narrow tailoring of the existing exemption, and would allow circumvention in some circumstances even when a dongle is neither malfunctioning nor obsolete. Based on a review of the examples and exhibits provided by Mr. Montoro, the Joint Creators and Copyright Owners continue to agree with the Register’s prior conclusions that (1) “[t]he record does not support an exemption for computer software protected by dongles that are working properly” and (2) “an exemption is [not] warranted simply when a dongle is malfunctioning or damaged, but where a replacement is reasonably available.” 2003 Rec. at 38, 40. To the extent that Mr. Montoro has identified any examples of hardware or software incompatibilities with dongles, he also admits that these issues are typically resolved by the companies involved. Comment 6 at 8. The fact that this process may take longer than it should at times is not enough to justify an exemption. The requested expansion should be rejected.

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<sup>71</sup> As in the past, the Joint Creators and Copyright Owners take no position on whether Mr. Montoro has satisfied his burden with respect to the renewal of the existing exemption.

**7. Proposed class or classes of copyrighted works to be exempted:** “Computer programs”  
[for forensic analysis].

**Summary of Joint Creators and Copyright Owners’ Response:**

The Joint Creators and Copyright Owners oppose the exemption proposed by Comment 7. Based on the submission, it appears that the proponent is not seeking access to computer programs, but instead seeks to circumvent computer programs in order to access electronically stored data. Comment 7 fails to demonstrate that the software programs at issue qualify as access controls. Even if they do qualify, he fails to demonstrate that copyright owners will not cooperate if asked to do so, that courts lack the ability to authorize and supervise circumvention in this context, or that existing statutory exemptions are inapplicable.

**Argument:**

Glenn Pannenberg requests an exemption related to “forensic investigators practicing in the fields of financial or information technology.” Comment 7 at 1. The Joint Creators and Copyright Owners oppose an exemption in this area because Mr. Pannenberg has not provided evidence that adequately supports his proposal, even as rephrased by the Register in the Notice of Proposed Rulemaking. NPRM at 79,427.

Despite the label he has placed on his proposed class, it is unclear whether Mr. Pannenberg is actually seeking access to computer programs at all. He instead appears to be seeking access to evidence in the form of encrypted “electronic data” contained in documents and similar means of electronic storage.<sup>72</sup> Thus, the computer programs at issue here may in fact be the alleged access controls that Mr. Pannenberg seeks to circumvent rather than the particular class of works that forensic investigators are unable to lawfully use due to the prohibitions of 1201(a)(1).<sup>73</sup>

Mr. Pannenberg is concerned that he and other forensic investigators are legally unable, due to 17 U.S.C. § 1201(a)(1), to “copy, activate or reverse engineer [certain] software in order to acquire the required evidence.” *Id.* at 2. He claims this prevents or inhibits him from “examin[ing] evidence in a civil or criminal proceeding and ... issu[ing] a report thereon to a court.” *Id.* at 1.

While it is not entirely clear whether, and if so to what extent, the conduct Mr. Pannenberg is talking about actually violates 17 U.S.C. §1201(a)(1), virtually all of the problems

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<sup>72</sup> To the extent that Mr. Pannenberg seeks an exemption that is not designed to facilitate access to computer programs, but is instead designed to facilitate access to all kinds of works for the purpose of forensic investigation, the proposal seeks to exempt a class of works based primarily on a type of use or user rather than a particular subset of a section 102 category of works. As discussed above in section II(C), such classes are impermissible.

<sup>73</sup> Of course, these computer programs may not actually qualify as access controls if they are not designed to control access to works. 2006 Rec. at 31.

he has encountered could be resolved by asking relevant copyright owners to consent to the conduct or by applying to the court in which the proceeding is taking place. As a matter of discovery, motions practice, or otherwise, the court would generally have the authority to order the owner of copyright in the data which is the subject of the forensic investigation to authorize circumvention of the access control in question. Such authorization, even if compelled by court order, would immunize the investigator from any liability under section 1201(a)(1). *See* 1201(a)(3)(A) (“to ‘circumvent’ a technological measure” means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, *without the authority of the copyright owner*”) (emphasis added). In circumstances where the owner of copyright in the data does not cooperate, companies that provide the software that controls access to protected data are responsive to court orders, and have procedures and processes in place to handle such requests appropriately. Furthermore, even if the copyright owner in question were not a party to the proceeding and the court lacked jurisdiction over it, there is no indication in the submission that any court order authorizing circumvention for the purposes of evidence gathering and reporting to the court has ever been challenged on grounds of incompatibility with section 1201(a)(1), or that any such challenge would be successful. Absent documentation that this situation actually has arisen or is likely to arise, the predicate for granting an exemption in this proceeding cannot be met.<sup>74</sup>

A court hearing a specific dispute is also far better situated to supervise the act of circumvention and the resulting discovery of evidence than could possibly be achieved through an administrative exemption in this proceeding. The court would be in a position to decide whether the request was part of a legitimate search for evidence, or whether it proceeded from an improper motive involving unauthorized access to commercially significant copyrighted material. It could also consider the qualifications of the particular forensic investigator, as Pannenberg acknowledges (Comment 7 at 2); this would be a challenge in fashioning an appropriate administrative exemption, since there are apparently “a variety of credentials” that could be used to establish the investigator’s bona fides. *Id.* Finally, the court is also in the best position to issue ground rules for how both the information discovered through circumvention, and the specific circumvention techniques employed, should be documented, used or disseminated (*e.g.*, through filings under seal). This would be a particularly important safeguard for copyright owners that could not easily be crafted in a generally applicable exemption issued in this proceeding.

At least two statutory exemptions might also be applicable to the circumstances raised by this proposal. First, if the circumvention is carried out pursuant to the lawful direction of a prosecutor, the section 1201(e) exemption for “law enforcement, intelligence, and other government activities” could apply. Since section 1201(e) applies to “lawfully authorized investigative ... activity of an ... agent ... of the United States, a State, or a political subdivision

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<sup>74</sup> In the two examples that Mr. Pannenberg provides, the client apparently decided not to seek a court order to authorize the circumvention allegedly needed. While it is not entirely clear why this was so, there is nothing in the submission to suggest that, in a case in which there were grounds for seeking such an order, section 1201(a)(1) would prove to be an insurmountable obstacle to its being granted.

of a State,” a court order authorizing a forensic investigator to engage in circumvention in order to retrieve evidence could be covered. Second, to the extent Mr. Pannenburg seeks to “reverse engineer” software to make it interoperable with other programs (*id.* at 2), this activity may be covered by section 1201(f). The potential applicability of these statutory exemptions to the conduct at issue should weigh heavily against the proposal as discussed above in section II(A).

In sum, on the record so far, the burden of persuasion for recognition of an exemption has not been met. To the extent any circumvention of an access control that would lead to liability under section 1201(a)(1) is involved, it can be authorized by the relevant copyright owner or ordered by, and carried out under the supervision of, a court of competent jurisdiction. The proposal should be rejected.

**8A. Proposed class or classes of copyrighted works to be exempted:** “Literary works, sound recordings, and audiovisual works accessible on personal computers and protected by technological protection measures that control access to lawfully obtained works and create or exploit security flaws or vulnerabilities that compromise the security of personal computers, when circumvention is accomplished solely for the purpose of good faith testing, investigating, or correcting such security flaws or vulnerabilities.”

**8B. Proposed class or classes of copyrighted works to be exempted:** “Video games accessible on personal computers and protected by technological protection measures that control access to lawfully obtained works and create or exploit security flaws or vulnerabilities that compromise the security of personal computers, when circumvention is accomplished solely for the purpose of good faith testing, investigating, or correcting such security flaws or vulnerabilities.”

**Summary of Joint Creators and Copyright Owners’ Response:**

The Joint Creators and Copyright Owners oppose both of these proposals. Professor Halderman’s submission fails to demonstrate that the prohibition against circumvention of access controls has or is likely to have a substantial adverse effect on noninfringing uses of any of the categories of works to which the proposed exemptions would apply. This failure is threefold.

- First, the submission provides little concrete or documented evidence of any security flaws or vulnerabilities associated with access control mechanisms used in connection with videogames (proposal 8B) or the broader categories of literary works, sound recordings, and audiovisual works (proposal 8A).
- Second, the comment utterly fails to support its allegation that any research, investigation, or remediation of security flaws or vulnerabilities has been chilled as a result of section 1201(a)(1), and completely ignores the development of a robust ecosystem within which security experts routinely identify such flaws, collaborate on remedies, and disseminate information to alert computer users of the problems and point them to solutions.
- Third, the comment fails to establish that the conduct at issue (i.e., security research) is prohibited by section 1201(a)(1), including by demonstrating that none of the relevant statutory exemptions applies.

Nevertheless, if the Register and the Librarian determine that Professor Halderman has met his burden, and that an exemption in this area is required, the Joint Creators and Copyright Owners believe that the exemption granted must be significantly narrower than the exemption proposed, to conform it to the evidence presented, meet the mandates of the statute, and reduce the probability that it will be abused.

**Argument:**

**A. The comment provides no concrete evidence of security flaws or vulnerabilities created by any access controls.**

In 2006, the Register and the Librarian concluded that a “security flaws and vulnerabilities” exemption was necessary to deal with a troubling occurrence connected to access controls used to protect sound recordings in CD format. By contrast, Professor Halderman’s comment in this proceeding points to no reported instances of security threats associated with access controls used to protect sound recordings on CDs since the last rulemaking concluded. In fact, he fails even to allege that any access controls are used to limit access to music on sound recordings in CD format today. Thus, there is no basis for renewal of the current exemption applicable to sound recordings and associated audiovisual works. *See* 2006 Rec. at 63 (“if, during the next three years, no such access controls have been deployed, proponents of renewal of an exemption may have difficulty three years from now ...”); 2008 NOI at 58,075 (“There is a presumption that the section 1201 prohibition will apply to any and all classes of works, including previously exempted classes, unless a new showing is made that an exemption is warranted.”).

Similarly, the comment provides no evidence that access controls that have been used to protect the broad categories of literary works and audiovisual works have caused any security threats or vulnerabilities. Instead, Professor Halderman merely accuses all access controls of creating security threats by referencing theoretical critiques of technological protection measures. Comment 8A at 10. He then points to news stories indicating that distributors of literary works and audiovisual works are using access controls. *Id.* at 7. But there is nothing to indicate that these access controls create any security threats; to the contrary, they are precisely the kind of technological developments that Congress intended to encourage when it passed the DMCA.

In essence, the only specific references to alleged security threats made in the comment relate to two applications that it identifies as access controls, SafeDisc and SecuROM, both of which have been applied to videogames.<sup>75</sup> Comment 8B at 5-7. In the first case, the SafeDisc vulnerability was identified and resolved, and a patch made available to consumers, through the channels described in more detail in subsection B below. It should be noted that this vulnerability could not be exploited by a remote user; “an attacker must convince a user to run an executable or must have valid logon credentials to exploit this vulnerability.”<sup>76</sup> Certainly there is

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<sup>75</sup>In order for a computer game protected by SafeDisc to play on the PC, it is necessary for a SafeDisc driver to be installed. That driver is included with Windows to increase the compatibility of games on that platform. However, the driver remains inactive until invoked by a game. *See* <http://www.microsoft.com/technet/security/Bulletin/MS07-067.msp> (under “Frequently Asked Questions”).

nothing to indicate that any delay in identifying or responding to the vulnerability had anything to do with 17 U.S.C. § 1201(a)(1).

Professor Halderman's discussion of SecuROM does not withstand close scrutiny. He eagerly refers to the allegations of various bloggers, many of them anonymous, that SecuROM leaves the PCs of users vulnerable to malware. The fact that these unsubstantiated allegations now also appear in complaints filed by class action litigators (from which Professor Halderman has drawn some of them) adds nothing to their credibility. Professor Halderman labels the use of SecuROM a "fiasco," (*id.* at 6), charges that it "cause[s] collateral security harm," (*id.* at 7), and asserts that because of it, consumers are "risking the security of their PCs." (*id.* at 15). Yet alongside this rhetoric, Professor Halderman is careful to note that there has been no "definitive analysis" of any such risks; that "anecdotal contentions of harm, speculation about causes, and contradictory assessments of risk have run wild on the Internet"; and that everything he cites refers to "what many turn out to be nonexistent or easily repairable faults" in SecuROM (*id.* at 6-7). Most conspicuously lacking is any evidence that any serious security exploit enabled by these alleged security threats has ever occurred.

A closer examination of Professor Halderman's sources, including but not limited to the class action complaints, shows that most of the complaints surrounding SecuROM involve performance issues, licensing restrictions, and disclosure questions unrelated to security threats. *See, e.g.,* Comment 8B at n. 27, n. 42, n. 69, n. 73, n. 75. His sources make much of the reviews posted to Amazon.com regarding the game *Spore*. But those reviews mostly focus on the number of activations allowed.<sup>77</sup> Allegations of security vulnerabilities are but a spindly tail being wagged by a much more robust dog of unrelated consumer complaints.<sup>78</sup>

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(...continued)

<sup>76</sup> *See* <http://www.microsoft.com/technet/security/Bulletin/MS07-067.msp> (under "Mitigating Factors"). Microsoft seems not to share Professor Halderman's view that this access control technology, "shipped preinstalled on nearly every copy of the Microsoft Windows XP and Windows 2003 operating systems," represents a threat "even more dangerous than" the highly publicized Sony rootkit. Comment 8B at 5. Although Microsoft issued a "security bulletin" identifying the problem as "important" and encouraging customers to update their OS's to deal with it "at the earliest opportunity," *id.*, it did not accord the vulnerability its highest severity rating. A Danish security firm that publicized the problem was apparently even less alarmed, since it gave the vulnerability its second lowest risk rating, "less critical." *See* <http://www.thestandard.com/news/2007/11/06/microsoft-patch-software-driver-vulnerability>.

<sup>77</sup> *See* Customer Reviews, *Spore*, <http://www.amazon.com/review/product/B000FKBCX4>. EA increased the number of activations allowed in response to customer complaints.

<sup>78</sup> Professor Halderman contends that Sony DADC has "professed ignorance" of any security threats caused any SecuROM. Comment 8B at 9. This is not true. Sony DADC has informed consumers that no security threats exist. *See* SecuROM Frequently Asked Questions, [http://www.securom.com/support\\_faq.asp](http://www.securom.com/support_faq.asp) ("SecuROM™ does not damage a computer in any way. Great care has been taken to make sure the SecuROM™ system is sound and compatible.").

Even if the Register and Librarian accept at face value Professor Halderman's assertion that "[i]ndependent security experts have not yet rigorously studied SecuROM,"<sup>79</sup> that fact would set this proposal apart from the record present during the last triennial rulemaking. There, Professor Halderman and Professor Felten based their proposal "on a really detailed technical study of what has happened in the Sony BMG case and, based on that study, a concern about the same issues being important going forward." 2006 Rec. at 61 (quoting testimony of Prof. Felten). In contrast, in support of his current proposals, Professor Halderman chose not to engage in such a "detailed technical study." This is true despite the fact that Halderman believes that "the ongoing uncertainty over SecuROM's safety could probably be settled by a single definitive scientific study." Comment 8B at 7. Such a study could have been undertaken by Professor Halderman, or others. They could have asked the copyright owners involved for permission to conduct it, following the increasingly well-trodden path of software assurance best practices, as summarized in subsection B below; or they could have undertaken it in reliance on the applicable existing statutory exemptions, such as section 1201(j), as discussed in subsection C below. Instead, they apparently have chosen to sit on their scientific hands for years and instead to seek pre-emptive legal immunity in this proceeding.

Professor Halderman decries the "regime of panic, protests and litigation" that he claims has displaced objective research in the SecuROM context. *Id.* at 7. But surely it is not the copyright owners, relying upon access control technologies to support the widespread dissemination of copyrighted works, who have created this regime. Indeed, Professor Halderman's uncritical recitation of unsupported claims, many of which have nothing whatsoever to do with security issues, and his characterization of the SecuROM situation as a "fiasco" while carefully distancing himself from any specific allegation of security vulnerabilities (*id.* at 6) can only contribute to consumer confusion. If the Register and the Librarian were to find what Professor Halderman has presented the kind of "highly specific, strong and persuasive" (House Manager's Rep. at 6; 2008 NOI at 58,075) evidence required to justify an exemption, they would be making a far more serious and damaging contribution to that confusion.

Perhaps more significantly, the record in this proceeding is far different from what was before the Register in 2006. As the Register emphasized in her 2006 Recommendation, any exemption in this area must be based on "*actual facts* demonstrating that a significant number of [copies of works] have been distributed ... with access controls *that create security vulnerabilities.*" 2006 Rec. at 63 (emphasis added). "The particular circumstances presented" three years ago which justified an exemption included the evidence that real vulnerabilities had already been created. 2006 Rec. at 64. By contrast, submission 8 is short on "actual facts" regarding security vulnerabilities, and long on unsupported allegations. Because the record here is entirely different than it was in 2006, Professor Halderman has failed to demonstrate a likelihood that access controls will threaten security in the upcoming three year period.

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<sup>79</sup> See subsection B below for evidence that this is not so.

**B. The comment provides no evidence that research has been chilled by section 1201(a)(1).**

The Joint Creators and Copyright Owners fully agree with Professor Halderman that independent research and testing of access control technologies should be encouraged in order to identify and correct any security vulnerabilities that they might inadvertently contain. Of course, Congress agreed with this assessment when it enacted a number of statutory exemptions to allow circumvention under certain conditions for purposes of security testing and encryption research. (See discussion below under subsection C.) Even if Professor Halderman had established that access controls used in connection with literary works, sound recordings and audiovisual works were likely to create exploitable security flaws or vulnerabilities during the next three years, the comment still fails to offer any evidence that section 1201(a)(1) would have a substantial adverse effect on the type of good faith security testing that all agree should be encouraged.

Professor Halderman asserts that “security researchers have clearly avoided addressing these problems, and the chilling effect of the DMCA anti-circumvention provisions is at least partially to blame.” Comment 8B at 7. Neither assertion is supported by his comment. Instead, the evidence he presents strongly suggests that researchers are engaged in identifying, publicizing, and repairing security problems that may be occurring (as well as debunking the numerous false claims circulating in the blogosphere), and fails to demonstrate any clear link between section 1201(a)(1) and any shortfalls in security research activities that may exist.

The comment’s assertions that the work of security researchers that “work for antivirus and anti-spyware firms and specialize in finding and correcting vulnerabilities” (*id.* at 13) is chilled by section 1201(a)(1) is flatly contradicted by the two primary examples of allegedly threatening access controls discussed in the comment itself. The SafeDisc security issue was first made public by Symantec, and there have been no reports of legal threats resulting from that report.<sup>80</sup> And Symantec and other independent researchers also explored and debunked some of the security allegations surrounding SecuROM without any report of legal threats or even hesitancy to research the issue.<sup>81</sup>

The Halderman assertion of a “chilling effect” ignores the significant software and content industry efforts aimed at actively encouraging researchers to uncover vulnerabilities in applications, including but certainly not limited to access control technologies. The industry has worked extensively with security research experts, firms, and developers to establish responsible reporting methods designed to insure that reporting of discovered actual or potential

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<sup>80</sup> Elia Florio, *Privilege Escalation Exploit In the Wild* (Oct. 16, 2007), <https://forums.symantec.com/t5/Vulnerabilities-Exploits/Privilege-Escalation-Exploit-In-the-Wild/ba-p/305541;jsessionid=B2EC758A1977510C3F3F0A0CEABB99D3#A122>.

<sup>81</sup> Peter Coogan, *Bioshock Rootkit Rumor Shot Down* (Aug. 31, 2007), [https://forums.symantec.com/symantec/board/print?board.id=malicious\\_code&message.id=154&format=one](https://forums.symantec.com/symantec/board/print?board.id=malicious_code&message.id=154&format=one); Ken Fisher, *Clearing the Air: Bioshock Does No Contain a Rootkit* (Aug. 26, 2007), <http://arstechnica.com/news.ars/post/20070826-clearing-the-air-bioshock-does-not-contain-a-rootkit.html>.

vulnerabilities by researchers is done in a manner that minimizes the public harm. Industry leaders have implemented online resources designed to receive and respond to such reports, including providing attribution, discussion of the vulnerability, and disseminating release or patch fixes. (See, e.g., <https://www.microsoft.com/technet/security/bulletin/alertus.aspx>.) Industry partnerships with security consultants in both the private sector and higher education sphere are growing, and more and more companies and security firms have integrated external research feedback into their product and support life cycles.<sup>82</sup> One highly regarded set of best practices in this field states that “any security vulnerabilities (exploited or not) reported against the deployed product are [to be] handled through incident response and relayed to the product development of sustaining teams to mitigate the vulnerability. *Communication with the discoverers* and the customers is important to ensure that proper actions are taken to mitigate the risk.”<sup>83</sup>

In short, a robust and collaborative ecosystem has developed for identifying, evaluating, and fixing exactly the type of security vulnerabilities which are the target of this proposed exemption, and there is absolutely no evidence that the existence of section 1201(a)(1) has impeded this development, whose pace has accelerated in recent years.<sup>84</sup> While of course no system is perfect and some vulnerabilities may still be exploited by bad actors before they are detected by researchers, nothing but Professor Halderman’s *ipse dixit* supports his assertion that “the chilling effect of the DMCA anti-circumvention provisions is at least partially to blame” (Comment 8B at 7) for any remaining security research shortfalls.

Professor Halderman asserts that “the manufacturer of insecure technological measures threatened him with a lawsuit prior to the third rulemaking.” Comment 8A at 18. The episode he describes took place in 2003 (see his footnote 4 and 5), and there is no evidence that the company involved (SunComm) plays any role in deploying the access control technologies that are the target of the comment’s critique. The comment is bereft of any evidence of a similar threat directed at Professor Halderman or any other researcher during the past six years. Tellingly, there is no evidence that Professor Halderman has even contacted the purveyors of

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<sup>82</sup> See Howard & Lipner, *THE SECURITY DEVELOPMENT LIFECYCLE: SDL: A PROCESS FOR DEVELOPING DEMONSTRABLY MORE SECURE SOFTWARE* (Microsoft Press 1996) for a detailed description of the process.

<sup>83</sup> SAFECODE, *Software Assurance: An Overview of Current Industry Best Practices* (February 2008), [http://www.safecode.org/publications/SAFECODE\\_BestPractices0208\\_plain.pdf](http://www.safecode.org/publications/SAFECODE_BestPractices0208_plain.pdf) (emphasis added).

<sup>84</sup> The October 2007 launching of the SAFECODE organization is a recent example of how security assurance practices continue to improve without being impeded by the DMCA. SAFECODE is an industry expert group “dedicated to increasing trust in information and communications technology products and services through the advancement of proven software assurance methods,” defined as “a developing set of methods and processes for ensuring that software functions as intended without introducing vulnerabilities, malicious code, or defects that can bring harm to the end user.” *What Is SAFECODE’s Mission?*, [http://www.safecode.org/mission\\_faqs.php](http://www.safecode.org/mission_faqs.php).

access control technologies, or the copyright owners who employ those technologies, for permission to engage in circumvention activities for the purpose of legitimate research inquiries. Of course, taking such a step could moot the entire proposed exemption, since authorization to circumvent would immunize the researcher against any liability under section 1201(a)(1). In any case, from all that appears, security researchers are doing their job, and to the extent they are not, the DMCA (including the section 1201(a)(1) prohibition, and the statutory exemptions aimed at fostering such research) is not to blame. Absent persuasive evidence to the contrary, this fact should foreclose granting any exemption in this area.

**C. The existence of statutory exemptions should preclude the Librarian from granting the requested exemption.**

Professor Halderman's failure to demonstrate that section 1201(a)(1) is likely to have any substantial adverse effect on the noninfringing uses he seeks to engage in is further evidenced by the existence of the statutory exemptions that could apply to security research, notably section 1201(j) on security testing.<sup>85</sup> The Joint Creators and Copyright Owners respectfully submit that the impact of statutory exemptions was not properly handled during the last rulemaking, as discussed above in section II(A)(2). The Register and the Librarian concluded during the last rulemaking that, at least under the particular circumstances found to exist there, the statute permits an administrative exemption to be granted when "it is not clear whether [a statutory exemption] extends" to the conduct in question.<sup>86</sup> 2006 Rec. at 59. As discussed above in section II(A)(2), this analysis in effect relieves the proponent of an exemption of the burden clearly assigned to her in this proceeding: to demonstrate that the prohibition contained in section 1201(a)(1), *as limited by all the applicable statutory exemptions*, is having an adverse impact on noninfringing use. If the proponent cannot prove that the circumvention in question falls outside the scope of an existing statutory exemption, the burden has not been met, and the proposal must be rejected. *See* 2003 Rec. at 181-82 ("Where a statutory scheme exists for a particular activity, persons must utilize such statutory exemption to accomplish their goals or provide evidence why the statutory exemption is unavailable to accomplish a noninfringing use, not simply that the user could have accomplished his or her goal more conveniently by deviating from the congressional design.").

The fact that a court has not yet interpreted the existing statutory exemption is not persuasive evidence that, absent an administrative exemption concerning the use in question, the

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<sup>85</sup> Sections 1201(g) (encryption research) and 1201(i) (protection of personally identifiable information) may also be applicable. The proponent should be required to demonstrate that these provisions, as well as section 1201(j), would be unavailable, before a conclusion can be reached that the conduct in question would violate section 1201(a)(1).

<sup>86</sup> The 2006 Recommendation also noted that "[i]t is difficult to fit concerns about computer security into a rulemaking process which is focused on noninfringing uses of copyrighted works." 2006 Rec. at 61. This difficulty strongly counsels that parties engaged in activities within the ambit of existing statutory exemptions should depend on those exemptions for protection, rather than resorting to this proceeding to seek an administrative exemption based on concerns peripheral to copyright protection.

activity must be deemed unlawful under section 1201(a)(1). Review of the 2006 Recommendation indicates that the Register placed the burden on the opponents of the exemption to prove that existing statutory exemptions were applicable, rather than placing the burden on the proponent to show that they were not, and that thus the statutory prohibition applies fully. *See* 2006 Rec. at 59 (requiring witness for opponents to “explain how the conduct in which the proponents wish to engage ‘fits’ the language described in § 1201(j)”). This is inconsistent with the established ground rules for this proceeding, as well as with the statute itself. *See* 2008 NOI at 58,075 (“proponents of an exemption bear the burden of providing sufficient evidence”).

Moreover, even where a proponent can persuasively show that the circumvention at issue is not covered by an existing statutory exemption, particular caution must be exercised when the lawful use that the prohibition allegedly inhibits resembles the conduct that the existing statutory exemption already covers. *See* 2000 Rec. at 64,571 (“When Congress has specifically addressed the issue by creating a statutory exemption ... in the same legislation that established the rulemaking process, the Librarian should proceed cautiously before, in effect, expanding the ... statutory exemption by creating a broader exemption ...”). *Accord*, 2003 Rec. at 181-82 (if proponents can show why the statutory exemption is unavailable, “even then they must justify issuance of any exemption that would appear to permit more than Congress intended when it enacted the statutory exemptions covering the same type of conduct.”). If Congress studied an issue and crafted a statutory exemption to apply only under specified conditions, the Register and the Librarian should presume that Congress intended to occupy that particular field and did not empower the Librarian to second-guess its conclusions by recognizing an exemption when the statutory conditions had not been satisfied. At the very least, Congress’ choice should weigh heavily against proposed exemptions in these circumstances.

Here, the conduct at issue could potentially be covered by three existing statutory exemptions. 1201(g) authorizes certain types of “encryption research,” 1201(i) authorizes protection of “personally identifying information” and 1201(j) authorizes certain types of “security testing.” 1201(g) and 1201(j) apply not only to the circumvention conduct at issue in this proceeding; they also provide limited exemptions to section 1201(a)(2) as well. *See* 17 U.S.C. § 1201(g)(4) & 1201(j)(4); 2006 Rec. at 58 (1201(j)(4) “actually goes beyond disclosure of the results of the security testing and extends to dissemination of tools that will correct the security vulnerability”). Without demonstrating that these exemptions are inapplicable, Professor Halderman has failed to meet his burden to show that the prohibition in 1201(a)(1) is likely to have a substantial adverse effect on his, or anyone else’s, noninfringing research activities in the next three years.

**D. If any exemption is granted, it must be significantly narrowed to prevent abuse.**

While the Joint Creators and Copyright Owners strongly advocate that no exemption be granted in this area, because of the proponents’ failure to satisfy their burden of persuasion under the statute and under the ground rules applicable to this proceeding, if the Register and the Librarian conclude that an exemption is adequately supported in this context, the exemption should be narrowed as discussed above in section II(A)(1). While specific examples of how the

proposed exemption would be employed are so scarce in Professor Halderman's submission as to make it difficult to provide a comprehensive list of the restrictions needed, among the most significant are that the exemption should only apply:

- When all digital versions of the work are protected by the access control measure in question. Clearly, whenever users have an alternative means of accessing the work, they are still able to carry out any noninfringing use with regard to it. This could include the ability to access the work with authorization on a platform that is not vulnerable to whatever security problems are linked to the access control (*e.g.*, on a console platform rather than on a PC).
- Where circumvention is "necessary" to accomplish verifiable security research. The exemption should not extend to any case in which removing the installed copy to which the offending access control applies would eliminate the security vulnerability, or in any circumstance in which the copyright owner (or provider of the access control mechanism) provides a patch or similar tool that addresses the problem.
- When the circumvention has no other purpose, and no foreseeable effect, other than the noninfringing activity identified in the exemption (including in particular any circumstance in which circumvention would give the circumventor access to any work in excess of his or her rights under an applicable license).

In addition, any exemption recognized must apply only where circumvention is engaged in by qualified experts engaged in verifiable security research. The latter qualification would help reduce, although certainly it would not eliminate, the risk that the exemption would be misused by persons seeking to undermine the effectiveness of licensing schemes based on access controls. Professor Halderman's comment repeatedly references misguided and misinformed users of copyrighted material as support for the notion that security threats exist. Comment 8B at 7-9. Most of these users are essentially complaining about the particulars of licensing schemes rather than true security issues. *See, e.g., id.* at n 27, 75. In fact, Professor Halderman himself complains about "unfair access limits that the statute place[s] on consumers," apparently entirely apart from security concerns. Halderman at 2. Given the apparent mingling of security issues and licensing restrictions in the minds of some consumers, any exemption in this area – especially one crafted as broadly as Professor Halderman's – carries with it a significant potential for abuse, which must be anticipated and ameliorated to the extent possible.

**9A. Proposed class or classes of copyrighted works to be exempted:** “Audiovisual works delivered by digital television (“DTV”) transmission intended for free, over-the-air reception by anyone, which are marked with a “broadcast flag” indicator that prevents, restricts, or inhibits the ability of recipients to access the work at a time of the recipient’s choosing and subsequent to the time of transmission, or using a machine owned by the recipient but which is not the same machine that originally acquired the transmission.”

**Summary of Joint Creators and Copyright Owners’ Response:**

The Joint Creators and Copyright Owners oppose the exemption proposed by Comment 9A. The proponent fails to establish that a broadcast flag system is likely to be utilized during the next three year period, much less that such a system is likely to have a substantial adverse affect on any noninfringing use during the next three year period. In addition, depending on the hypothetical technology used to implement a broadcast flag system, it may not qualify as an access control. Just as the Register concluded in 2006, “[t]he proposed exemption is premature at best.”

**Argument:**

Mr. Perkins’ proposal should be rejected for the same reasons that the Register rejected proposals related to a hypothetical broadcast flag during the 2006 proceeding. 2006 Rec. at 83-4. Despite the comment’s assertion that “[i]t must be expected that, following the complete shut-off of standard analog TV signals in 2009, broadcasters and copyright owners will do more to experiment with these copy restrictions,” (Comment 9A at 1) the comment offers no evidence to support this claim. Just as in 2006, “[c]urrently, there is no broadcast flag mandate ...” 2006 Rec. at 84. Thus, it remains “unclear whether a television broadcast flag will again be resurrected by regulation pursuant to specific Congressional enactment, by direct Congressional enactment, or by any other means in the next three years.” *Id.* Mere “speculation” (*id.*) regarding future use of a broadcast flag scheme is insufficient support for the proposal. “The proposed exemption is simply premature at best.” *Id.*

Moreover, as Mr. Perkins’ comment illustrates, it is far from clear whether a broadcast flag system would qualify as an access control. It may instead qualify as a distribution or retransmission control, depending on the details of the hypothetical technology used. 2006 Rec. at 84 n. 275. Without such specifics, even if the Register concluded that Congress was likely to adopt the legislation necessary to implement a broadcast flag regulation and that copyright owners were likely to use the broadcast flag, an exemption could not be properly granted. Mr. Perkins has failed to demonstrate that the broadcast flag is an access control that will have a substantial adverse effect on noninfringing uses in the next three years, and thus the proposal should be rejected.

**9B. Proposed class or classes of copyrighted works to be exempted:** “Audiovisual works embedded in a physical medium (such as Blu-ray discs) which are marked for ‘down-conversion’ or ‘down-resolutioning’ (such as by the presence of an Image Constraint Token ‘ICT’) when the work is to be conveyed through any of a playback machine’s existing audio or visual output connectors, and therefore restricts the literal quantity of the embedded work available to the user (measured by visual resolution, temporal resolution, and color fidelity).”

**Summary of Joint Creators and Copyright Owners’ Response:**

The Joint Creators and Copyright Owners oppose the exemption proposed by Comment 9B. The proponent fails to establish that marking a copy of an audiovisual work for “down-conversion” or “down-resolutioning” constitutes utilizing an access control, since he admits that a work “remains accessible” even when techniques are utilized. In addition, the proponent concedes that such techniques are not currently in use, and fails to offer any concrete evidence that they are likely to have a substantial adverse affect on any noninfringing use during the next three year period.

**Argument:**

Mr. Perkins fails to demonstrate that the techniques he is concerned about will qualify as access controls. He admits that “the ‘work’ itself remains accessible” when these techniques are in place. Comment 9B at 2. And he provides no evidence that any titles that are available in Blu-ray format are not also available in DVD format or other formats. So his complaint appears to be that attempts to view works in a manner that produces the best resolution quality possible without utilizing the proper cables may be thwarted. This is not an issue of access, but rather an issue of preference for certain cables and formats over others. Such preferences do not justify exemptions. 2006 Rec. at 22 (“Simply finding that a work is optimized in a particular format, however, is not determinative of whether or not an exemption is warranted. ... Preferences are not determinative and, in most cases, relate only to convenience.”).

An additional reason that Mr. Perkins’ second proposed exemption should be rejected is precisely the same reason that his first proposal, related to a hypothetical broadcast flag, should be rejected; he does not provide any evidence that audiovisual works on Blu-ray Discs are likely to be “marked for ‘down-conversion or ‘down-resolutioning’” using the image-constraint-token (“ICT”) during the next three year period, much less that such techniques are likely to cause section 1201(a)(1) to have a substantial adverse effect on any noninfringing use. Comment 9B at 2. Mr. Perkins admits that “[t]here is evidence that ICTs are rare in today’s Blu-[r]ay discs.”<sup>87</sup> He also concedes that his proposal is based on “an anticipated rise in ICT use” rather than any specific evidence. This kind of “speculation” based on mere “conjecture and opinion” (2006 Rec. at 84) is an insufficient basis for an exemption.

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<sup>87</sup> To our knowledge, none of the MPAA member studios are currently releasing Blu-ray Discs that utilize the ICT techniques described by Mr. Perkins. For a more detailed discussion, see the separately filed comments of AACS and Time Warner Inc.

**10A. Proposed class or classes of copyrighted works to be exempted:** “Lawfully purchased sound recordings, audiovisual works, and software programs distributed commercially in digital format by online music and media stores and protected by technological measures that depend on the continued availability of authenticating servers, when such authenticating servers cease functioning because the store fails or for other reasons.”

**Summary of Joint Creators and Copyright Owners’ Response:**

The Joint Creators and Copyright Owners oppose the exemption proposed by Comment 10A, because granting it would undermine “use-facilitating” access controls and thereby decrease the availability of exciting new online services. The proponent fails to establish that the section 1201(a)(1) prohibition on circumventing access controls is likely to have an adverse effect on any noninfringing use within the next three year period, because material available through online stores tied to authentication servers is invariably available elsewhere pursuant to alternative contractual terms. In addition, every example included in the comment as justification for the exemption indicates that the marketplace itself has accommodated consumer concerns. Finally, the previously recognized exemptions that the proponent claims are analogous to this proposal are inapposite.

**Argument:**

Access control systems increasingly make use of “authentication servers” and similar mechanisms. These systems offer many advantages, to copyright owners and users of copyrighted works alike, that are much more difficult to achieve in an environment in which access controls are physically bundled with the copy of the work and operate in a stand-alone environment. Chief among these advantages is flexibility.<sup>88</sup> Right holders can quickly and effectively implement changes that modify the terms and conditions of access, in order to provide users with greater flexibility in how the works in question can be copied, performed, or otherwise used. Indeed, the submission in support of this exemption offers many examples of just such flexibility.<sup>89</sup> The access control mechanisms that the proponent advocates as targets of circumvention are thus precisely those that Congress sought to encourage: “use-facilitating” measures that enable right holders to offer varied new methods for accessing protected works. 2003 Rec. at 91-2, 97. The success of these measures in achieving the goal of broader and more pervasive access is well documented in the growing list of online music and media stores, many

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<sup>88</sup> For example, when EA launched *Spore* it originally permitted the game to be authenticated on 3 machines. Subsequently, EA increased that limit to 5 machines, and this increase applied to all copies of *Spore*, including those purchased prior to the change in policy. See Christopher Lawton & Ben Charney, *EA Relaxes Rules on Installing Spore*, Wall St. J., Sept. 19, 2008, <http://online.wsj.com/article/SB122178384121054773.html>.

<sup>89</sup> See section III of these Joint Comments for other examples of flexible uses of access controls involving authentication servers.

of them described in the submission, that employ such systems in delivering copyrighted materials to a broader public.<sup>90</sup>

Mr. Soghoian points to several instances in which services employing this model of access control have been phased out or terminated by their operators. In each case, it appears that the service provider took steps to accommodate the interests of existing subscribers: deadlines for shutting down authentication servers were extended; alternative means were provided for subscribers to retain copies to which they would enjoy access after termination of the service (*e.g.*, burning sound recordings subject to access controls to CDs without such controls); and/or subscribers were provided with full or partial refunds or credits to enable them to buy or license access to copies of the same works from other sources. Nevertheless, Mr. Soghoian asserts that “there is no reason to believe that other companies or services that fail or are shut down in the future will provide similar corrective steps,” (Comment 10A at 2) and that consequently an exemption should be provided because “[t]he usage rights users obtain with [their] purchases will be jeopardized if consumers are not assured the ability to circumvent the DRM in the event the stores’ central servers are shut down for any reason.” *Id.* at 12.

The Joint Creators and Copyright Owners urge that this proposed exemption not be recognized, because Soghoian is wrong on both counts. There is no evidence that the scenario he fears is likely to occur, and if it did occur, it would not provide a sufficient basis for an exemption to the prohibition on circumvention of access controls.

The proponent of this exemption must shoulder the burden of demonstrating dramatic changes in the marketplace that would impel the operators of online stores to reverse course over the next three years and depart from the apparently consistent record of marketplace accommodation of the interests of customers in similar situations in the past. Only then could Mr. Soghoian make a persuasive case that the scenario of “stranded” (*id.*) customers is likely to occur.<sup>91</sup> Even if he could make that case, however, he would not have made the showing necessary to justify an exemption, for at least two reasons. First, to adopt his phrasing, “the usage rights users obtain with [their] purchases” (*id.*) are not unlimited in duration or scope; rather, they are defined by the license agreements into which the subscribers have voluntarily entered. Second, Mr. Soghoian has made no showing that subscribers to a terminated online

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<sup>90</sup> Although Mr. Soghoian’s proposed classes, and the vast majority of his argument, are focused on “online music and media stores,” he also discusses some examples “in addition to online stores” in which “copy protection mechanisms utilizing remote server authentication” or “server-based copy protection methods” are incorporated in particular software applications or operating systems. Comment 10A at 9-10. Since these examples fall outside the scope of his proposed classes, we do not discuss them here, other than to note that he fails to adduce a single example in which authentication servers have become unavailable in the non-store context.

<sup>91</sup> As written, the proposed exemption would also sweep much more broadly than the scenario of stranded users, unlikely as that might be. It would cover not only permanent cessations of operation without any intention to resume service, but also situations in which the service simply went offline temporarily for maintenance, due to a power failure, or for some other reason.

store for copyrighted works cannot obtain authorized access to the very same works, at a minimal price in dollars or inconvenience, without circumventing access controls.

**A. “Usage rights” are contractually determined.**

In virtually all cases, the rights or privileges that customers of an online music or media store obtain are spelled out by contract, license, or terms of service to which they have assented as a condition of gaining access to the copyrighted material in question. Those terms of service or license provisions will virtually always provide that the stores in question may discontinue service when necessary.<sup>92</sup> Thus, the scenario described in the comment is not one in which consumers are unable to engage in a noninfringing use due solely to section 1201(a)(1). Instead, they no longer have access to the content involved because they chose to purchase access to content through specific online services rather than electing to purchase other, more permanent, forms of media (*e.g.*, CDs or DVDs). Such consumers are not, in Mr. Soghoian’s formulation, “den[ied] . . . the lawful ability, for which they have paid, to access and use purchased content” (Comment 10A at 11); what they have paid for is a right to access the content conditioned on continued operation of the service, and that is what they have received.

This is certainly true of subscription services.<sup>93</sup> Consumers who “rent” access to digital content have no legitimate expectation for continued access to that content when the subscription ends. An exemption so broad as to encompass content acquired by paying a subscription price would rewrite the bargain and confer upon subscribers a benefit they did not pay for when they originally acquired their limited license.

Additionally, in the specific context of subscription-based online games, this exemption could spur the growth of “pirate servers,” host computers than enable online multiplayer functionality using third party servers without the authorization of the publisher. There are valid, compelling business reasons why a publisher may stop supporting a particular online game. For example, the number of subscribers may fall below the threshold needed to support the extensive

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<sup>92</sup> See, *e.g.*, Napster Terms of Service, <http://home.napster.com/info/terms.html> (“Napster reserves the right at any time and from time to time to modify or discontinue, temporarily or permanently, the Service (or any part thereof) with or without notice to you, without any liability to you or to any third party.”); Zune Terms of Service, <http://www.zune.net/en-US/legal/termsofservice.htm> (“We may change the service or delete, modify or discontinue, temporarily or permanently, functions and features of the service at any time and for any reason.”), Yahoo! Music Terms of Service, <http://info.yahoo.com/legal/us/yahoo/utos/utos-173.html> (“Yahoo! reserves the right at any time and from time to time to modify or discontinue, temporarily or permanently, the Yahoo! Services (or any part thereof) with or without notice.”).

<sup>93</sup> For example, millions of consumers play what are know as massively multiplayer online games (“MMOs”). The major draw of these games is the ability to play them simultaneously with thousands of other gamers. Typically, consumers pay a monthly subscription fee, which entitles them to continually updated and expanded content as well as publisher management of the online community.

costs of running the game. Publishers should be permitted to end a subscription-based game without fear that others can resurrect the game without their permission.<sup>94</sup>

Mr. Soghoian himself, in an article cited in his comment, has acknowledged that consumers sometimes choose to be tied to specific service providers when other options are available. See Christopher Soghoian, *Caveat Venditor, Technologically Protected Subsidized Goods and the Customers Who Hack Them*, 6 Northwestern J. Tech & Intell. Prop. 46, 71 (2007) ("Those who choose to purchase the subsidized product and then strive to strip out the DRM are then engaged, essentially, in theft."). And the Register has also previously discussed the impact of such choices. See 2003 Rec. at 139-140 ("consumers have choices of which formats to select or whether their intended use is best served by a digital online version or by another available version of the work"). Although some may dislike the contracts they have entered after a business model proves unsuccessful and a service has to shut down, "[t]his rulemaking is not the proper forum for adjudicating the legitimacy of such contractual terms." 2003 Rec. at 150.

**B. Other means of access to the works are readily available.**

A customer of an online music or media store who loses access to content when the service ceases operation generally has many other options for obtaining access to precisely the same works. As Mr. Soghoian's submission amply demonstrates, some of these have been provided or facilitated by the terminating operators themselves, such as the ability to save copies of sound recordings in other formats. Comment 10A at 4-9. Mr. Soghoian does not believe that these options are "adequate," largely<sup>95</sup> because the copies to which the customer retains access (such as burned copies of sound recordings on CD) may be "inferior in quality to the original files."<sup>96</sup> Regardless of the merits of this assertion, even if it is true, it is well established in this proceeding that the ready availability of a copy in a different format, even if technologically inferior to the desired format, fully satisfies the criterion of availability for noninfringing use,

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<sup>94</sup> This is not simply a revenue issue for videogame publishers. There is also the concern that players operating pirate servers could manage the game in ways that reflect badly on the publisher, tarnishing its goodwill.

<sup>95</sup> Mr. Soghoian also complains that it may take as long as 5 minutes to burn 60 minutes of digital files onto a CD, and a similar length of time to convert the CD into mp3 files. Comment 10A at 17. These trivial timeframes fall squarely within the category of "mere inconveniences" that are insufficient to support an exemption. House Manager's Rep. at 6; 2006 Rec. at 13.

<sup>96</sup> Mr. Soghoian concedes that "many ... DRM-protected audio files .. encode sound recordings in a 'lossy' format" that is of lower quality than the master recordings. Comment 10A at 17. His concern is apparently that the burned CDs will be even "lossier" than those originally accessed through the music store—a dubious assertion that is not supported by any evidence. But he also states that "CD audio tracks ... are stored in the lossless CDDA format." Any customer whose top concern was audio quality would probably have purchased a CD version in the first place, rather than the "lossy" version available online, and in the vast majority of cases, such a customer would still have the option of doing so after learning of the phase-out of an online music store.

and forecloses recognition of an exemption. *See* 2006 Rec. at 72 (“An exemption is not warranted simply because some uses are unavailable in the particular manner that a user seeks to make the use, when other options are available.”).<sup>97</sup>

It is also important to bear in mind that even if authentication servers shut down, it is not necessarily the case that consumers will no longer be able to use their content. Not all authentication regimes require continual authentication in order to use the content. More often, these systems require authentication during the initial installation and where the user has made significant changes to the PC on which the work will be rendered. Mr. Soghoian references the *Mass Effect* example, and Electronic Arts’ initial plan to require re-authentication of the copy every 10 days. Comment 10A at 9. However, it is important to note that EA never implemented that system.<sup>98</sup>

As the online marketplace for copyrighted works continues to grow, and the diversity of channels for consumer access to these materials increases – both phenomena encouraged by the growing deployment of access control technologies – we are very likely to see an increase in the availability of alternative means for accessing titles to which access via a particular online store is phased out. This access could be provided by competitors to the service that is being terminated, or even by the same operator using a different format. *See, e.g.*, Comment 10A at 9 (Napster’s entire 6-million song inventory now available in DRM-free format). Relatively few titles are available through only one online service, and Mr. Soghoian points to none. Nor does he identify any titles available through any terminating online store that are not also available in high-quality, permanent digital formats such as redbook CD for audio, or DVD and/or Blu-ray Disc for video.

In short, in the limited circumstance where any consumer whose access to copies obtained through an online store is effectively terminated because an authentication server is no longer being operated, the consumer is likely to have a plethora of alternatives before her – some through self-help within the scope of the terms of service of the store (*e.g.*, the ability to install copies on other platforms not requiring online authentication), some through the increasingly competitive online marketplace, and some through offline channels such as purchase of CDs or DVDs. None of these alternatives require circumvention.

### **C. Previously recognized exemptions are readily distinguishable.**

Mr. Soghoian argues that his proposal is similar to previously granted exemptions (Comment 10A at 13-14), but the latter are readily distinguishable. The dongle exemption rests on the finding that “damaged or malfunctioning dongles can prevent authorized access to the protected software.” 2006 Rec. at 33. That is not the case with a terminated authentication

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<sup>97</sup> Since the Register has previously found available analog formats to be acceptable substitutes for digital formats in this regard (*e.g.*, VHS v. DVD, 2003 Rec. at 101-02), *a fortiori* the same would be true when comparing two digital formats of different quality.

<sup>98</sup> *See* Official BioWare/EA Response to DRM Discussion, <http://masseffect.bioware.com/forums/viewtopic.html?topic=629059&forum=125&sp=0>.

server. Because of the applicable terms of service, access to the particular copy obtained through an online store would likely no longer be “authorized access.” More importantly, as described above, access to a different but comparable or substitutable copy of the same work is readily available through a variety of means, without resort to circumvention of the access control system. The user of a software program protected by a damaged and obsolete dongle may have no feasible alternative but circumvention because the software itself is no longer supported. That is not the case with proposed exemption 10A.

Mr. Soghoian also points (Comment 10A at 14) to the exemption granted in the 2006 rulemaking at the request of the Internet Archive (class 2 – 2006 Rec. at 25). This exemption was carefully crafted to apply only to a narrow category of noninfringing uses – preservation or archival reproduction by a library or archive – which is specifically referenced in the statute. 17 U.S.C. § 1201 (a)(1)(C)(ii). Proposed class 10A is in no way so bounded. More significantly, the exemption recognized in 2006 applies only when there is no other reasonable mechanism for the library or archive to obtain access to the work, because the original media or hardware is required for such access, and the machine or system necessary to render perceptible a work stored in that format is no longer manufactured or reasonably available in the commercial marketplace. Furthermore, for the archival purpose involved, it may not be acceptable to have access to another copy of the same work (or a different version of the same work) in another, non-obsolete format. *See* 2003 Rec. at 60 (“Even for works that exist in both analog and digital formats, the archivist has a legitimate interest in preserving all editions, including the electronic editions, for posterity.”). Consumers’ needs are very different from those of archivists. Under the circumstances involved in proposed class 10A, copies of the same work in another format may be readily substitutable and may fully satisfy the need for the work to be available for noninfringing uses.<sup>99</sup>

In fact, Mr. Soghoian’s proposed classes much more closely resemble those repeatedly rejected in past cycles of this proceeding: requests to allow circumvention of access controls for the purpose of using copyrighted materials on a particular platform, even though it could readily be accessed on other platforms that were easily available to users. *See, e.g.*, 2003 Rec. at 143-45 (no exemption for viewing DVDs on Linux); 2003 Rec. at 157 (no exemption for listening to CDs on preferred device). This proposal should suffer the same fate.

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<sup>99</sup> We also note that no one has requested that the Internet Archive exemption be recognized again in this proceeding, so presumably it will expire on October 28, 2009.

**10B. Proposed class or classes of copyrighted works to be exempted:** “Lawfully purchased sound recordings, audiovisual works, and software programs distributed commercially in digital format by online music and media stores and protected by technological measures that depend on the continued availability of authenticating servers prior to the failure of [authenticating] servers for technologists and researchers studying and documenting how the authenticating servers that effectuate the technological measures function.”

**Summary of Joint Creators and Copyright Owners’ Response:**

The Joint Creators and Copyright Owners oppose the exemption proposed by Comment 10B. An exemption that would allow “technologists and researchers” to circumvent all access controls related to online stores that utilize authentication servers is unjustified given that material available through online stores tied to authentication servers is invariably available elsewhere pursuant to alternative contractual terms. The marketplace has accommodated consumers concerns thus far when they have arisen, and facilitating circumvention services is not the purpose of this proceeding. The proposed exemption bears no resemblance to the previously granted exemption related to “security flaws and vulnerabilities.”

**Argument:**

As discussed above, Mr. Soghoian has failed to meet the criteria required to support an exemption related to consumer circumvention of access controls involving authentication servers. Such access controls are precisely the sort of “use facilitating” technological protection measures that Congress intended to encourage when it passed the DMCA. 2003 Rec. at 91-2, 97. Because there is no need for an exemption for consumers, there is similarly no need for an exemption aimed at research activities. Soghoian cannot establish that any single service is likely to shut down in the next three year period, much less that all such services are likely to do so, which would be necessary in order to justify the blanket exemption he seeks in comment 10B.

Despite Soghoian’s assertions (Comment 10B at 19), his proposal is not analogous to the “security flaws and vulnerabilities” exemption granted in 2006. That exemption was aimed at enabling researchers to expose security threats that could impact consumers. In contrast, Mr. Soghoian asks for an exemption that would serve no real purpose other than to enable researchers to prepare to distribute circumvention tools and to offer circumvention services (all likely in violation of section 1201(a)(2), and perhaps section 1201(b)(1) to the extent that a copy control function is involved) upon learning that an online service that utilizes authentication servers is shutting down. No security flaws or vulnerabilities are involved here. The only “correcting” going on as a result of research in this area would be the deletion of access restrictions imposed pursuant to valid licenses.

**11A. Proposed class or classes of copyrighted works to be exempted:** “Audiovisual works released on DVD, where circumvention is undertaken solely for the purpose of extracting clips for inclusion in noncommercial videos that do not infringe copyright.”

**Summary of Joint Creators and Copyright Owners’ Response:**

The Joint Creators and Copyright Owners oppose the exemption proposed by Comment 11A. The proponent fails to articulate a proper class of works. *See* Section II(C) above. Unless the Register and the Librarian adopt the radical change in the ground rules of this proceeding proposed by the proponent, the proposal must fail. In addition, the proponent does not demonstrate that reproducing portions of audiovisual works and incorporating them into “noncommercial videos” for distribution is in fact a noninfringing use. Finally, circumvention is not necessary to achieve the use at issue.

**Argument:**

This proposal is contained in the same comment that proposes a drastic change in the ground rules for this proceeding. This is fitting: unless the radical surgery that the proponent proposes for this proceeding (in defiance of Congress’ clearly expressed intent) is carried out, its proposal for this “particular class of works” cannot possibly be granted.

“Creat[ing] and shar[ing] original, noncommercial videos that include clips taken from movies and television shows released on DVDs” (Comment 11A at 13) is an activity that “might plausibly be a fair use,” (*id.* at 3), at least in some circumstances. But such activity may also be infringing. To the extent that the ban on circumvention of access controls impedes this activity – an extent that Comment 11A exaggerates by ignoring or downplaying the existence of alternative means – there is no basis for the Register to conclude that what is being impeded is, in fact, a noninfringing use.

This proposal serves as an example of why such an approach to the ground rules of this proceeding would spawn consumer confusion and lawsuits rather than resolving any adverse affects of section 1201(a)(1) on a specific noninfringing use. Moreover, the proponent fails to establish that circumvention is necessary to obtain high quality footage of audiovisual material protected by CSS for use in “noncommercial videos.”

**A. The proposed exemption is not a proper “particular class of works.”**

The comment fails to “specifically explain what noninfringing activity the prohibition on circumvention is preventing.” 2008 NOI at 58,077. The proponent is unable to “establish that the prevented activity is, in fact, a noninfringing use under current law.” *Id.* Therefore, the proponent fails to meet an “essential element” of its burden. 2003 Rec. at 70.

As the proponent admits, “whether any *particular* remix video qualifies as a fair use will depend on the facts of the case and is for a court to determine.” Comment 11A at 20 (emphasis in original). Although some “remix” videos may qualify as fair uses of audiovisual material, many will not. And “it is impossible to evaluate the fair use merits of all of the tens of thousands of remix videos that make use of clips taken from DVDs ...” Comment 11A at 18. Thus, the

proponent asks the Librarian to create an exemption that would encourage widespread circumvention and subsequent unauthorized copying and creation of derivative works, while leaving it to the courts to sift through the legal rubble that results. Such a proposal strays far outside the intended scope of this proceeding. 2006 Rec. at 29 (“it is improper in this context to generalize about the parameters of § 107”); 2003 Rec. at 55 (same).

The proponent argues that an exemption is needed to legalize activity that consumers are already engaging in. These consumers, the proponent in effect asserts, either are not aware of the law, do not understand it, or knowingly choose to break it because it inconveniences them. But the proponent offers nothing to indicate that these same consumers will, if an exemption is granted, even become aware of it, much less that they will suddenly become law-abiding and will hew to the letter of any exemption the Librarian chooses to craft. Comment 11A thus is more “a purely theoretical critique[] of section 1201” (2008 NOI at 58,075) than a request for an exemption aimed at a particular class of works.

The proponent’s limitation of the proposed exemption to “noncommercial videos” would do little to reduce this harmful impact. Although the proponent claims that many “vidders” (described as a subset of the group for whose benefit the exemption is proposed) are committed to avoiding monetary gain from their work product (Comment 11A at 33-4), significant income is now being earned by many such online video distributors.<sup>100</sup> The increasingly commercial nature of such video distribution calls into question which video distributors would qualify as “noncommercial” under 11A’s proposal. This adds another layer of uncertainty to a proposed exemption that is already lacking a well-defined scope.

Despite EFF’s portrait of the consumers it claims to represent, the Joint Creators and Copyright Owners continue to believe that the vast majority of consumers respect the law and do not circumvent CSS or distribute motion pictures online. *See* Comment 4G at 4 (“CSS places enough of a technical barrier to prevent the vast majority of consumers from copying the DVDs they purchase or rent from the video store.”). Industry confidence in the average consumer’s recognition that digital locks are not meant to be picked has led to the rapid spread of content available in many digital forms. Granting the proposed exemption could confuse even law abiding consumers by placing the stamp of the Librarian’s approval on the “darknet” marketplace. This would undermine copyright owners’ confidence in the integrity of CSS as well as yet unreleased business models.<sup>101</sup>

In addition, the proposed class is a paradigmatic example of a “particular class” that is defined primarily by characteristics of users and/or uses, not by characteristics of the type of

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<sup>100</sup> *See* Brian Stelter, *YouTube Videos Pull In Real Money*, N.Y. Times, Dec. 11, 2008, <http://www.nytimes.com/2008/12/11/business/media/11youtube.html> (discussing turning “hobbies into businesses”).

<sup>101</sup> Despite the assertions contained in Comment 11A, CSS has not made “works *less available* to remix video creators.” Comment 11A at 21. Without CSS, copyright owners may have never distributed audiovisual content in DVD formats, and “remixers” would still be using the analog techniques available to them previously.

work itself. Any audiovisual work on DVD would be swept up in the proposed exemption, subject only to whether the particular use made of the work after circumvention turned out to be “noncommercial,” and did not infringe copyright. To approve such a proposal would be to slide far down the slippery slope of exempting, not particular classes of works, but particular uses or users. Regardless of whether the Register was justified in deciding in 2006 that such criteria could be used to “refine” the definition of a class, there is no basis in the statute for concluding that the class may properly be “defined” in such a way. 2006 Rec. at 17.

**B. Circumvention is not necessary to obtain footage for noncommercial videos.**

The proponent has not met its burden of showing that remix video creators do not have ample access to works for noninfringing purposes without resorting to circumvention of access controls. Although Comment 11A argues that “many of the alternatives theoretically available to remix video creators require additional equipment and technical expertise that are beyond their reach[,]” the interview with an anonymous vidder attached thereto to as Appendix C states that vidders “tend to spend a good deal of money on [creating videos], from souped-up computers and external hard drives to high-end professional editing and post-production software to the show [sic] DVDs and music [they] buy.” Comment 11A at 36. Thus, many of the vidders who particularly care about the quality of the videos they produce are likely willing to spend extra money to produce exceptional work product. Those vidders who are less interested in exceptional quality can obtain footage in less expensive ways while still sharing their work product with the online marketplace.

The needs of remix video creators are not analogous to the needs of film and media studies professors considered during the last triennial rulemaking. There, the Register concluded that using a digital camcorder to capture screen shots would likely “satisf[y] the needs of many types of noninfringing users and even many educational users – e.g., those wanting to comment on the historical context of a film or create a parody...” 2006 Rec. at 20. This conclusion applies fully to vidders. Digital video recorders that can record material off the screen are more widely available, at lower prices, and with higher quality results, than ever before. These devices enable vidders to obtain high quality footage for their creations without ever circumventing CSS. While understandably some vidders would prefer to use circumvention to access material for copying, rather than using some form of screen capture technique, even a sincere dedication to quality is not a sufficient basis for circumvention when other reasonably substitutable measures are available. Even to the extent that the final product may be, in a particular case, noninfringing, “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 techniques, or in the format of the original.” *Universal City Studios v. Corley*, 273 F.3d 429, 459 (2001).

The proposal should be rejected.

**11B. Proposed class or classes of copyrighted works to be exempted:** “Motion pictures and other audiovisual works in the form of Digital Versatile Discs (DVDs) that are not generally available commercially to the public in a DVD form not protected by Content Scramble System technology when a documentary filmmaker, who is a member of an organization of filmmakers, or is enrolled in a film program or film production course at a post-secondary educational institution, is accessing material for use in a specific documentary film for which substantial production has commenced, where the material is in the public domain or will be used in compliance with the doctrine of fair use as defined by federal case law and 17 U.S.C. § 107.”

**Summary of Joint Creators and Copyright Owners’ Response:**

Although this proposal is more narrowly crafted than proposal 11A discussed above, it is fundamentally flawed in similar ways. First, the commenters fail to properly articulate a specific noninfringing use that is likely to be adversely affected by section 1201(a)(1) during the next three years. To the extent that the proposal is aimed at public domain content, it is outside of the scope of this proceeding. To the extent that it defines the proposed class by reference to uses “in compliance with the doctrine of fair use as defined by federal case law and 17 U.S.C. § 107[.]” it exposes its own lack of contours. Second, the commenters fail to demonstrate that circumvention is necessary to obtain high quality footage of audiovisual material protected by CSS for use in documentary films, even assuming that all such uses are noninfringing. Thus, the proposed exemption should be rejected.

**Argument:**

**A. The proposed exemption is not a proper “particular class of works.”**

As discussed above in section II(C), and as stated in the 2008 NOI, it would be improper for the Librarian to grant exemptions when proponents fail to “specifically explain what noninfringing activity the prohibition on circumvention is preventing.” 2008 NOI at 58,077. The inability of the commenters to articulate a “specific” noninfringing use is evidenced by the fact that the proposed class is defined by a circular reference to uses made “in compliance with the doctrine of fair use...” The commenters are unable to “establish that the prevented activity is, in fact, a noninfringing use under current law.” 2008 NOI at 58,077. Instead, at most, they can assert that some courts have found some uses of audiovisual materials in documentary films to be fair. Comment 11B at 13 n. 38.<sup>102</sup> However, other courts have not. *See, e.g., Elvis Presley Enters., Inc. v. Passport Video*, 357 F.3d 896 (9th Cir.), *cert. denied*, 542 U.S. 921 (2004). The case-by-case nature of fair use and the wide scope of the definition of a “documentary film” prevents the articulation of an appropriate class of works for which circumvention would lead only to noninfringing conduct, or that would at least meet the standard set in previous proceedings of focusing on activity that is “clearly” or “generally” noninfringing. Even if uses

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<sup>102</sup> *See* The American University Center for Social Media, *Fair Use and Documentaries in Court*, [http://www.centerforsocialmedia.org/videos/sets/fair\\_use\\_case\\_studies/](http://www.centerforsocialmedia.org/videos/sets/fair_use_case_studies/) (“What does the legal record tell us about fair use in documentaries? Not very much, because there have been so few cases—nine since 1996, and only five plaintiffs in total, since two plaintiffs each brought three of the cases. None of the plaintiffs have been motion picture studios or large archives.”).

of audiovisual material by reputable documentarians, who have at least been exposed to the basic issues of fair use, are more likely to be noninfringing than the more “underground” uses of “vidders” discussed above, it would still be a considerable stretch to assert that the uses are so clearly likely to constitute fair use that an exemption would be justified.

In addition, the proposal seeks an exemption applicable to circumvention for the purpose of obtaining access to public domain material. This aspect of the proposed exemption is inappropriate for the reasons explained by the Register in her 2003 Recommendation:

[T]here is considerable doubt whether the Librarian has the power to grant an exemption the sole purpose of which is to enable “noninfringing” uses of public domain works. The purpose of this rulemaking is to determine whether the prohibition on circumvention has adversely affected users “in their ability to make noninfringing uses under this title of a particular class of *copyrighted* works.” (Emphasis added.) Because public domain works are not copyrighted works, it does not appear that adverse effects on users’ abilities to use public domain works can be considered. 2003 Rec. at 100-01.

**B. Circumvention is not necessary to obtain footage for documentary films.**

Although the commenters discuss at length “three primary analog alternatives to circumvention of CSS[,]” (Comment 11B at 6) they fail to discuss in much detail the most salient alternative method of making a noninfringing use of audiovisual material, which is to obtain footage directly from the copyright owners. The comment does admit that “documentary filmmakers theoretically could seek licenses from copyright owners,” (Comment 11B at 3) but claims that “the clearance process has become so prohibitively expensive, time-consuming, and complex that the vast majority of documentary filmmakers ... must rely on fair use where it applies.” This falls well short of demonstrating that copyright owners are so likely to refuse to provide unencrypted digital versions of material for use in documentary films that this route to a noninfringing use is substantially blocked by section 1201(a)(1).<sup>103</sup>

The proponents have submitted no evidence that persons who would benefit from the proposed exemption have ever tried to obtain clips from a copyright owner by asserting that they intended to make fair use of the material in a documentary film, much less that such a request has been refused. As described in the comments of Time Warner, filed separately, there is evidence that filmmakers could achieve their goal if they approached copyright owners for clips of limited duration as long as they are willing to pay reasonable lab fees, even when the

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<sup>103</sup> The proposed exemption would apply if works “are not generally available commercially to the public in a DVD format not protected by [CSS] technology.” But the general availability to the public is irrelevant; what matters is the availability of unencrypted footage to documentary filmmakers.

documentary at issue is critical in nature. The proponents cannot meet their burden in this proceeding unless and until they can overcome this evidence.<sup>104</sup>

Moreover, the submission does not reflect that digital camcorders are increasingly capable of capturing very high quality images, especially when in the hands of skilled filmmakers. Nor does the submission discuss presentation technologies that increasingly enable high quality screen image-captures. These methods of obtaining footage should be sufficient in many cases “for public performance in theatres or via broadcast.” Comment 11B at 1.

While the Joint Creators and Copyright Owners believe that proposal 11B should be rejected, at the very least its scope must be further narrowed. The potential availability of licensing or permission is sufficiently significant here that, at a minimum, if any exemption is to be recognized in this area, it should include the additional condition that the filmmaker has made a good faith effort to obtain authorized access to unencrypted content before claiming the exemption.<sup>105</sup> Since the exemption as proposed already includes a number of specific conditions about the filmmaker and her behavior, it would not add much additional burden to include this requirement. We propose it, not to suggest in any sense that fair use is conditional upon seeking consent, but simply to recognize the reality that this path to a noninfringing use ordinarily should be tried first before resorting to the extraordinary step of undertaking circumvention. This condition would also provide the added benefit of creating a contemporaneous record of circumstances in which permission had been sought, so that it would be easier to for the Registrar and the Librarian to evaluate how often and in what situations the exemption had been employed during the three-year period in question. To promote this beneficial aspect, the filmmaker could be required to file a notice of use with the Copyright Office or with some other entity for each work as to which it seeks to take advantage of the exemption.

Finally, if an exemption is granted, the Librarian should delete the language at the end of the proposal limiting the exemption to circumstances where material “will be used in compliance with the doctrine of fair use as defined by federal case law and 17 U.S.C. § 107.” For the reasons discussed above in Section II(C), qualifying exemptions in such a manner is impermissible under the statute. Any exemption must be crafted narrowly enough to meet the standard that the use enabled by circumvention be “in fact noninfringing.” Congress decided in 1998 not to allow circumvention in every case in which an enabled use was adjudicated a fair use, and the Librarian is not authorized to disturb that conclusion.

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<sup>104</sup> To be clear, the Joint Creators and Copyright Owners are not arguing here that seeking permission is a prerequisite to fair use. This proceeding is not directed simply at identifying adverse impacts on fair use, but on “noninfringing use,” a category that includes uses under license or with permission of the copyright owner. Clearly, before the merits of their proposed exemption can be considered, the proponents have the burden of showing that this means of making a noninfringing use is not viable. Otherwise, there is a failure to “reasonably demonstrate that a measure protecting access was the cause of the harm.” 2008 NOI at 58,075.

<sup>105</sup> The exemption should be further narrowed consistent with section II(A)(1) above as well. In particular, it should be limited to “when circumvention that is accomplished solely for the purpose of including portions of a work in a documentary film” or words to that effect.

*Comments of Joint Creators and Copyright Owners*  
*February 2, 2009*

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