Reply Comments
Relating to

EXEMPTION TO PROHIBITION ON CIRCUMVENTION OF COPYRIGHT PROTECTION SYSTEMS FOR ACCESS CONTROL TECHNOLOGIES

Submitted By

THE SOFTWARE & INFORMATION INDUSTRY ASSOCIATION

to

THE UNITED STATES COPYRIGHT OFFICE

Docket No. RM 2008-8

February 2, 2009

The Software & Information Industry Association ("SIIA") appreciates the opportunity to respond to the public comments filed pursuant to the Notice of Inquiry published in the Federal Register on October 6, 2008, in accordance with the Notice of Proposed Rulemaking published in the Federal Register on December 29, 2008. SIIA files the following reply comments on behalf of itself and its members.

SIIA is the principal trade association of the software and information industry and represents approximately 500 high-tech companies that develop and market software and electronic content for business, education, consumers, the Internet, and entertainment. SIIA members represent a wide range of business and consumer interests. In particular, numerous SIIA members:

- Create and develop new and valuable access-control technologies for use by others seeking to protect their copyrighted software and content with such technologies,

- Use access-control technologies to protect their proprietary software and content, and

- Purchase or license software and information products and other content and services that utilize access-control technologies.

Consequently, SIIA and our members are extremely interested in issues relating to the protection and use of access-control technologies and the relationship between noninfringing use of copyrighted content as it relates to the anti-circumvention provisions in section 1201(a)(1) of the Digital Millennium Copyright Act ("DMCA").

Please find below SIIA's position on many of the proposed exemptions – including a summary of SIIA's position followed by factual and legal arguments addressing whether a proposed exemption should be adopted.

RESPONSES TO PROPOSED EXEMPTIONS

A. Response to Submission 1

Summary: Although SIIA does not agree with several of the factual and legal arguments made by the American Foundation for the Blind (AFB), because the language proposed by the AFB is identical to the exemption set forth in the previous triennial rulemaking and that exemption is narrowly tailored to the limited evidence provided by the AFB while also taking in to account the audio book market as well as the market for other audio formats for literary works and works not protected by DRM, SIIA does not oppose renewal of the existing exemption for ebooks as proposed by AFB.

Argument: SIIA agrees with the assertions made by the AFB that fully sighted people enjoy greater access to literary works than do the blind and visually impaired. However, the question is not whether the blind and visually impaired have less access, but rather whether such access is due to access controls applied to ebooks and if so, to what extent. It has been the experience of SIIA and its members that the use of secure ebook formats has facilitated greater use of and access to literary works and these formats have been used to support new ways of disseminating copyrighted works to users, including blind and visually impaired users. We do not believe that there is evidence that the growth of the ebook market is preventing or inhibiting the release of literary works in other accessible formats. Moreover, we believe that the pool of literary works for which a fully accessible digital version is available has grown immensely, which in turn has lead to greater access to ebooks then ever before.

An improperly drafted exemption for ebooks could have a significant adverse effect on the market for audio books. Although there is certainly a difference between the current technology for synthetic speech sounds and the human readings used in audio books, the two compete with each other now as they provide the same content in the same format. Continued improvement in the quality of synthetic speech will make the competition even more direct. Consequently, the

creation of an overly broad exemption could put publishers of audio works at a significant disadvantage.

Interestingly, although the AFB attempts to provide a significant amount of evidence to justify renewing the present exemption for ebooks, they have failed to provide any evidence that AFB or its members are actually using the exemption. A significant element in considering whether to renew an existing exemption is whether and to what extent the exemption has been used. However, AFB comments fail to site to any examples of such use.

Nevertheless, because the language of the present exemption is narrowly tailored to the limited evidence provided by the AFB while also taking in to account the audio book market as well as the market for other audio formats for literary works and works not protected by DRM, SIIA does not oppose renewal of the existing exemption for ebooks.

B. Response to Submission 6

Summary: SIIA opposes expanding the existing exemption as proposed in Mr. Montoro's comments, but would not oppose renewing the existing exemption. Although Mr. Montoro suggests broadening the existing exemption for dongles, he fails to provide sufficient evidence to support broadening the exemption in this manner.

Argument: SIIA opposes expanding the existing exemption as proposed but would not oppose renewing the existing exemption. The existing exemption provides that:

> *Computer programs protected by dongles that prevent access due to malfunction or damage and which are obsolete. A dongle shall be considered obsolete if it is no longer manufactured or if a replacement or repair is no longer reasonably available in the commercial marketplace.*

Mr. Montoro is suggesting that this exemption be broadened by deleting the phrase "and which are obsolete" and replacing it with the phrase "*or hardware or software incompatibilities or require obsolete systems or obsolete hardware as a condition of access.*" However, he fails to provide sufficient evidence to support broadening the exemption in this manner.

The evidence provided by Mr. Montoro is virtually identical to the evidence he has provided in past rulemakings. In these past rulemakings the Register concluded that only when a dongle is malfunctioning or damaged, *and* where a replacement is not reasonably available was there sufficient adverse impact on a noninfringing use and an insufficient threat to the copyright owner to exist to justify an exemption. The Register found that exempting a broader class "would adversely affect the market for and value of software." The Register explained that an exemption is not warranted when a dongle is malfunctioning or damaged, but a replacement is reasonably available. Moreover, past rulemakings have also shown that "the unavailability of dongle replacement or repair from the original vendor in and of itself is not sufficient to justify an exemption when the computer program and dongle are still providing access to a work." Mr. Montoro now seeks to broaden the existing exemption by making virtually the same arguments

and providing virtually the same facts that have been continually considered and rejected by the Register in prior rulemakings. He fails to provide any compelling justification for why the Register should dramatically alter her past decisions and justifications and accept this new exemption.

Further, it makes little sense to add the phrase "*or hardware or software incompatibilities or require obsolete systems or obsolete hardware as a condition of access*," because, unlike all the other criteria in the present exemption, this phrase has nothing to do with the dongle itself. Mr. Montoro cites to examples of certain dongles not working with certain operating systems or software or hardware configurations. This is an issue that relates to interoperability, not access control. We understand and appreciate the significance of interoperability issues, like those raised by Mr. Montoro. However, this is not the forum to address such issues.

Most significantly, Mr. Montoro fails to justify why the requirement that the dongle be considered "obsolete" be removed from the exemption. This is especially important given the Register's statements that this requirement is essential to ensuring that the interests of copyright owners are respected (as quoted above).

With few exceptions, the focus should be on making sure that companies support their products rather than granting an exemption upon which certain companies are able to profit by allowing others to bypass legitimate security features and technologies. The bottom line in this situation is that there are already laws, guidelines, legal precedents, and sufficient remedies for most consumers if they have a defective product or a technical glitch. If, however, the company that supported the dongle is no longer making the dongle and a replacement or repair is no longer reasonably available in the commercial marketplace then we would not oppose an exemption for instances when a computer program protected by a dongle prevents access due to malfunction or damage. Extending an exemption beyond that set of circumstances in unwarranted and would harm copyright owners of computer programs.

C. Response to Submission 7

Summary: SIIA opposes the proposed exemption for forensic testing because Mr. Pannenborg, the proponent of the exemption, fails to provide sufficient evidence to justify the exemption and because there already exists an exception for "law enforcement, intelligence, and other government activities" in section 1201(e) of the Copyright Act that shelters from liability under §1201(a)(1)(A) the type of activities Mr. Pannenborg is concerned about.

Argument: There is no need for an exemption for "computer program for forensic analysis." First, the proponent of the exemption, Mr. Pannenborg, provides little if any evidence to support the exemption. To meet the burden of proof in this rulemaking Mr. Pannenborg must establish "distinct, verifiable, and measureable impacts."[1] Mere "conjecture" is "insufficient to support a finding of "likely adverse effect" and the "identification of isolated or anecdotal

[1] *See* 73 FR 58073 (Oct 6, 2008)

problems will be generally insufficient to warrant an exemption."[2] Mr. Pannenborg refers to two isolated examples of cases where the 1201(a)(1) prohibition may have prevented him or anyone else from engaging in certain forensic activity. Given the significant number of cases in which software or any other technology is the subject of a civil or criminal matter it is remarkable that Mr. Pannenborg is the only person requesting the exemption and that he can only proffer two isolated instances where a problem may have arisen.

Mr. Pannenborg attempted to justify an exemption in three situations:

> (a) When the software manufacturer is beyond the jurisdiction of the court and chooses not to comply
>
> (b) When the software manufacturer exists as a corporate entity and copyright holder but has no staff or no individuals possessing the requisite technical knowledge to comply
>
> (c) Where the software manufacturer has a vested interest in protecting their client and may choose to render incomplete or inadequate compliance. In such case neither the court nor the forensic investigator would be in a position to evaluate whether compliance was complete or adequate.

None of these three rationales justify an exemption. Certainly in the last two situations a court has the ability to order compliance by the software manufacturer or a third party. As for the first example, although it may be true that a court order against a software manufacturer may not have any legal binding effect, it is important to understand that in such a case the software manufacturer would also have no action under 1201(a)(1) unless they first subjected themselves to the jurisdiction of the court. Thus, in this unusual case, there is no violation of 1201(a)(1) unless the software manufacturer made themselves subject to the jurisdiction of the court and thus there is no adverse affect against the forensic investigator.

Most significantly, there already exists an exception for "law enforcement, intelligence, and other government activities" in section 1201(e) of the Copyright Act. 1201(e) shelters from liability under §1201(a)(1)(A) any "lawfully authorized investigative, protective, information security, or intelligence activity of an officer, agent, or employee of the United States, a State, or a political subdivision of a State, or a person acting pursuant to a contract with the United States, a State, or a political subdivision of a State."[3] Mr. Pannenborg fails to explain in any detail why 1201(e) does not adequately address his concerns. While he argues that 1201(e) does not apply to "civil or criminal investigations," he does not provide any factual or legal explanation as to why a court order pursuant to a "civil or criminal activity" would not fall within 1201(e).

---

[2] *See* 73 FR 58073 (Oct 6, 2008)

[3] The term "information security" means activities carried out in order to identify and address the vulnerabilities of a government computer, computer system, or computer network.." 17 U.S.C. 1201(e).

Moreover, Congress has already considered the exemption proposed by Mr. Pannenborg and chosen to address it by enacting section 1201(e). Therefore, if the Copyright Office were to take action by, for example, broadening the section 1201(e) exemption as Mr. Pannenborg proposes it would be contravening -- at least to some extent -- Congressional intent. If the Copyright Office is going to take such a significant step it needs to have substantial evidence as to why section 1201(e) is insufficient. There is no such evidence provided in Mr. Pannenborg's submission.

Under the precedent established in the 2003 rulemaking, proponents of an exemption must show why section 1201(e) is "unavailable" to resolve the problem they discern, and then "justify" why the Librarian should, in effect, second-guess the Congressional determination by providing a temporary exemption for conduct not reached by the permanent statutory provision. Submission seven does not even begin to meet these two requirements. Accordingly, an exception is not warranted for the exemption proposed by Mr. Pannenborg.

The most significant problem with Mr. Pannenborg proposed exemption is that it could create a very big loophole in the law and cause significant harm to owners of computer programs. Section 1201(e) is drafted so as to allow circumvention of computer programs for investigatory purposes in a very controlled environment and one that would limit or preclude abuse of the exemption. If, however, the exemption were broadened, as Mr. Pannenborg suggests, just about anyone would be able to lay claim to be a forensic investigator or to be circumventing for purposes of conducting a forensic investigation merely to avoid prosecution under section 1201(a)(1). In essence the exception would swallow the rule here. For these reasons SIIA is strongly opposed to an exemption for "computer programs for forensic analysis."

D. Response to Submission 8

Summary: SIIA opposes the proposed exemption for security testing as proposed in submission eight because there already exists an exception for security testing in section 1201(j) of the Copyright Act that shelters from liability under §1201(a)(1)(A) the type of activities Mr. Halderman, the proponent of the exemption, is concerned about.

Argument: Mr. Halderman proposes an exemption for security testing. However, there already exists an exception for security testing in section 1201(j) of the Copyright Act that addresses Mr. Halderman's concerns. 1201(j) shelters from liability under §1201(a)(1)(A) any "act of security testing," which is defined as "accessing a computer, computer system or computer network, solely for the purpose of good faith testing, investigating or correcting, a security flaw or vulnerability, with the authorization of the owner or operator of such computer, computer system, or computer network." Nowhere in Mr. Halderman's submission does he explain why 1201(j) does not adequately address his concerns. The closest he comes to addressing the 1201(j) exception is in one line of a footnote[4] in which he says 1201(j) "provides insufficient protection." Mr. Halderman provides no explanation why it is insufficient, and thus, provides no legal or factual basis to justify this exemption under the current evidentiary standard.

[4] *See* Footnote 52 of Halderman's comments.

Moreover, Congress has already considered the security flaws issue and chose to address the issue by enacting 1201(j). Therefore, if the Copyright Office were to take action in this area it would be contravening -- at least to some extent -- Congressional intent. If the Copyright Office is going to take such a significant step it needs to have ample evidence as to why 1201(j) is insufficient.

Under the precedent established in the 2003 rulemaking, proponents of an exemption must show why §1201(j) is "unavailable" to resolve the problem they discern, and then "justify" why the Librarian should, in effect, second-guess the Congressional determination by providing a temporary exemption for conduct not reached by the permanent statutory provision. Submission eight does not even begin to meet these two requirements. Accordingly, an exception is not warranted for submission eight.

Although a similar exception was enacted in the last rulemaking, there is exponentially less factual and legal evidence provided during this rulemaking then in the past and the exemptions proposed are even broader then the prior exemption.[5] Further, even though there has been a similar exemption in place for the past three years the proponent of the exemption makes no mention of whether and to what extent the exemption has been used, which (as noted above) is a significant factor in determining whether to renew an existing exemption.

E. Response to Submission 10

Summary: SIIA takes no position as to whether an exemption may be warranted to address the problems complained of in submission ten. However, in the event that the Librarian concludes that an exemption is warranted here, it is clear that the evidence in Mr. Soghoian's submission in support of this exemption fails to support the breadth of the exemption he proposes.

Argument: SIIA takes no position as to whether an exemption may be warranted to address the problems complained of in submission ten. However, in the event that the Librarian concludes that an exemption is warranted here, it is clear that the evidence in Mr. Soghoian's submission in support of this exemption fails to support the breadth of the exemption he proposes.

Mr. Soghoian proposes an exemption that would apply to "sound recordings, audiovisual works and software programs distributed commercially in digital format by online music and media stores…." In his submission, Mr. Soghoian references numerous music and media stores and potential problems that consumers may encounter if and when these stores were to go out of business or discontinue a particular product or service. All of the so-called problems complained of relate to music and/or movies. None relate to software. Mr. Soghoian fails to give any examples of a "music or media store" that has gone out of business or discontinued a particular

[5] The proposed exemption: (1) includes "literary works," "video games" and/or "software programs"; (2) is not limited to works "distributed on compact disc"; (3) would apply to any work on a "personal computer"; and (4) applies to any work legally "obtained" rather than "purchased".

product or service that prevents or would prevent access to a lawfully owned software program. In fact, the only mention of access to software is in the description of iTunes on page 8 of the submission. In sum, not only is there insufficient evidence to justify this exemption apply to software, but there is no evidence whatsoever in this submission to justify such an extension. SIIA therefore opposes this exemption to the extent it would apply to any computer program.

F. Responses to Submissions 4 and 11

Summary: SIIA takes no position as to whether some narrowly tailored exemption may be warranted to address the problems complained of in submissions four and eleven. However, in the event that the Librarian concludes that an exemption is warranted here, it is clear that the evidence in the submissions relating to these exemption fail to support the breadth of the exemptions being proposed.

Argument: SIIA takes no position as to whether some narrowly tailored exemption may be warranted to address the problems complained of in submissions four and eleven. However, in the event that the Librarian concludes that an exemption is warranted here, it is clear that the evidence in the submissions relating to these exemptions fails to support the breadth of the exemptions being proposed.

First, the reference to "audiovisual works" is too broad. The evidence in the submissions does not address all types of audiovisual works, but only certain types of audiovisual works – commercially distributed motion pictures. There is no evidence whatsoever provided for other types of audiovisual works, such as educational or training videos, presentations, video games, newscasts, or other composite and multimedia works that contain a significant audiovisual component.[6]

If educational videos were to be covered by an exception here the exemption could destroy the market for these works. To the extent an exemption is warranted it ought to be restricted to commercially distributed motion pictures and expressly exclude audiovisual work which are primarily made or distributed for an educational purpose, including (but not limited to) audiovisual works (including audiovisual work associated with literary works) that are typically used by students or teachers in an academic setting.

Second, the comments only cite to audiovisual works contained on a DVD that are protected by CSS. The comments have no issue with or evidence relating to audiovisual works that are distributed in other formats (such as streamed or broadcast videos) or other types of DRMs that protect audiovisual works. In fact, several submissions acknowledges that the exemption should only encompass audiovisual works released on DVD's protected by CSS.[7]

---

[6] Although there is some evidence of audiovisual works that are not commercially distributed movies that is contained in the submission by Kartemquin Educational Films, Inc., these audiovisual works are in the public domain and thus not protected under 1201(a)(1).

[7] See Submissions by Kartemquin Educational Films p. 9 ("The proposed class includes only those audiovisual works that are in DVD form, and of that subset, only those that are protected by CSS technology. Audiovisual works in other digital formats, such as works streamed over the internet or broadcast, would not be eligible; nor would

Third, it is unclear how the term "noncommercial video," as used by the Electronic Frontier Foundation in its comments, is defined. The term "noncommercial" is used sparingly in the Copyright Act to define types of webcasters or educational broadcasters who may be eligible to take advantage of an exception in the Act.[8] However, in the few instances where those terms are used in the Act they are precisely defined. That is not the case here. If this concepts were to be incorporated into any exception, to avoid any confusion, perhaps a word or phrase presently used in the Act and understood and interpreted by the courts would be more appropriate, such as the phrase "without any direct or indirect commercial purpose." For instance, if a remixed video appears on a website that makes money through ads, that should be considered to be a commercial purpose and not subject to the exemption even though one might consider the video itself to be "noncommercial." In other words, it's not only the characteristics of the video that should be considered but also the way the video is used.

Lastly, the premise that the people making the remixes are entitled to the best quality video clips is incorrect. In fact, this argument has been rejected by the Copyright Office in the past. Accordingly, if this exemption were to be enacted there should be a further limitation placed on it -- similar to the limitation in the ebooks exemption -- that requires "all existing versions of the motion picture are protected by CSS so that clips cannot be reasonably obtained through other means."

---

works protected by technological measures other than CSS."); Handman p. 2; Hobbs p. 3 ("CSS 'effectively prevents' Media Literacy teachers and learners from 'gain[ing] access' to media clips on DVDs…."); American Association of Law Libraries p. 3 ("The films from which instructors derive these clips are available only on DVDs using CSS …."); Electronic Frontier Foundation p. 13 ("The exemption should encompass audiovisual works released on DVDs protected by CSS.")

[8] *See* 17 U.S.C. 111(f) ("A 'noncommercial educational station' is a television station that is a noncommercial educational broadcast station as defined in section 397 of title 47.) and 17 U.S.C. 118 (f)(5)(E) ("As used in this paragraph — (i) the term "noncommercial webcaster" means a webcaster that — (I) is exempt from taxation under section 501 of the Internal Revenue Code of 1986 (26 U.S.C. 501); (II) has applied in good faith to the Internal Revenue Service for exemption from taxation under section 501 of the Internal Revenue Code and has a commercially reasonable expectation that such exemption shall be granted; or (III) is operated by a State or possession or any governmental entity or subordinate thereof, or by the United States or District of Columbia, for exclusively public purposes").
).