

UNITED STATES COPYRIGHT OFFICE

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

Docket No. RM 2011-7

JOINT REPLY COMMENTS

of

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

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March 2, 2012

The Joint Creators and Copyright Owners¹ respectfully submit these reply comments to respond to some of the comments filed on February 10, 2012 in response to the Notice of Proposed Rulemaking.² The main focus of this proceeding, bearing in mind the benefits of access controls, is to identify any particular class of works for which the prohibition on circumventing access controls has diminished in a substantial manner the ability to make noninfringing uses. The proponents of exemptions bear the burdens of demonstrating such diminution for a defined class, and showing that it outweighs the need for continuing the prohibitions set forth by the statute. *See* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies; Notice of Inquiry, 76 Fed. Reg. 60,398, 60,401 (Sept. 29, 2011) (“2011 NOI”) (“[T]he proponent of an exemption must demonstrate ‘distinct verifiable, and measurable impacts,’ and more than ‘*de minimis* impacts.’”). Philosophical objections to the use of technological protection measures specifically or copyright protection generally do not suffice. *See id.* (“[P]urely theoretical critiques of section 1201 cannot satisfy the requisite showing.”).

Responding to a campaign by an exemption proponent, the Electronic Frontier Foundation,³ several hundred comments were filed on February 10. Most of those comments address issues well outside this proceeding, or consist of little more than naked assertions of support for proposed exemptions related to circumvention for the purpose of hacking various platforms (proposed exemptions 3, 4, and 5) or circumvention for the purpose of copying portions of motion pictures and television shows for incorporation into primarily noncommercial videos (proposed exemptions 7B-C). Although the Copyright Office must base its decision on

¹ The comments filed by the Joint Creators and Copyright Owners on February 10, 2012 include descriptions of the individual associations that comprise the Joint Creators and Copyright Owners. The comments are available at http://www.copyright.gov/1201/2012/comments/Steven_J._Metalitz.pdf.

² Of course, the statute places no burden on the Joint Creators and Copyright Owners to address or rebut every comment filed in support of a proposed exemption. Regardless, the Joint Creators and Copyright Owners’ prior comments, along with the comments of the Advanced Access Content System Licensing Administrator (“AACSLA”), the Entertainment Software Association, the DVD Copy Control Association (“DVDCCA”), and Sony Computer Entertainment America, address substantially all of the relevant points raised in the comments filed on February 10. To the extent that the Copyright Office would like clarification on specific matters raised by comments in support of an exemption, our expectation is that such matters will be addressed during the course of upcoming hearings and in written responses to post-hearing questions.

³ *See* Mitch Stoltz, EFF, *Letters to the Copyright Office: Why I Jailbreak*, Feb. 7, 2012, <https://www.eff.org/deeplinks/2012/02/letters-copyright-office-why-i-jailbreak>; EFF, *Jailbreaking Is Not A Crime: Tell the Copyright Office to Free Your Devices!*, <https://www.eff.org/pages/jailbreaking-not-crime-tell-copyright-office-free-your-devices>.

whether or not to recommend an exemption on the merits and not on the volume of comments filed either in support or opposition, it is worth putting the number of comments in perspective.⁴

Consumers have purchased over 180 million iPhones, 30 million iPads, 65 million Xbox consoles, 55 million PlayStation 3 consoles, 95 million Nintendo Wiis, and hundreds of millions of DVD/Blu-Ray players. As explained in earlier filings, each of these devices and their content ecosystems (and many others) rely on access controls protected by section 1201(a)(1). That means hundreds of millions of consumers have purchased these devices and been satisfied with the bargain offered them from access controls. In fact, some portion of those consumers have chosen these devices in part because of the benefits of those access controls, such as ensuring the availability of high-quality, legitimate content and protection from malware and security threats. The Office must consider this reality of how the marketplace and populace at large have reacted to access controls when evaluating the costs and benefits of exemptions proposed by an extremely small minority of users. Bereft of any analysis, the comments bring the proponents no closer to satisfying their burden with respect to any of the proposals currently under consideration.

As discussed in the prior comments filed by the Joint Creators and Copyright Owners, the enactment of the DMCA has contributed significantly to the development of a robust and competitive marketplace, in which more people have more access to more works in more ways than ever before. The proliferation of innovative platforms that provide lawful access to works has benefitted all consumers, including persons engaged in fair use or other non-infringing uses of copyrighted works. The proponents have offered no concrete evidence that would justify inhibiting these choices by unraveling existing protections against circumvention.⁵ An application developer can choose from among these devices and platforms the one (or more) that best suits the developer's needs. Thus, consumers and developers benefit from the existing robust marketplace, which offers real choices among products and services.⁶

The current marketplace also enables citizens to engage, comment on, and interact with cultural products and utilize digital tools to remix and transform existing works, especially motion pictures and television programs. As discussed in the prior comments filed by the Joint Creators and Copyright Owners, the DMCA has helped to encourage a proliferation of access to

⁴ The Joint Creators and Copyright Owners chose to express the views of a substantial number of entities and individuals in joint filings rather than attempting to fill the docket with submissions.

⁵ See 2011 NOI at 60,401-60,402 (“[T]he Register’s inquiry must assess any benefits to the public resulting from the prohibition as well as the adverse effects that may be established.”).

⁶ There are more than 450,000 apps in the Android Market and more than 500,000 apps in the iTunes App Store. Ian Paul, *Android Market Hits 450K Apps, Challengers Abound*, PCWORLD, Feb. 27, 2012, http://www.pcwORLD.com/article/250765/android_market_hits_450k_apps_challengers_abound.html. In the face of these numbers, assertions that access controls are inhibiting creativity, innovation, or the availability of new works lack any credible basis.

copyrighted works that fuels a remix culture. And, as discussed more thoroughly in the prior comments filed by AACCS LA and DVD CCA, a plethora of alternatives exist that enable easy and effective copying and editing of portions of motion pictures and television programs, without resort to circumvention of access controls. The comments filed demonstrate the validity of the concern voiced in the Register's 2010 Recommendation, cited in our previous comments, that "it may very well be true that an [sic] class that was not narrowly tailored ... would risk confusion."⁷ That such confusion has occurred in the case of the 2010 exemption for educational uses and noncommercial videos is evident from the comments in support of exemptions, which almost uniformly suggest that the proponents are engaged in circumvention for purposes that appear to be divorced from the need for the highest-quality copies, and do not even attempt to argue for the need to circumvent to obtain the copies they need for their purposes. As the Register noted in the 2010 Recommendation, "where alternatives to circumvention can be used to achieve the noninfringing purpose, such non-circumventing alternatives should be used."⁸ The comments filed on February 10 counsel caution in renewing the current exemptions and underscore the need to ensure that any recommendations in this area are more narrowly drafted.⁹

Thus, while the Joint Creators and Copyright Owners fully support creativity through fair use,¹⁰ we must oppose most of the proposed exemptions, as discussed more thoroughly in our prior comments. The proposed exemptions, if granted, would unnecessarily undermine the cutting-edge technologies that increase access to works. Although transformative uses can be

⁷ See Recommendation of the Register of Copyrights in RM 2008-8; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies 59 (June 11, 2010) ("2010 Rec."), available at <http://www.copyright.gov/1201/2010/initialed-registers-recommendation-june-11-2010.pdf>.

⁸ See 2010 Rec. at 75 (noting the express limitation that the person must reasonably believe that access to a high-quality digital copy, not otherwise obtainable without circumvention, is necessary in order to fulfill the purpose of the use, and that such a limitation is necessary "to avoid an overly broad class of works given the limited number of uses that may require circumvention to achieve the intended noninfringing end").

⁹ We also note that the few comments submitted in support of proposed exemptions 9A-D, like the underlying proposals themselves, provide little information with which to gauge how circumvention would be employed to achieve the purposes of the proposed exemptions or how those activities might impact the legitimate market for and access to the underlying works. These and the other points made in our previous comments are important considerations that should guide the Register in any determination in this area.

¹⁰ As stated in the prior comments of the Joint Creators and Copyright Owners, copyright holders rarely take action against remix video creators, even in circumstances where fair use is unlikely to apply. In addition, licensing is readily available for many such creators. See, e.g., Movieclips, <http://movieclips.com/>; MGM Media Licensing.com, <https://www.mgmmedialicensing.com/#>; Sony Pictures Film Clips, <http://www.sonypicturesfilmclips.com/Faq.html#Faql3>; Universal Clips Business to Business Broadcast Film Clip and Still Licensing, <https://www.universalclips.com/login.aspx?ReturnUrl=%2fRestrictedPages%2fMyCart.aspx>.

lawful, individuals are not legally entitled to make them in the precise manner they prefer. *See Universal City Studios, Inc. v. Corley*, 273 F. 3d 429, 459 (2d Cir. 2001). Therefore, the proposed exemptions related to circumventing access controls to copy portions of works should be denied, except to the extent indicated in our prior comments.

The Joint Creators and Copyright Owners appreciate this opportunity to share their views with the Register. We look forward to participating in the remainder of the proceeding.

DATED: March 2, 2012

Respectfully submitted:

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