

**LIBRARY OF CONGRESS
COPYRIGHT OFFICE**

In The Matter of Exemption to Prohibition on
Circumvention of Copyright Protection
Systems for Access Control Technologies

Docket No. RM 2011-7

**COMMENTS OF THE DVD COPY CONTROL
ASSOCIATION (“DVD CCA”)**

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I. Summary

As a “veteran” of these proceedings, having participated in each of the preceding rulemakings, DVD Copy Control Association, Inc. (“DVD CCA”) is pleased to see the digital marketplace has moved to meet many, if not all, of the needs that have been expressed in the requests for exemption from the prohibition against circumventing the Content Scrambling System (“CSS”), DVD CCA’s licensed technology for the protection of motion picture content recorded onto DVDs. When the first of these proceedings was held in 2000, DVD was essentially the only way for consumers to see motion pictures from a digital source. The last three years has seen a virtual explosion in the ways in which consumers can receive and enjoy motion picture content, on literally any device that has a screen and audio rendering capability.

The result is that many ways in which people might want to use digital content for noninfringing purposes (most likely some form of “fair use”) can be enabled through one or more of the alternative ways in which digital content is distributed, including through innovate authorized clip websites. The ability to capture video through widely available and inexpensive technologies has grown enormously since even the just prior proceeding. In short, the need for exemptions from circumvention has diminished even as the ways in which educators, filmmakers, and others use digital video content has expanded.

Accordingly, DVD CCA is generally opposing the new requests for exemption, and one of the requests for renewal of an exemption, from the circumvention prohibition relative to CSS and reluctantly not opposing a few of the requests for renewal of exemptions provided those renewals are clarified to ensure that they apply only to the narrow circumstances that may be justified. With regard to the request for an exemption to enable the use of accessibility technologies, we believe the marketplace is developing quickly to meet the needs of the

communities served by those technologies, but we are prepared to accept a very narrow exemption where the marketplace is not yet serving those needs adequately.

II. DVD CCA

A. Introduction

DVD CCA is a not-for-profit corporation with its principal office in Morgan Hill, California. DVD CCA licenses CSS for use to protect against unauthorized access to or use of prerecorded video content contained on DVD discs. Its licensees include the owners of such content and the related authoring and disc replicating companies; producers of encryption engines, hardware and software decrypters; and manufacturers of DVD players and DVD-ROM drives.

The availability of CSS was essential to incentivize content owners to risk releasing their valuable content in digital form on DVD, thereby allowing consumers to enjoy movies and other video content in higher resolution than previously available on analog VHS and exciting new ways. This in turn laid the groundwork for the fastest growing consumer electronics product in history. This was possible because CSS allowed content owners to protect their copyrighted works distributed onto DVDs. The technology does so by allowing the content owner to encrypt the content in a manner that requires the use of a licensed decryption product to view the content while the DVD is in the device.

In order for a product to be licensed to decrypt the content, the manufacturer of the product is required by the CSS license to equip the product in a manner that adheres to certain rules that are specifically designed to protect copyright interests of the content owner. At the outset, it is important to note that CSS is “an effective technological protection measure” covered

by the anti-circumvention provisions of the DMCA, including the “access control” anti-circumvention provisions of Section 1201(a).¹

CSS continues to be a viable technical digital protection measure because of the legal framework that supports it — from patent protection to the DVD CCA licenses to the provisions of the DMCA. Although almost fifteen years old at this point, CSS is critical to the ongoing success of the DVD market. Requests for exemption from the DMCA’s circumvention prohibitions must be viewed in light of this continued critical role and the legal regime on which the DVD market is based.

B. Participation in the prior rulemakings

DVD CCA has participated in each of the prior triennial proceedings convened by the Copyright Office. In each of those prior proceedings, DVD CCA has expressed its willingness to work with interested parties to find ways to meet legitimate needs for content use and analysis. No party has ever come to DVD CCA to discuss ways of meeting alleged needs without triggering the adverse effects that an exemption to circumvent CSS would cause. Nonetheless, DVD CCA reiterates its willingness to discuss possible means of accommodating legitimate uses.

¹ See *Universal City Studio v. Corley*, 273 F. 3d 429, 441–42 (2d Cir. 2001) (noting that the trial court had found that the posting of DeCSS, a program designed to defeat CSS, was a violation of Section 1201(a)(2)(A) because CSS was a technological measure that “effectively controls access to a work”); see also Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 68 Fed. Reg. 62,011, 62,015–62011, 62015–17 (Oct. 31, 2003) (rejecting several proposed classes seeking exemptions to circumvent CSS, an access control technology).

C. General facts about marketplace developments since the last rulemaking

1. Marketplace offers an array of sources for motion picture content

The digital video marketplace has exploded in the last few years, accelerating even faster in the past three years than in the prior period. Commercial entertainment content, whether current movie releases, catalog titles, or television programming, is available from numerous sources for use on many platforms and devices. Some content is available for consumers to keep permanently — via sale of physical goods or online download to consumer devices or recordable media — much is available for rent, including through downloads that time out after a specified period, and still more content is available for streaming through a variety of network connections.

Services that were once tethered to in-home set-top-boxes are now offered for use on a variety of consumer devices, often regardless of the location of the device. Cable, satellite, and other home delivery services (such as Verizon’s FIOS) compete in part on the flexibility and variety of services that they enable, including to mobile devices.

Services often have different levels or different versions, allowing consumers to choose between subscriptions, a la carte, rental, and download/purchase offerings.

An innovative new systems is UltraViolet, which has already launched with streaming services and will soon be offering the full-range of its functions — allowing downloading of content for copying and playing on up to 12 consumer devices, including portable ones for taking outside of the home, streaming to an unlimited number of devices regardless of location, and the option of removable media copies (either as the original way the consumer purchased the content, on either DVD or BD, or as a consumer made copy onto DVD or SD card recordable media). UltraViolet’s membership includes major movie studios, virtually all of the consumer

electronics and computer companies, the major game console providers, and backbone services providers.²

Disney expects to launch Disney Studio All Access (“DSAA”) this year. DSAA is Disney’s cloud-based content delivery and rights locker initiative, which will enable consumer access to over 250 Disney movies via streaming or download across a broad spectrum of consumer devices.

Apple’s iTunes video system is well known and very widely used by consumers, permitting movie and television programming content to be purchased or rented for playback on a variety of devices, including, of course, Apple’s platform itself, including iPad, iPhone, and iPod type devices, but also including many non-Apple platform products. Apple’s system allows multiple devices to have copies of the same content, giving flexibility for consumers to use a single purchase or rental.³

This past fall, Amazon launched the Kindle Fire, said by many commentators to be a major competitor to Apple’s iPad platform. Amazon itself has thousands of movie and television titles that are available to Fire owners, and that content is also available for use on other devices through applications that are readily available.⁴

² See *UltraViolet Alliance*, UVVU.com, <http://www.uvvu.com/partners.php> (last visited Feb. 9, 2012).

³ See *Music, TV Shows, Movies, and More*, Apple.com, <http://www.apple.com/itunes/whats-on/> (last visited Feb. 9, 2012).

⁴ See *Kindle Fire*, Amazon.com, http://www.amazon.com/dp/B0051VVOB2/ref=sa_menu_kdpo3 (last visited Feb. 9, 2012); *Amazon Instant Video*, Amazon.com, <http://www.amazon.com/gp/video/ontv/start> (last visited Feb. 9, 2012); *Amazon Prime Members Enjoy*, Amazon.com, http://www.amazon.com/gp/prime?ie=UTF8&tag=googhydr-20&hvadid=2480937525&ref=pd_sl_4jhisc5c2_e (last visited Feb. 9, 2012).

Android devices also have networks of content available, both through the Android Market and through use of applications that give consumers access to content on a variety of other distribution networks.⁵

Microsoft has its own platforms, taking advantage of its game console as a hub for content delivery as well as enabling Microsoft-based smartphones and computers.⁶

Physical media distribution, especially Blu-ray Discs, often comes with a “digital copy” already included, allowing the consumer to transfer the file containing the copy from the disc to the hard drive of a computer, a smartphone or tablet, or recordable media.⁷

In addition, under the terms of the AACS LA agreements, with limited exceptions, all BDs produced under that entity’s final license agreements (since December 2009) are subject to the license’s managed copy obligation, meaning that consumers will be able to make at least one copy of the movies found on BD, using a variety of alternative platforms for the copying (such as copying to a hard drive, to SD or Memory Stick memory cards, and to various recording media using Windows Media DRM).

⁵ See *Android Market*, Android.com, <https://market.android.com/movies?feature=top-nav> (last visited Feb. 9, 2012).

⁶ See *Zune on Xbox Live*, Zune.net, <http://www.zune.net/en-us/products/zuneonxbox/default.htm> (last visited Feb. 9, 2012).

⁷ For website information about digital copies, both from the perspective of the content companies and from the perspective of a couple of the device and service providers, see *Fox Connect: Digital Copy*, <http://www.foxdigitalcopy.com/> (last visited Feb. 9, 2012); *Warner Brothers Digital Copy*, <http://www.wbdigitalcopy.com/home/#/Home> (last visited Feb. 9, 2012); *Paramount Digital Copy*, <http://www.paramountdigitalcopy.com/support/> (last visited Feb. 9, 2012); *Universal Hi-Def: Digital Copy*, <http://www.universalthidef.com/digitalcopy/whatisdigitalcopy/> (last visited Feb. 9, 2012); *Transferring or Downloading an iTunes Digital Copy*, <http://support.apple.com/kb/HT1539> (last visited Feb. 9, 2012); *Disney File Digital Copy*, <http://disney.go.com/disneyvideos/disneyfile/textonly.html> (last visited Feb. 9, 2012); *Digital Copy: Insert. Transfer. Go*, <http://www.amazon.com/Digital-Copy-DVD/b?ie=UTF8&node=721726011> (last visited Feb. 9, 2012).

Content is typically available in both standard definition and high definition, as supported by the consumer's device and as convenient for the consumer given network capabilities.

Content can also be downloaded to one device and side loaded to another device, so the viewing device does not need to be the vehicle for a download when that is not convenient.

The fact that most of these systems use a form of technological protection is not a reason to permit circumvention of those or other technologies (such as CSS). Using such technologies to enable access to or delivery of an authorized number of copies — and not more — or to avoid unauthorized distribution of the content over Internet or other network connections is precisely what Congress contemplated in enacting the DMCA.⁸ The fact that the DMCA is working to support the launch of a myriad of content delivery and consumer playback systems and models should be celebrated.

Services and systems that will be available this year to consumers include at least the following: UltraViolet, Flixter, Amazon (Instant Video and Prime), Blockbuster, Hulu and Hulu+, iTunes, DSAA, Microsoft Zune/Xbox, Netflix, Android Market, Playstation Network, Vudu, Redbox, BD sales, DVD sales.

⁸ WIPO Copyright Treaties Implementation and Online Copyright Infringement Liability Limitation 18, House Rept. 105-551 Part 1 (May 22, 1998) (an individual would not be able to circumvent in order to gain unauthorized access to a work, but would be able to do so in order to make fair use of a work which he or she has acquired lawfully).

2. Marketplace offerings of alternatives for copying short portions of works have improved

(a) Authorized Uses of Clips

(i) Online Clip Availability

Certain online sites offer short portions of many movies. Content providers supply and authorize clips on one such site, *www.anyclip.com*.⁹ Users are able to search the site's online library, which as of December 2011 included access to over 12,000 films and over 50,000 clips. More importantly, the site permits a user to make various uses of its clips including compiling clips into playlists (as a professor might wish to do for classroom use) and accessing the library with an API¹⁰ to incorporate clips into an application that the user is developing.¹¹ The quality of the clips is sufficient that Universal Studios is using it to power their own 100th anniversary website.¹² For many of the uses described in the proposed classes, this site offers exactly what the proponents are requesting without any need for the circumvention of CSS.

⁹ See *About Us*, AnyClip.com, <http://www.anyclip.com/pages/about/> (last visited Feb. 8, 2012); Paul Bond, *Universal First Studio to Make All Movie Clips Available Online*, HollywoodReporter.com (Mar. 7, 2011), <http://www.hollywoodreporter.com/news/universal-first-studio-make-all-164835>; Will Richmond, *AnyClip Licenses Warner Bros. Movies for Clip Library*, VideoNuze.com (Nov. 9, 2011), <http://www.videonuze.com/article/anyclip-licenses-warner-bros-movies-for-clip-library>.

¹⁰ The API is subject to a free license that limits the use of the clips accessed through the API for noncommercial purposes and in certain other ways. See *API License Agreement*, AnyClip.com, <http://wiki.anyclip.com/anyclip-api/api-license-agreement> (last visited Feb. 8, 2012).

¹¹ *Id.*

¹² See Press Release, *Universal Studios Chooses AnyClip to Reveal the Most Memorable Moments From 100 Years of Movie Making*, Yahoo.com (Jan. 10, 2012), <http://finance.yahoo.com/news/universal-studios-chooses-anyclip-reveal-180000935.html>.

(ii) Online Clip Licensing

For uses where licensing from the content owner is appropriate, motion picture companies have moved much of their clip licensing to an online system.¹³ This is intended to simplify and shorten the licensing process. In some cases, the entire transaction can be completed online, including searching the studio's movies for the clip that is desired, putting clips into an online "cart" along with details of the proposed use of the clips. For those sites, after the user "checks out" using the site, the studio reviews the request and, if the studio agrees to the license, responds with a link to the desired clip. Studio responses typically take no more than two days. This process is far more straightforward and less time consuming, than the filmmaker requests for exemption suggest.

(b) Quality Improvements and Lower Prices for Screen Capture Software, Video Cameras, and Video Editing Software

Since the last rulemaking, significant technological and marketplace developments have made possible various alternatives to achieve the noninfringing uses identified in a number of exemption requests, which may altogether eliminate any basis to grant those requests. While the effects of these developments on specific proposed classes are discussed further below, the following provides an overall discussion of several developments that we apply to a number of different exemption categories. We note that our discussion of the utility of these alternatives is

¹³ See *Universal Clips: Business to Business Broadcast Film Clip and Still Licensing*, UniversalClips.com, <https://www.universalclips.com> (last visited Feb. 10, 2012); *MGM Media Licensing*, MGMMediaLicensing.com, <https://www.mgmmedialicensing.com> (last visited Feb. 10, 2012); *Sony Pictures Film Clips*, SonyPicturesFilmClips.com, <http://www.sonypicturesfilmclips.com/Faq.html#Faql3> (last visited Feb. 10, 2012); *Sevices: Film Clip Licensing*, Paramount.com, <http://www.paramount.com/studio/services#film-clip-licensing> (last visited Feb. 10, 2012); *Archive of American Television: Clip Licensing*, EmmyTVLegends.org, <http://www.emmytvlegends.org/license-our-clips> (last visited Feb. 10, 2012).

limited to the context of this proceeding, where the use of any specific alternative is assumed to be for noninfringing purposes only. More importantly in the immediate context of this proceeding, that assumption is premised on the requirement that users would employ these alternatives to copy only “short portions” of audiovisual works from the playback of audiovisual content from DVDs. Finally, the discussion of the utility of these alternatives is intended to demonstrate only that viable alternatives to circumvention do exist. It in no way endorses these alternatives for any specific purpose, including the noninfringing purposes described by the proponents, and certainly in no way authorizes the use of a work either by the copyright holder or under the color of law.

The Register in her 2010 recommendation identified two specific reasons why video capture software and camcording (generically, “video recording”) were not then viable alternatives for some of the requests: quality and cost.¹⁴ On both of those fronts, the developments since 2010 have been significant. High-quality video capture software is now available for less than \$50, through at least one such product features an endorsement from a film studies teacher. Video recording using smartphones is both high quality and ubiquitously available. Most importantly, the resolution and audio quality of the recordings from either of these sources can now be improved significantly, even to broadcast quality, including as will be described below, through a “one click” approach of a video editing program that is available for under \$50. Each of these developments is discussed in more detail below.

¹⁴ *See, e.g.*, Rulemaking on Exemption from Prohibition on Circumvention of Copyright Protections Systems for Access Control Technologies 61 (June 11, 2010) [hereinafter 2010 Rulemaking].

(i) Improved video capturing software offers high quality copies

In her 2010 Recommendation, the Register found that video capture software was a viable alternative that would satisfy some but not all uses.¹⁵ Specifically video capture software did not satisfy those uses that required higher quality copies of the work, falling short in video and audio quality.¹⁶ Pixilated video output reduced the overall quality of the copy, and audio quality was poor, out-of-sync with the video and in some instances not available at all.¹⁷ Our research reveals that easily accessible products now exist in the marketplace that appear to remedy the problems that were seen in the products demonstrated in 2009. We believe that the Register should review these marketplace developments, in particular where there are video capture products that do not implicate section 1201's prohibition on circumvention (as the Register found they did not in her 2010 recommendation). While DVD CCA does not endorse video capture software generally nor any particular software program, among the products we encountered in our own review is *Replay Video Capture* ("Replay") offered by Applian.¹⁸

Replay allows the user to record the screen contents either as a WMV file or a MPEG-2 file.¹⁹ According to Applian, Replay's "super-fast MPEG-2 codecs don't bog down your CPU, so you won't lose video frames or get choppy audio."²⁰ Applian suggests that optimal

¹⁵ 2010 Rulemaking at 59.

¹⁶ *Id.* at 61.

¹⁷ *Id.*

¹⁸ *See If You Can Watch it, You Can Record it With Replay Video Capture*, Applian.com, <http://applian.com/replay-video-capture/> (last visited Feb. 6, 2012).

¹⁹ *Id.*

²⁰ *Id.*

performance for recording a DVD requires putting Replay's recording window around the DVD player window, which should be set at 480 x 640 pixels, standard definition digital television.

Replay advertises a testimonial from a customer, who teaches film and media classes.²¹ Specifically, the customer uses the software to record clips from films and TV shows. The customer notes that other video capture software "had problems playing back the video or audio."²² "[Replay] worked first time and is simple to use. The quality of the playback is absolutely superb and there are no problems with audio synching."²³ The customer concludes, "Thanks to you my media and film lessons will actually feature some media and film!"²⁴

While our own informal observation of the software suggests minimum processing requirements do exist,²⁵ our "amateur" use of the Replay software otherwise performed consistently with the testimonial. Recording a DVD from an *Acer Aspire x3400G* desktop using this video capture software, the Replay software performed as promised. The video quality was very good, with no apparent color distortion or other degradation of the image quality. The English language subtitles were legible, and the actors' gestures and facial expressions were clear. The sound was also impressive.

²¹ *Replay Video Capture Customer Testimonials*, Applian.com, <http://www.applian.com/replay-video-capture/testimonials.php> (last visited Feb. 6, 2012) (testimonial of Chris J.).

²² *Id.*

²³ *Replay Video Capture Customer Testimonials*, *supra* note 21. While suggesting even the problems with other software may have been the result of his laptop being too old and slow, this instructor found that Replay's technology did not require his laptop to have topnotch processing speed, power and memory.

²⁴ *Id.*

²⁵ For example, the laptop described below for the smartphone recording could not support a DVD player and the Replay software.

The Replay Video Capture software and can be purchased for \$39.95.²⁶ The significant performance improvement that this product represents, as well as its apparent popularity in a competitive marketplace, suggests that we may soon see similar low cost, high quality capture products from other companies. Again, while in 2009 the Register found that video capture software lacked the quality necessary for certain of the requested noninfringing uses, this finding should not be presumed as true in 2012.

(ii) Video recording with a smartphone is high quality and affordable

Camera phones have made video recording vastly more accessible than in the periods covered by the prior rulemakings. In the last rulemaking, the Register found that then-available camcording techniques were cost-prohibitive due to the expense of the necessary equipment and that, while reasonably good, the quality of the copy was often considered inferior.²⁷ Today, however, a user can now create a video recording of what is shown on the screen easily with the video recording features of her own smartphone, a product widely available and owned by millions of American consumers.²⁸

²⁶ *If You Can Watch it*, *supra* note 18.

²⁷ 2010 Rulemaking at 59.

²⁸ While camera phones have been in the marketplace for ten years, the quality of camera phones did not improve dramatically until the introduction of the Apple iPhone in 2007, which forced manufacturers to compete on adding innovative features including video recording. Since 2007, these “smartphones” have consistently improved year to year. Apple included video recording for the first time with its release of its 3GS in June 2009. That model offered VGA video at 30 frames per second (“frame/s”). The iPhone 4 model, released for the AT&T network in June 2010, offered 720p HD video at 30 frame/s. The iPhone 4GS, released in October 2011, offers 1080p Full HD video at 30 frame/s. *See iPhone 4S*, Apple.com, <http://www.apple.com/iphone/specs.html> (last visited Feb. 6, 2012). The next largest competitor in the smartphone market, Samsung, also offers 1080p HD video recording at 30 frame/s on its Galaxy SII model. *See Specification*, Samsung.com, <http://www.samsung.com/global/microsite/galaxys2/html/specification.html> (last visited Feb. 6, 2012).

A smartphone recording offers no less quality (than the camcording had), and rapid improvements in video recording features are likely to achieve higher quality than camcording demonstrated in prior rulemakings, and at a fraction of the cost. In fact, our own smartphone recordings — made under modest circumstances²⁹ — showed that the playback of such recordings resulted in quality that did not suffer from the defects that were found to be critical in the last rulemaking. Indeed observing the recording played back through Window Media Players on the same machine that played the DVD, the subtitles are legible, facial expressions and other gestures are discernable, and the sound, particularly when the audio portion is played back through external speakers, is sufficiently precise that nuanced inflections can be distinguished.

(iii) Video editing software can significantly enhance the quality of a recording

To the extent that the quality of the “raw” smartphone recording (or other inexpensive high quality recorder) is not sufficient for a particular use, the advent of inexpensive, easy to use video editing software should be able to enhance the resolution to a satisfactory quality.

In the last rulemaking, even though camcording produced a good copy, the Register granted the classroom-related exemption in part because “a copy that appears adequate on a television screen may be quite grainy when displayed on a large screen in a classroom . . .”³⁰ Again, improved offerings in the marketplace can enhance the quality of the copy to render it usable for even these purposes.

²⁹ Playback of the work (*Amelie*) on DVD occurred on a Compaq Presario CQ60 laptop with a 15.6 inch screen. The playback of the audio portion was through Logitech speakers. The recording was made with an Android HTC, Incredible 2 that has video recording features of 1280x720 (720p HD).

³⁰ 2010 Rulemaking at 60.

There are numerous offerings of video editing software that more experienced users would be likely to have available for use,³¹ and there are also programs now in the market that are quite simple to use even by novices. An example of the latter is vReveal offered by Motion DSP.³² With vReveal's toolbox, a user has various one-touch tools to deinterlace, sharpen, stabilize and remove grain and pixilation. If the user does not want to use these tools individually, vReveal has a "one-click fix" that will automatically run each enhancement.³³ The "Premium" (or full) version of vReveal 3 is priced at only \$49.99.³⁴

The discussion of these examples, video capture and smartphone video recording, plus easy video editing software, highlights that, for less than \$50.00, there are programs that can then be used repeatedly. Thus, there are viable alternatives available for at least many of the noninfringing uses identified in the proposed classes. A \$50 alternative is far better than the pricey investment for camcording that the Register found rendered camcording an impractical alternative for most of the noninfringing uses at issue in the last rulemaking.

³¹ A film professor, who is familiar with editing tools, would likely use the Video Spirit Pro, which amongst other things allows the user to join, split and extract images from video. The interface however is not intuitive for the first time user.

³² See *Video Software, Reimagined*, vReveal.com, <http://www.vreveal.com/features> (last visited Feb. 6, 2010). DVD CCA does not endorse this product, but rather mentions it as illustrative of developments in the marketplace.

³³ A cNet reviewer of the software stated, "I'm impressed. Often times we are sent low quality video that is unacceptable for broadcast. We've turned a number of clips into acceptable on air video with this product." *vReveal CNET's Editors Review*, Cnet.com (Jan. 4, 2010), http://download.cnet.com/vReveal/3000-13631_4-10911245.html#userreview. His summary is very precise, "Short learning curve, easy to use, effective and a good value for the price." *Id.*

³⁴ *Top Reasons to Go Premium*, vReveal.com, <http://www.vreveal.com/premium> (last visited Feb. 6, 2012).

III. Standard for Exemptions pursuant to this Proceeding

The law governing exemptions to the prohibition against circumvention prescribes certain requirements that the Register and Librarian must consider in granting an exemption request.

First, the proponents of an exemption must “bear the burden of proof that an exemption is warranted for a particular class of works [by] providing sufficient evidence under this standard to support an exemption.”³⁵

Second, proponents’ evidence of harm to the noninfringing use of a work must be in the form of “evidence either that actual harm currently exists or that it is ‘likely’ to occur in the ensuing 3-year period.”³⁶ Current harm must be shown in the form of “[a]ctual instances of verifiable problems,” and [t]he standard of ‘likelihood’ requires proof that adverse effects are more likely than not to occur.” Where the proponent argues that substantial harm is “likely to occur,” the standard is met only “in extraordinary circumstances in which the evidence of likelihood is highly specific, strong, and persuasive.”³⁷ Further, in relation to either actual harm or likelihood of harm, “[t]he identification of isolated or anecdotal problems will be generally insufficient to warrant an exemption. Similarly, the mere fact that the digital format would be more convenient to use for noninfringing purposes is generally insufficient factual support.”³⁸

Third, any exemption request must be narrowly tailored to delineate “the class in relation to the relevant noninfringing use proven to be, or likely to be, adversely affected by the

³⁵ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technology, Notice of Rulemaking, 76 Fed. Reg. 60,398, 60,400 (Sept. 29, 2011) (internal quotations omitted).

³⁶ 76 Fed. Reg. at 60,400.

³⁷ *Id.* (quoting the House Manager’s Report).

³⁸ *Id.* at 60,400–01.

prohibition on circumvention, . . . while leaving the statutory prohibition against circumvention intact for that class with respect to other uses.”³⁹

Fourth, as stated in the initiation notice, “Exemptions are reviewed de novo and prior exemptions will expire unless sufficient new evidence is presented in each rulemaking that the prohibition has or is likely to have an adverse effect on noninfringing uses. The facts and arguments that supported an exemption during any given 3-year period may be insufficient with the context of the marketplace in a different 3-year period.”⁴⁰

The Proposed Classes

IV. College/University Professors (including Librarians and Digital Media Staff) and Media and Film Studies Students Exemptions

Proposed Class:

7G (partial), 7A (partial), and 7F

Summary:

The existing exemption covering circumvention of CSS for a variety of college and university uses involving copying short portions of motion pictures should be revisited, refined, and limited to the only conduct that is clearly noninfringing and simultaneously requires high quality: pedagogical and educational uses of clips of motion pictures on DVD by college and university faculty and students in disciplines that involve detailed analysis of visual images or sounds, where the circumvention is accomplished with respect to short portions of motion pictures for use in new works for the purpose of criticism or comment and where the person engaging in circumvention believes and has reasonable grounds for believing that circumvention is necessary to fulfill the purpose of education. DVD CCA also does not object to including

³⁹ *Id.* at 60,403.

⁴⁰ 76 Fed. Reg. at 60,401.

explicitly Librarians and Digital Media Staff as users authorized under the this same exemption, when they are acting in support of the exempted users for the exempted use purposes (as clarified above). As explained below in more detail below, DVD CCA does, however, object to extending this exemption to Kindergarten to Twelfth Grade educators and to university and college students and faculty outside of the narrowly defined category above.

V. Documentary Filmmaking Exemption

Proposed Class

7A (partial), 7D (partial)

Summary:

Although DVD CCA believes that the current exemption request relative to documentary films and filmmakers is weak in its demonstration of the need for this exemption and may not support a grant of the exemption, if this exemption is granted, DVD CCA believes that it should be clarified and narrowed so that it clearly applies only where (x) the short portion of the motion picture is to be used in a manner that is itself fair use (or otherwise noninfringing), and (y) the short portion to be used is not reasonably available to the filmmaker through noncircumventing means (for example, a clip license from the content owner or using a non-protected version of the motion picture from which the clip is to be taken) such that the circumvention is necessary. As explained below, DVD CCA opposes renewal of the exemption for noncommercial videos generally and opposes extension of the “filmmaker” exemption to fictional films and filmmakers.

VI. Accessibility Exemptions

Proposed Class:

9C and 9D:

Summary of Argument:

DVD CCA believes that the marketplace has worked to enable accessibility technologies for many movies, including those released on DVD, and that the interests of having such technologies included in most or all movies, again including those released on DVD, would be better served by allowing the marketplace to continue to develop. If the Register nevertheless believes that it is essential to recommend an exemption for this purpose, DVD CCA requests that such an exemption be modified from the requested exemption, so that it is narrowly tailored to circumstances in which the relevant accessibility descriptions are not already available for the specific work either natively on the CSS-protected DVD or via an alternative noncircumvention method such as those discussed below.

Facts:

A. Works are often available with accessibility descriptions and do not require circumvention

Content providers are releasing more DVDs and BDs with video description and audio captions (generically, “descriptions”). Audio captions, which are either open caption or closed caption,⁴¹ render the audible portion of a film into text for the benefit of hearing impaired and deaf people. Similarly, video description assists visually impaired and blind people with the visual portion of the film by providing a narration of the visual elements of the film such as

⁴¹ Open caption means that entire audience may view the audible portion of the work rendered into visual text. Typically, the text is “burned into” the work. Closed caption means that audience members must choose to see the visual text.

“actions, settings, facial expressions, costumes, and scene changes.”⁴² Movie studios add video description and audio captions to a film in the course of the post-production process. These descriptions are then included for the film’s theatrical release.⁴³ When the film is released again for the home viewing market, these descriptions can subsequently included in DVDs and BDs.

The Media Access Project identifies those films, which are released with audio captions and video description.⁴⁴ In January 2012, eighteen (18) current releases have both audio captions and video description including: *Alvin and the Chipmunks*, *The Girl with the Dragon Tattoo*, *J. Edgar*, *The Muppets*, *Shame*, and *We Bought a Zoo*. These eighteen titles are among some six hundred thirty-three (633) titles that the Media Access Project has identified containing both descriptions when released as first-run movies.⁴⁵ Comparing those titles identified by the Media Access Project to the top ten movies in gross sales for 2011,⁴⁶ seven of the top ten movies were released with audio caption and video description.⁴⁷ The other three of the top ten movies were released with audio caption.⁴⁸

⁴² See Nondiscrimination on the Basis of Disability; Movie Captioning and Video Description, Advanced Notice of Proposed Rulemaking, 75 Fed. Reg. 43,467, 43,468 (July 26, 2010).

⁴³ Public television station, WGBH, is home to the Media Access Group, which has pioneered accessibility technologies for both TV and film. See *Media Access Group at WGBH*, WGBH.org, <http://main.wgbh.org/wgbh/pages/mag/> (last visited Feb. 6, 2012). This includes Rear Window Captioning System and DVS Theatrical, which permit deaf, hearing impaired, blind and visually impaired people to enjoy films during their theatrical runs in those theaters that have adopted the Motion Picture Access (“MoPix”) system.

⁴⁴ *Making Movie Theaters Accessible to Disabled Audiences*, WGBH.org, <http://ncam.wgbh.org/mopix/index.html#currel> (last visited Jan 24, 2012).

⁴⁵ *All MoPix Films*, WGBH.org, <http://ncam.wgbh.org/mopix/mopixmovies.html> (last visited Jan. 24, 2012).

⁴⁶ See *2011 Domestic Grosses*, BoxOfficeMojo.com, <http://boxofficemojo.com/yearly/chart/?yr=2011&p=.htm/yearly/chart/?yr=2011&p=.htm> (last visited Jan. 24, 2011).

⁴⁷ They included: *Harry Potter and the Deathly Hallows Part 2*, *The Twilight Saga: Breaking Dawn Part 1*, *The Hangover Part II*, *Pirates of the Caribbean: On Stranger Tides*, *Fast Five*,

While audio captions are much more pervasive than video description, the availability of video description is improving. Even after the Federal Communications Commission's initial regulations were overturned,⁴⁹ voluntary efforts made progress.⁵⁰ With passage of the *Twenty-First Century Communications and Video Accessibility Act of 2010* ("21st CCVA"),⁵¹ a legal mandate for video description now exists that will create more market pressure to include video description in all films.⁵²

Even in the absence of a legal mandate and its effects on the motion picture industry, content providers are voluntarily making their films more accessible to blind and visually impaired people. Advocates for accessibility acknowledge that the availability of video description is improving. The Audio Description Project ("ADP"), an Initiative of the American Council of the Blind, notes

2010 proved that we've turned the corner on availability of [video] description tracks on DVDs, with more first-run movie DVDs released than all previous years combined. Several major studios (Sony, Universal, and Disney-Pixar) have

Cars 2, and *Sherlock Holmes: A Game of Shadows*. See *id.*

⁴⁸ They were *Thor*, *Transformers: Dark of the Moon*, and *Mission: Impossible - Ghost Protocol*. *Id.*

⁴⁹ See *Motion Picture Ass'n of America, Inc. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002) (holding that the FCC lacked the statutory authority to promulgate the video description regulations).

⁵⁰ See Media Access Project, *MAG Guide Vol. 3*, WGBH.org, http://main.wgbh.org/wgbh/pages/mag/resources/guides/mag_guide_vol3.html (last visited Feb. 6, 2012) (noting that even though the video description regulations were void, broadcasters and cable providers were committed to "honor the spirit of the FCC's intention -- to provide greater access to television for people who are blind or visually impaired").

⁵¹ Pub. L. 111-260, 124 Stat 2751 (2010).

⁵² Because the regulations are imposed on broadcasters and cable providers, which control a downstream market for the distribution of films, studios, which want to distribute their films in these markets, will need to ensure that their films comply with the video description requirements before broadcasters and cable providers will be willing to transmit studios' films into their markets.

committed to description on their DVDs and Blu-ray discs whenever they contract for it in the original movie.⁵³

Content providers, similarly, have made significant strides in including audio captions in their works. As already discussed the top 10 movies for 2011 each included audio captions. Advocates for hearing impaired and deaf people have acknowledged this reality too. In explaining when captioning is required, the *National Association of the Deaf* stated:

Closed captioning has been provided on a voluntary basis by many movie producers, studios, and distributors for movie videos and DVDs produced for sale or rent. Today, captioning is also being provided by movie studios and distributors for most wide-release movies. These captions are being displayed by hundreds of movie theaters nationwide.⁵⁴

B. Noncircumventing means of applying accessibility descriptions may become available

To the extent that such services would require a license for CSS, DVD CCA welcomes the opportunity to license services that would enhance accessibility of works to people who are deaf, hearing impaired, blind or visually impaired. We invite representatives of companies or groups serving those communities to contact us with ideas on how we can be helpful in making DVDs more accessible. We offer this as a meaningful alternative to circumvention, designed to enable the accessibility descriptions discussed in the proposed classes without the negative side effects on the works that could be the result of permitting the circumvention of CSS technology.

⁵³ See The Audio Description Project, *DVDs and Blu-ray Discs With Audio Description*, ACB.org, <http://www.acb.org/adp/dvds.html> (last visited Jan. 24, 2012).

⁵⁴ See National Association of the Deaf, *When is Captioning Required?*, NAD.org, <http://www.nad.org/issues/technology/captioning/when-required> (last visited Dec. 24, 2012). This is consistent with MPAA statements as well, that films released by its member companies containing closed captioning grew from 75 % in 2006 to 88% in 2008. See Comments of the MPAA at 6, CRT Docket No. 112; RIN 1190-AA63 (Aug. 18, 2008) (*filed in DOJ, Nondiscrimination on the Basis of Disability; Movie Captioning and Video Description*, CRT Docket No. 112; RIN 1190-AA63).

VII. Noncommercial Space Shifting Exemption

Proposed Class

10A

Summary of Argument:

DVD CCA opposes the proposed class, which premises the need to circumvent CSS-protected DVDs on the consumer's desire to transfer their copies of purchased content from one device to another. In light of that plethora of sources distributing content on multiple devices and over various platforms the need for consumers to space-shift, as the proponents have justified those needs, is dubious, particularly when the risks of an exemption are fully-weighed against any marginal benefits as the proponents have assumed. Moreover, with the recent development of sophisticated distribution methods enabling consumers to do exactly what the proponents describe, the proponents' justification for the exemption becomes untenable.

The proposed class lacking the requisite refinements is on its face defective. Accordingly, when the proposed class is properly considered under the statutory factors for an exemption, the weight of those factors leads to only one result — the proposed class must be denied.

Facts:

DVD CCA incorporates by reference those general facts set out in its introduction concerning marketplace developments since the last rulemaking. Facts, which are immediately responsive to the proponents' factual claims and legal arguments, are set out below.

A. Market preferences for portable devices

The complaint that DVD players are being phased-out of devices is overstated. Manufacturer decisions not to include a DVD slot or tray in portable devices reflect recent consumer preference for portable, lightweight devices. Those portable devices are still able to

play the DVDs from an external device (“peripheral”).⁵⁵ In fact, these devices are designed with more ports to support more peripherals.⁵⁶ Should a consumer want to buy a new product with a DVD drive, there are many options available with advanced screen quality that makes watching DVDs an enjoyable experience.⁵⁷ Just because a consumer prefers a portable device does not mean that consumer is foreclosed from obtaining a device that plays DVDs.

Notwithstanding that increased development of portable devices is in direct response to consumer preferences, the fact that a consumer cannot play her DVD on her iPad without the use of a peripheral does not warrant an exemption for space shifting. As early as the first rulemaking the Register has recognized that “there is no unqualified right to access a work on a particular machine or device of the user’s choosing.”⁵⁸ The consumer has bought a DVD containing a digital copy of the audiovisual work. The consumer was able to afford to make this purchase because the copy was distributed on a specific medium that would playback only on licensed players, which did not expose the work to unauthorized distribution.⁵⁹ Accordingly, the price point for that purchase was regularly less than \$20.00.

⁵⁵ See, e.g., *Apple MacBook Air SuperDrive*, Apple.com, <http://store.apple.com/us/product/MC684ZM/A> (last visited January 31, 2012); *HP Mobile USB DVD Reader*, HP.com, http://www.shopping.hp.com/product/computer/categories/cd_dvd_media/1/accessories/BU515AA%2523ABL (last visited Feb. 8, 2012).

⁵⁶ See, e.g., *MacBook Air Specs*, Apple.com, <http://www.apple.com/macbookair/specs.html> (last visited January 31, 2012). *HP Pavilion dm1z Series*, HP.com, http://www.shopping.hp.com/webapp/shopping/.../notebooks/Ultra-Portable/dm1z_series (last visited Feb. 8, 2012).

⁵⁷ See, e.g., *MacBook Pro*, Apple.com, <http://www.apple.com/macbookpro/> (last visited January 31, 2012); *HP Envy 14 Series*, HP.com, http://www.shopping.hp.com/webapp/shopping/.../notebooks/ENVY/ENVY14_series (last visited Feb. 8, 2012).

⁵⁸ Exemption to Prohibition on Circumvention of Copyright Control Technologies, 65 Fed Reg. 64,556, 64,569 (Oct. 27, 2000) (rejecting the exemption for an unlicensed Linux player).

⁵⁹ Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies 92 (Oct. 27, 2003) (stating that all loans, rentals, or conditional access would be requires to be prices the same as the full sale price of the work,

The proponents assert at very points that the consumers buy and or own the movie. , These statements are not legally accurate. Consumers do not buy the copyrighted work when they purchase a DVD of a motion picture.⁶⁰ They buy a DVD that contains a copy of the motion picture in a particular digital format, configured according to the DVD format specifications. This distinction, more than mere semantics, captures the legal and economic underpinnings for all content distributed in a the form of physical supports, including high quality content such a motion pictures distributed on DVDs. Consumers understand that when they buy a DVD, they need a DVD player or DVD drive to playback the copy of the motion picture distributed on the DVD.

Legal Arguments:

A. Exemption is unnecessary even for its stated purpose

As illustrated in our introductory section, above, there has been a proliferation of sources of digital content, to the point where consumers have dozens, if not more, ways of obtaining digital audiovisual content for viewing on a wide variety of platforms and devices. Consumers simply have no need to make a copy of content from a DVD in order to be able to watch a movie on essentially any device. If that is not precisely accurate for all devices and all pieces of content today, the marketplace explosion of mechanisms to transfer content from one device to another means that it will soon will be an accurate statement of the marketplace for copyrighted works. While the introductory section, above, illustrates many ways that motion picture content is made available to consumers, three examples that are being rolled out now, or at least during 2012, are the widespread practice of DVDs and BDs coming with “digital copy” rights, the new market

since users would be free to circumvent the access controls that enforced the limitation as to time or scope) [hereinafter 2003 Rulemaking].

⁶⁰ See Comments of Public Knowledge at 1–2, 4, 10, 14, 17.

practice of content providers releasing works on DVD now with UltraViolet rights,⁶¹ and the forthcoming AACCS managed copy system (available later in 2012). In each case, if a consumer wants to be able to shift the content from the physical media for use in other ways, she simply needs to select the version that comes with digital copy, UltraViolet rights, or Blu-ray-based managed copy. These practices show that consumers have, or very soon will have, the ability to transfer works distributed on CSS-protected DVDs (or AACCS-protected BDs) from one device to another, thus completely negating any justification to circumvent the CSS-protected DVD. In light of the foregoing, proponents have simply not presented sufficient evidence that an exception is warranted.

B. The proposed class would overwhelm the purpose of Section 1201

The fundamental purpose of Section 1201 was to enable the development of a market for a wide variety of distribution systems for copyrighted digital content. CSS itself was developed by a cooperative effort of three industry groups in the manner that Congress intended to promote through the protections afforded by Section 1201.⁶² These proceedings have recognized the necessity to take care in the exemption process so that particularly identified fair uses may be enabled without overwhelming the very protection systems that the broader provision was intended to benefit.⁶³ Yet, the proposals to craft an exemption that would allow *all* users to

⁶¹ See *Ultra Violet Offer Details*, UVVU.com, <http://www.uvvu.com/uv-offer-details.php> (last visited Feb. 9, 2012).

⁶² WIPO Copyright Treaties Implementation and Online Copyright Infringement Liability Limitation 18, House Rept. 105-551 Part 1 (May 22, 1998) ([Section 1201] is drafted carefully to target “black boxes,” and to ensure that legitimate multipurpose devices can continue to be made and sold).

⁶³ See *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, Final Rule, 75 Fed. Reg. 43,825, 43,826 (July 27, 2010) (stating that the rulemaking process require the Register and the Librarian to carefully balance the availability of

circumvent CSS for any form of noncommercial space shifting or to make back-up copies is precisely the kind of exemption that would overwhelm CSS. And despite its “age” in digital terms – close to 15 years based on the launch of DVD products into the U.S. marketplace – CSS remains a viable technological protection mechanism that the marketplace continues to rely on, and courts continue to protect, both under the DMCA and under its own licensing terms.

Granting the proposed exemption would undermine the CSS License, which has been critical to the development of the market for copyrighted works distributed on DVDs. As explained below, courts have affirmed the uniform license system and DVD CCA’s need to uniformly enforce its terms including terms such as the provisions of the CSS Specification that do not permit CSS licensees to manufacture and market home entertainment systems that would store the DVD content on a server.⁶⁴

Most recently, on January 9, 2012, the trial court issued a ruling in favor of DVD CCA, finding that Kaleidescape had indeed violated the requirements of the License.⁶⁵ The trial court noted that the Court of Appeal had already recognized that CSS combined with License Agreement was the result of efforts made by the consumer electronics and the computer technologies industries to work with the entertainment industry to find an “answer to the concern” for preventing unauthorized copies. Recognizing that the three industries are disparate,

works for use, the effect of the prohibition on particular uses, and the effect of circumvention on copyrighted works).

⁶⁴ See generally *RealNetworks, Inc. v. DVD CCA, Inc.*, 641 F. Supp.2d 913 (N.D. Cal. 2009); *DVD CCA, Inc. v. Kaleidescape Inc.*, 176 Cal .App. 4th 697 (2009).

⁶⁵ *DVD CCA, Inc. v. Kaleidescape, Inc.*, No. 1-04-CV-031829, at 3 (Sup. Ct. Santa Clara County, January 9, 2012) [hereinafter *Superior Court Decision*]. Under California procedure, the January 9 ruling is “tentative” in order to allow the parties to file objections and requests for clarification. That process is in process as of this filing. DVD CCA will inform the Copyright Office when a final ruling is issued.

the court credited that the basis that the three industries coalesced was “the trust in the integrity of the License Agreement.” According to the court,

This trust would erode if a CSS licensee that broke the rules preventing unauthorized copying of DVDS nevertheless was permitted to keep breaking them, i.e., if the breach were unaddressed . In that event the intended uniformity of the rules [as applied to all the licensees] would become effectively moot, because other licensees then would have little compunction about following the footsteps of the initial rule-breaker and breaking the rules too and uniform, [the] level playing field of the License Agreement established would be upset.⁶⁶

Although the trust is between the three industries, the harm would be specific to DVD CCA as “the undermining of those industries’ trust and confidence in the License Agreement, and thus in DVD CCA, if a breach by a licensee were to go unaddressed.”⁶⁷

The Court also found the harm to the integrity of the license would be compounded by additional breaches by licenses.

An unaddressed breach of the License Agreement would likely beget follow-on breaches An unaddressed breach will establish a rule-breaking precedent, thus compromising DVD CCA’s authority to enforce the rules going forward. Other CSS licensees, concluding that they can get away with DVD copiers will make them, frustrating the ability of DVD CCA to carry out its goal of ensuring the uniformity of the CSS licensing system.⁶⁸

The noninfringing use for which the proponents request an exemption are the same consumer activities that the CSS licensees, Kaleidescape and Real Networks, wanted to facilitate with their respective products. As the courts found, those companies’ products breached the CSS license. Granting the requested exemption would have no less adverse effect on the integrity of the CSS licensing regime as the courts found that the two companies’ breaches would have had on the integrity of the licensing regime.

⁶⁶ *Superior Court Decision* at 46–47 (citations to the record omitted).

⁶⁷ *Id.* at 47.

⁶⁸ *Id.* at 47 (citations to the record omitted).

The recent court decisions illustrate the fact that licensed, compliant DVD playback products continue to dominate the marketplace, notwithstanding the availability of “hack” programs through rogue websites. CSS continues to protect movie content released on DVDs according to the requirements that were put in place nearly 15 years ago. It remains a viable technological protection measure supported by a license regime that is actively enforced by DVD CCA, its licensing body.

C. Proposed class must be rejected based on the statutory factors

1. Proponents’ fair use arguments fail to satisfy the burden of proof established by the precedent of this proceeding

Through this rulemaking the copyright office has made clear that with respect to exemptions, the burden of proof to establish fair use lies with the Proponent. The Register has explained that the significance of a “de novo” assessment is to the facts, not to past legal interpretation.⁶⁹ In the absence of persuasive legal argument, the Register will not reconsider past legal interpretations.

In the 2003 Rulemaking, the Register held that: “The proponents of an exemption bear the burden of proving that their intended use is a noninfringing one.” The Registrar concluded that “no proponent has offered a fair use analysis or supporting authority which would allow the Register to consider such a basis for the exemption, and the Register is skeptical of the merits of such an argument”⁷⁰ The Register noted that in the *Betamax* decision⁷¹ the Supreme “Court explicitly did not address the issue of librarying such a work”⁷² Presumably, the Register implies that

⁶⁹ 2003 Rulemaking at 90.

⁷⁰ 2003 Rulemaking at 106.

⁷¹ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

⁷² 2003 Rulemaking at 106.

making a back-up copy of a motion picture is librarying. Moreover, the Registrar states that: “this rulemaking is not the forum in which to break new ground on the scope of fair use.”⁷³ The Register then concludes — that in the context of the 1201 proceeding — any restrictions on space shifting are simply “an inconvenience rather an adverse effect on noninfringing use.”⁷⁴

Here, proponents’ articulated uses for space-shifting are to make personal use of the work on different devices. Whether this need arises from the dubious suggestion that DVD players are soon to disappear from the market or simply a desire to play the works on the newest devices,⁷⁵ proponents’ desires for these uses do not render them any more meritorious a basis for an exemption than the need for backup copies in 2003.⁷⁶

Proponents have neither relied on any new legal authority nor raised any novel legal theory to support the argument that space-shifting is fair use. In fact, Proponents’ principal authority is the Ninth Circuit decision, *RIAA v. Diamond Multimedia Systems Inc.*,⁷⁷ which was decided in 1999, well before the Register’s prior determinations in this rulemaking process.

⁷³ *Id.*

⁷⁴ 2003 Rulemaking at 108.

⁷⁵ In 2003, the Register further concluded that prohibition against circumvention resulting in the inability to make more use of a work – even if that use was noninfringing – than what was bargained for does not constitute a substantial adverse effect on the use. The proponents sought to circumvent technological protection measures employed on time-limited DVDs. According to the proponents, the TPM took away from the consumer the ability to playback content on a lawfully acquired DVD and that an exemption was warranted to “permit the noninfringing use of private performance.” 2003 Rulemaking at 96. The Register disagreed concluding that the user cannot expect to get more than what he bargained for. Not surprisingly, the consumer who paid for a DVD cannot reasonably expect the DVD to playback on anything other than a DVD player.

⁷⁶ In 2003, the desired activities were “to travel with backups or keep backups of their [movies] in multiple locations, e.g., vacation homes or cars” 2003 Rulemaking at 108.

⁷⁷ 180 F.3d 1072 (9th Cir. 1999).

2. The scope of the proposed class lacks the requisite “refinements”

In the 2006 determination to change the approach to what is a permitted “class of work” for the purposes of granting an exemption under Section 1201(a)(1) and the consequent determination to grant an exemption relative to CSS, and confirmed in the 2010 determination with regard to additional exemptions relative to CSS, the Register and the Librarian took great care to state that the exemptions could be warranted only where there are not “undesirable consequences” in the form of “undue harm to copyright owners.”⁷⁸ The proposal here suffers from the lack of refinements that made past classes tolerable and would adversely impact the emerging market for digital works.⁷⁹ The past rulemakings have concluded that an exemption to circumvent CSS-protected DVDs is permissible if it is narrowly tailored.⁸⁰ The conclusion rested on the observation that the success of the DVD distribution system could tolerate an exemption. As the 2006 Rulemaking reasoned,

failing to specify the use or users for whom the exemption was found to be warranted would result in an unnecessarily broad exemption. Further, if a class is too broad, it will often entail undesirable consequences. If those consequences are such that they would lead to undue harm to copyright owners, it may be difficult to justify the exemption at all.⁸¹

⁷⁸ 2006 Rulemaking at 19.

⁷⁹ *See, e.g.*, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 75 Fed. Reg. 43,825, 43,827 (July 27, 2010) (stating that the “class” must be properly tailored not only to address the harm demonstrated, but also limit the adverse consequences that may result from the creation of an exempted class).

⁸⁰ Contrary to proponents’ assertion, the Register did not suggest that the concern of creating a disincentive was no longer warranted. Comments of Public Knowledge at 8. The Register clearly recognized that a class not carefully tailored, such as proponents’ class here is not, could still “risk confusion.” 2010 Rulemaking at 57.

⁸¹ Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies 19 (November 17, 2006) [hereinafter 2006 Rulemaking].

Here the proposed class is far from being narrowly tailored as it clearly intends for all consumers to take advantage of the exemption.⁸² In fact, the proposed class that would permit circumvention for “motion pictures on . . . DVDs that are protected by the Content Scrambling System” closely approximates the example “motion pictures on CSS-protected DVDs”, which was given in the prior rulemakings as a not carefully tailored class.⁸³ In explaining how the 2006 exemption for film professors, as narrowly tailored class, satisfied the statutory analysis to grant an exemption, the Register explained concurrently how “motion pictures on CSS-protected DVDs”, the not carefully tailored class, would result in a negative outcome under the statutory analysis.

Here as the proposed space-shifting class so closely approximates the unacceptable class “motion pictures on CSS-protected DVDs”, the 2006 analysis of the narrowly tailored class in 2006 (college and university film and media studies professors for classroom teaching) this unacceptable class dictates that the proposed class for space-shifting be rejected.⁸⁴

Under the first statutory factor, the Register could not conclude for the unacceptable class, as she had for the narrowly tailored class for film professors, that the prohibition against circumvention adversely effected the availability of the work for noninfringing uses. According to the Register the narrowly tailored class for film professors did not raise the studios’ “fear that permitting circumvention for such a specialized use by such a focused class of users would result

⁸² See Comments of Public Knowledge at 1 (the proposed rule contains no designation of a class of users except for all consumers of DVDs).

⁸³ See 2010 Rulemaking at 57; 2006 Rulemaking at 19–20.

⁸⁴ 2006 Rulemaking at 19 (stating “[b]ut when the class of works is more narrowly defined, permitting circumvention only by college and university film and media studies professors for classroom teaching, motion picture studios are not likely to be deterred from releasing their works on DVDs ...”).

in the circulation of large numbers of unprotected copies of their movies.”⁸⁵ In contrast to the class for film professors, the unacceptable class did raise fears that an exemption would result in the unauthorized distribution of a large number of unauthorized copies.⁸⁶ Not surprisingly, the proposed space-shifting class, as explained below, produces the very same fear – specifically that an exemption for space-shifting will result in the unauthorized distribution of a large number of unauthorized copies.

Under the second statutory factor, availability for nonprofit archival, preservation and educational uses, the Register noted the unacceptable class was a “class of works consisting of all motion pictures on DVD.” On the other hand, the class for film professors constituted “motion pictures in the educational library of a college or university’s film or media studies department, when circumvention is accomplished for the purpose of making compilations of portions of those works for educational use in the classroom.” The Register concluded that the statutorily favored purpose under the second factor - education - would be more clearly served by an exemption in the film professors’ case than in the former unacceptable class of “works consisting of all motion pictures on DVD.”⁸⁷ To circumvent motion pictures on DVDs protected by CSS for space-shifting purposes, as the instant class proposes, is certainly not one of the enumerated uses identified under the second statutory factor.⁸⁸

The third statutory factor concerning itself with the effect on criticism, comment, news reporting, teaching, scholarship, or research also favored the narrowly tailored class for film

⁸⁵ *Id.*

⁸⁶ *See* 2006 Rulemaking at 19 (noting that without these refinements to the class, the fears would be present).

⁸⁷ *Id.* at 19–20.

⁸⁸ *See id.* at 22.

professors for classroom teaching more than it did for the unacceptable class. Again here an exemption for “motion pictures on . . . DVDs that are protected by the Content Scrambling System” premised on space shifting for personal performances, as articulated by the proponents, is unlikely to have any beneficial effect on reporting, teaching, scholarship, or research.

The fourth statutory factor — the effect of circumvention on the market for or value of a particular class of copyrighted works — according to the Register requires no equivocating “upon whether that class consists of all motion pictures on DVDs or only of motion pictures used by film and media studies professors for classroom teaching.”⁸⁹ The effect of the circumvention authorized by a broad exemption such as motion pictures on DVDs “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.”⁹⁰ Because the proposed class for space-shifting “motion pictures on . . . DVDs that are protected by the Content Scrambling System,” is as broad as the unacceptable class of “motion pictures on DVDs” is, the proposed class for space shifting is undoubtedly equally harmful.

In the absence of the requisite refinements that prior rulemakings have instructed, the proposed class, which would allow any consumer with a lawful, and lawfully acquired, copy of a DVD to space shift, remains unacceptably broad. This renders the exemption unworkable, as it would be an exception that swallows the rule against circumvention. It should be denied.

⁸⁹ 2006 Rulemaking at 22.

⁹⁰ *Id.* at 24.

3. The proposed class would harm the market for works distributed in the DVD medium and by other digital means

The proposed exemption poses a threat to the continued proliferation of distribution mechanisms for digital content and to the market development and maturation for platforms and devices. Content providers and their partners have developed an array of offerings for the delivery of their copyrighted works over the Internet to consumers at an affordable price.⁹¹ These offerings constitute the development of the digital online marketplace for copyrighted works that the DMCA was intended to foster.⁹² This vision for these offerings was to complement the distribution of works in digital formats already in place.⁹³ Any unprotected digital copy originating from any source, including the off-line marketplace, will disrupt these services, and the more unprotected copies that exist, the more disruptive the copies can be to the online marketplace. Congress did not craft the DMCA to foster the growth of the online marketplace only to see it stymied by the proliferation of unprotected digital works, which creates the conditions for displaced sales.

The loss to displaced sales becomes unquantifiable, as public confusion will exacerbate displaced sales. Nothing in the proposed class requires the consumer to consider how many “space-shifted” copies she should be able to make. The proposed class would leave the decision

⁹¹ See, e.g., *Watch Your Movies Here, There, Anywhere*, Apple.com, <http://www.apple.com/itunes/digital-copy/> (last visited January 31, 2012) (covering digital copies of movies directly downloaded and uploaded from the digital copy contained on purchased disks).

⁹² See The Digital Millennium Copyright Act, S. Rep. No. 105-190, at 8 (1998) (“Legislation implementing the treaties provides this protection and creates the legal platform for launching the global digital on-line marketplace for copyrighted works. It will facilitate making available quickly and conveniently via the Internet the movies, music, software, and literary works . . .”); see also 2010 Rulemaking at 56 (noting that Congress intended “the prohibition [against circumvention] [was] also to foster new use-facilitating business models that offer the public access to works in a variety of new ways”).

⁹³ *Id.*

in the consumer's unbounded discretion. The consumer must then discern the difference between making a copy for her minivan and making a copy for others in her carpool. If the consumer were confronted with the violation, she would likely tell you that she could make as many copies as she wants. The proposed exemption, more than any other, is likely to result in the public confusion rendering the class indeed unworkable. And, again, the proposed exemption would be the exception that swallows the rule against circumvention.

VIII. Back-up, Format Shifting, Access, and Transfer Exemption(s)

Proposed Class

10B

Summary of Argument:

DVD CCA opposes the proposed class. The proponents express their opinion on matters relating to this proceeding. That however does not constitute facts, which are necessary for a prima facie showing that the prohibition against circumvention has caused, or is likely to cause in the next three years, a substantial adverse effect on the noninfringing uses that the proponents desire to make. The proposed class is defective because it too lacks the requisite refinements of a class that is neither not too narrow nor too broad. Accordingly, the proposed class must be denied.

Facts:

DVD CCA incorporates by reference those facts set forth in its general statement of facts about marketplace developments since the rulemaking.

Legal Argument:

A. Proponents have not shown a substantially adverse effect on noninfringing use

1. The media cited by proponents is available in non-protected format

The individual proponents of the exemption collectively request that an exemption be granted to all digital media copied for personal use. However, the proponents fail to explain or indicate which works are distributed on CSS-protected DVDs and why the work is not available in another, non-protected format.⁹⁴ For instance, motion pictures, as explained above, are still available in VHS format.

The comments of Susan Fuhs most completely sum up the proponents' collective position. They want to use protected material in any format or on any device they choose out of personal convenience.⁹⁵ The Register has concluded in the past that harms that amount to a mere inconvenience are only de minimis.⁹⁶ Therefore, the Register must conclude again that the harm to noninfringing uses is de minimis and deny the exemption.

⁹⁴ Ever since the very first rulemaking on exemptions, the Register has followed the principle that “the availability without restriction in [traditional hard copy] format may alleviate any adverse effect that would otherwise result from the technological controls utilized in the electronic format.” 65 Fed Reg. at 64,559.

⁹⁵ Comments of Susan Fuhs at 1.

⁹⁶ 2003 Rulemaking at 145 (“the Register concludes, as she concluded three years ago, that the harm to such persons is de minimis, amounting to no more than a mere inconvenience”).

B. Statutory analysis weighs against granting an exemption

1. The proposed class of all personal use of digital media would create an unnecessarily broad class

Proponents argue for an exemption that would cover all personal use of digital media. This argument ignores a fundamental requirement of the statute—that Proponents present the Register with an identifiable class of works based upon the attributes of the works themselves, and not by reference to some external criteria such as the intended use or users of the works.⁹⁷ The attributes of the works can include the type of access control on the work. Proponents do not identify any particular type of access control that would distinguish a class of works. Without identifying a particular class of works, the proponent’s argument must fail.⁹⁸

2. Such an overly broad class would result in undesirable outcomes

Even if proponents had met their burden to identify a class of works where the access controls are adversely affecting a particular noninfringing use, the granting of such an exemption would be extremely detrimental to the availability of copyrighted works. The Register has noted in the past that the use of access controls on digital media has encouraged copyright owners to make their works available in digital formats.⁹⁹ An overly broad class eliminates the protections of access controls thereby eliminating the incentive for copyright owners to make works available in digital format. Such ease of copying formerly protected works would also result in the deterioration in value of those works by dramatically increasing the unauthorized reproduction and redistribution of such works.

⁹⁷ 65 Fed. Reg. at 64,559.

⁹⁸ See 2006 Rulemaking at 69.

⁹⁹ *Id.* at 70.

IX. Exemption for Kindergarten through Twelfth Grade Educators (“Educators”)

Proposed Class

8

Summary of Argument:

DVD CCA opposes the proposed exemption on the grounds that the proponents fail to demonstrate a causal nexus between CSS and the alleged adverse effect on the noninfringing uses of a work that K-12 educators may make; alternative means are available for these educators to access and make use of works without resorting to circumvention of CSS-protected DVDs.

Legal Argument:

1. The evidence is not persuasive that DVD quality copy is necessary

Proponents fail to show that the prohibition against circumvention has resulted in, or likely will result in, a substantial adverse effect of K-12 educators’ use of works distributed on CSS-protected DVDs. This rulemaking has previously created exemptions premised on minimizing the loss of classroom time that was the result of using several different works in a single classroom session. Here the proponents suggest that the use of merely one work in a single classroom session results in substantial adverse effect.¹⁰⁰ However, common sense suggests that cannot be right. The Register stated in the last rulemaking, ‘in some cases, professors needing to perform only one clip in a class may be able to use the CSS-protected

¹⁰⁰ Reviewing proponents’ evidence most liberally, the Proponents’ example involving the documentary of *Edward R. Murrow: This Reporter* and the movie *Good Night, and Good Luck* could involve a lesson comparing the works where the use of clips on a compilation could be timesaving. Comments of Professor Renee Hobbs at 3. However, the proponents did not suggest this.

DVD itself in a DVD player by cuing the scene up before class.”¹⁰¹ While the proponents imagined a parade of horrors, which could befall the classroom experience if teachers had to fumble with Internet alternatives, the proponents failed to imagine the practical solution that experienced teachers make use of everyday – prepare the device before the class begins.

The proponents’ argument is premised on current alternatives to an exemption not being ideal for teaching purposes. However, that argument admits that there are available alternatives like online streaming from websites offering clips (including anyclip.com, which allows preparation of a series of clips from different movies in a playback sequence), using VHS, or employing video capture software or the video recording function of modern smartphones.¹⁰² As such, the Proponents do not claim that the current prohibition results in a substantial adverse effect on their noninfringing use, but that they are inconvenienced by the current prohibition. A mere inconvenience is not sufficient grounds for an exemption.¹⁰³

Further, proponents’ reasoning for DVD-quality copies fails to articulate a persuasive reason for DVD-quality copies. In the last Rulemaking the Registered reiterated the basis for granting an exemption for DVD-quality copies of a work premised on the need for a DVD-quality copy:

[F]or older works, the DVD version of a motion picture can preserve the color balance and aspect ratio to accurately reflect how the original work would have appeared when it was originally released in theaters. The record does not reveal sufficient viable alternatives to the DVD version of the motion pictures for this purpose. For instance, VHS versions of the films altered the color balance and aspect ratio. Similarly, the demonstration at the hearing of screen shots with a digital video recorder revealed dramatic color distortions and greatly reduced picture quality. While these options may have satisfied the needs of many types

¹⁰¹ 2010 Rulemaking at 63.

¹⁰² Comments of Professor Renee Hobbs at 2.

¹⁰³ 75 Fed. Reg. at 43,826.

of noninfringing users and even many noninfringing educational uses – e.g., those wanting to comment on the historical context of a film or create a parody, or to show a film clip in a class unrelated to cinematographic significance – the reduced quality of alternative formats was wholly insufficient for the pedagogical purposes for which the clips were sought in film and media studies classes.¹⁰⁴

The proponents however do not draw any nexus between their desire for high quality images and any pedagogical value of that quality. Instead, they articulate reasons that satisfy the noninfringing educational use of copyrighted works. However, they do not provide sufficient information on why higher-quality images available on DVD format are that much more suited for educational purposes.¹⁰⁵ Educational videos in VHS, Betamax, and even reel-to-reel have been used for years without issue.

Educators have alternative means to access a work distributed on CSS-protected DVDS. The website, anyclip.com, is particularly well suited for their needs, allowing streaming of individual clips or a series of clips that can be prearranged into a playback order. Further, contrary to proponents claim, as demonstrated above, current video capture software is sufficient for their purposes. That software is simple to use and retains high quality image and sound. Smartphone recordings are also available to educators. Educators are no exception to the consumer trend of adopting smart phones. Consequently, a video recording of the playback of the DVD is also available. In essence, the market has responded to the fair use needs of educators, negating the need for an additional exemption to the prohibition on circumvention.

¹⁰⁴ 2010 Rulemaking at 25 (citing 2006 Rulemaking at 20).

¹⁰⁵ The two scholarly articles cited do not address image quality.

X. Exemption for College and University Students other than Film and Media Studies Students (“Other Students”)

Proposed Class:

7G (partial)

Summary of Argument:

DVD CCA objects to the proposed class because the proponents fail to establish a causal nexus between CSS and alleged adverse effect on any noninfringing use by students. Moreover, alternatives exist for students to make use of works without circumventing CSS. Finally, the exemption poses to great of a risk to the market for the works.

Legal Argument:

A. Proponents have failed to show a prima facie case of substantial adverse effect on any noninfringing use of a work

Proponents have failed to make a prima facie showing that the prohibition against circumvention of CSS has caused a substantial adverse effect on the use of works by other college and university students. First, none of the examples of participatory learning environments relates the aspired uses to works distributed on CSS-protected DVDs. In fact only two examples reference the use of works distributed on DVDs (a third example may imply the use of works distributed on DVDs).¹⁰⁶ However, without the names of the titles, it is impossible to evaluate whether circumvention of CSS was actually required to make use of works on DVDs. Therefore, there is no basis to determine whether the prohibition against circumvention of CSS is causing a substantial adverse effect.¹⁰⁷

¹⁰⁶ Assuming that circumvention of CSS indeed occurred, it is unclear whether the teacher engaged in circumvention or the students did the circumvention. Clearly, the latter falls outside the exemption.

¹⁰⁷ Not all works distributed on DVDs are CSS-protected.

Even assuming a nexus existed that could result in some harm, such harm would be mitigated by alternatives in the marketplace that would permit students to make use of the works. Whether it is a high quality image recording with Replay video capture software or a just a smartphone recordings, other students can make use of the work. Moreover, as proponents proclaim, these students who have access to digital media labs with video editing software, can make use of the lab's software to improve the image quality of the recordings.¹⁰⁸ An exemption therefore would offer little additional benefit in light of the market alternatives already provide.

In the last rulemaking, based on similar factual shortcomings, the Register concluded:

Although students in college and university courses may, on occasion, need to create class projects or assignments that create compilations of clips from motion pictures, there has been no factual demonstration of such a need or the likelihood of such a need for the ensuing three-year period. Moreover, to the extent that such a need is likely to exist, there has been no evidence introduced that alternative to circumvention, such as the use of video capture software, would be unable to sufficiently accommodate those needs.¹⁰⁹

The statement resonates equally true today.

To the extent that a 1201 statutory analysis is warranted, which we do not believe so, the only additional information relevant to the analysis is the harm to the work. As we argued in the last rulemaking with respect to the proposed class for students, an exemption for all other students to circumvent CSS-protected DVDs risks causing widespread confusion among students as to whether a particular use falls under the exemption. An exemption is certain to lead to more illegal circumvention on college and university campuses. In light of the foregoing, we cannot imagine how any perceived benefit of circumvention outweighs the risk of harm. Consequently, the proposed class should be rejected.

¹⁰⁸ See Comments of University Professors at 20.

¹⁰⁹ 2010 Rulemaking at 63–64.

XI. Exemptions for Fictional Filmmaking, Multimedia e-Book Authors, and Creators of Noncommercial Videos (Remix Videos)

Proposed Classes:

7A,¹¹⁰ 7B, 7D, 7E

Summary of Argument:

DVDCCA objects to each of these proposed classes for fictional filmmaking, multimedia e-book authors, and remix videos. The proponents for each class fail to establish a prima facie case that the prohibition against circumvention of CSS-protected DVDs has resulted in a substantial adverse effect on their allegedly noninfringing use of the protected works. The proponents also fail to draw any nexus between their alleged use of any work and the CSS content protection technology. In addition, all three proposed classes fail because there are multiple alternatives for the proponents to make use of the work without circumventing CSS. Consequently, the requests must be denied.

Facts:

DVD CCA incorporates its statement of general facts set out at the beginning of these comments for the fundamental proposition that the beneficiary of each proposed class can access any CSS-protected work through various alternatives to circumvention that will satisfy their noninfringing uses purposed in their requests.¹¹¹

¹¹⁰ The proposed class identified in 7A seems to be a renewal of the 2010 exemption proposed by the University of Michigan Library. There proffer contains no evidence in support of renewing the exemption for noncommercial video creators.

¹¹¹ DVD CCA has little confidence that if the proposed classes were created, that any of the intended beneficiaries, availing themselves of the exemption, would actually ever make an unequivocally noninfringing use of the work. Such supposition however is not required to conclude that the proposed classes should be denied. A reasonable evaluation of the evidentiary record, particularly the proponents' own failure to come forward with specific facts to substantiate the alleged harm, warrants that the proposed classes be denied.

Legal Argument:

A. Proponents Fail to Make a Prima Facie Showing of Substantial Adverse Effect on Non Infringing Use of CSS-Protected DVDs

1. Proponents fail to identify any work distributed on CSS-protected DVDs

(a) Fictional Filmmakers

The Proponents' evidence does not relate to CSS protection. Proponents provide one example of a fictional filmmaker's use of a work. That example concerned Bruce Isacson and his future release of *South Dakota*.¹¹² According to the proponents, Isacson, requiring clips of passionate pro-choice and pro-life advocates, drew on clips from documentary interviews and news programming such as *the O'Reilly Factor*. Other than the significance of the clips to the movie, the proponents proffer nothing more about the director's actual use of other copyrighted works relevant to this proceeding. First, it is unclear whether the filmmaker made use of the *O'Reilly Factor* as they describe. Most importantly, there is no connection made with CSS technology, or DVD more generally, and specifically, there is no allegation that that Isacson's use of the work was thwarted by CSS technology. Hence, proponents have failed to show that the prohibition against circumvention has resulted in actual harm or the likelihood of future harm on fictional filmmakers' noninfringing use of works distributed on CSS-protected DVDs.

(b) E-Book Authors

Though they offer a few examples in support of their request, proponents for an exemption for E-book Authors fail to link harm to their inability to circumvent CSS technology. The proponents, in contrast of the fictional filmmakers, actually discuss their use of DVDs. It however does not specify any harm resulting from the CSS technology.

¹¹² Comments of International Documentary Association, *et al.* at 7.

The proponents alleged harm to Ms. Buster caused by the inability to use clips from DVDs.¹¹³ However that bald assertion is insufficient for this proceeding. First, not all works are CSS-protected. But even for works that may be protected by CSS, the proponents need to show that the work is not otherwise available for use (*e.g.*, that the work is not distributed in an unprotected format or that use of the work could not be achieved with other means such as video recording or an alternative source such as authorized clip or clip license.

Proponents subsequently describe how Ms. Buster is using presumably a clip from *Schindler's List*.¹¹⁴ However, the proponents are merely describing the noninfringing use of the work by this e-Book author. They do not allege that CSS –technology prevented Ms. Buster from making use of *Schindler's List*. In fact, based on their description (that the reader of the chapter would be lost without seeing the clip), we must conclude that Ms. Buster was able to make use of the work *Schindler's List*.

Proponents also assert that Mr. Gene Rudow will need to access clips on DVDs for his work on *Born to Lose: The Gangster Film in America*.¹¹⁵ The only work that they identify is Josef von Sternberg's 1927 *Underworld*, along with some other gangster genre movies from the 1920s and 1930s. Use of DVD clips from unidentified movies of the gangster genre is nothing more than speculation as there is no basis on which to allege, or know, whether the work is released on CSS-protected DVDs or is otherwise available in an unprotected format, such as VHS. As far as the silent film *Underworld*, proponents have not identified any harm associated

¹¹³ Comments of Mark Berger, *et al.* at 1–2.

¹¹⁴ *Id.* at 1.

¹¹⁵ *Id.*

with the use of the work. The proponents have not shown that Mr. Rudow was unable to make use of *Underworld* due to its CSS protection.

Proponents next suggest that eBook author Barnett Kellman would like to make use of a clip from Francois Truffaut's *Stolen Kisses*.¹¹⁶ While proponents describe his desire to use the clip, there is no description of why Mr. Kellman has not yet made use of the work or that CSS prevented Mr. Kellman from making use of the work. Thus, in the absence of more information, we cannot determine why Mr. Kellman has not yet made use of the work and, hence, there is no basis on which to grant the requested exemption.

(c) Non-commercial videos

Proponents have not established the requisite causal relationship showing that CSS technology precludes their ability to incorporate works into non-commercial videos. Proponents' reliance on past rulemaking proceedings is a red herring as each triennial proceeding is conducted de novo (without reference to evidence or factual conclusions from prior proceedings). Therefore, proponents cannot rely on any evidentiary matter that may have previously satisfied the Register in the last proceeding as the basis to satisfy their prima facie burden in this proceeding of actual or likely harm.

Proponents fail to proffer any evidence of harm caused by CSS to the noninfringing use of a work by remix video creators. Proponents proffer Eric Fadden who created *Fair(y) Use Tales*, which made use of multiple Disney films to criticize copyright law. Neither proponents nor Mr. Fadden suggest that he had made use of these films by relying on the previous exemption. In fact, such an argument cannot be made, because Mr. Fadden had made the video

¹¹⁶ Comments of Mark Berger, *et al.* at 2.

widely available on the Internet in May 2007 well before the prior exemption for noncommercial video creators were created. Proponents have not established that the prohibition against circumvention has had or likely will have a substantial adverse effect on the noninfringing use of works in the proposed class.

2. Proponents can make use of the work for the noninfringing purposes identified in the proposed classes by alternative means

Even assuming that proponents demonstrated actual harm or the likelihood of harm, any such harm could be mitigated by the methods already outlined above in DVD CCA's statement of general facts, which are hereby incorporated by reference for consideration in relation to this exemption request.

XII. Conclusion

For all of the reasons given above, DVD CCA requests that the Register recommend, and the Librarian determine, that most of the exemption request related to CSS be denied and that the remainder be granted only under very clear and narrow conditions as set forth above in the relevant sections above.

Respectfully submitted,

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