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*via electronic mail*

Maria A. Pallante, Register of Copyrights  
David Carson, General Counsel  
Rob Kasunic, Deputy General Counsel  
Chris Reed, Senior Advisor  
Ben Golant, Assistant General Counsel

United States Copyright Office  
Library of Congress  
Office of the General Counsel

**Re: Copyright Office Docket No. RM 2011-7  
Exemption to Prohibition on Circumvention of Copyright  
Protection Systems for Access Control Technologies  
Proposed Exemptions 9C and 9D  
AACSLA and DVD CCA Licensing Negotiations**

Dear Register Pallante, Mr. Carson, Mr. Kasunic, Mr. Reed, and Mr. Golant:

The Copyright Office conducted a June 5, 2012 hearing at the Library of Congress regarding the above-referenced rulemaking docket, where witnesses testified in support of and in opposition to proposed exemptions 9A-9D regarding circumvention to facilitate perceptibility improvements for motion pictures and other audiovisual works delivered via Internet protocol and on fixed disc-based media.<sup>1</sup>

At the hearing, Dean Marks, representing the Advanced Access Content System Licensing Authority ("AACSLA"), the administrator of the AACSLA

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<sup>1</sup> Hearing on Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Section 1201 (Digital Millennium Copyright Act, Library of Congress (June 5, 2012), 40-169, [http://www.copyright.gov/1201/hearings/2012/transcripts/section\\_1201\\_06-05-2012.pdf](http://www.copyright.gov/1201/hearings/2012/transcripts/section_1201_06-05-2012.pdf) ("Hearing").

digital rights management system for Blu-ray discs, raised the possibility that AACIS LA would be able to offer a free license to developers interested in carrying out the activities contemplated under proposed exemptions 9C and 9D, and thus obviate the need for those exemptions with respect to Blu-ray discs.<sup>2</sup> Mr. Marks also suggested that the DVD Copy Control Association (“DVD CCA”) would be favorably inclined to provide a similar license for the Content Scramble System (“CSS”) for DVD discs, and thus obviate the need for exemptions 9C and 9D with respect to DVD discs, and in conjunction with a license from AACIS LA, obviate the need for proposed exemptions 9C and 9D altogether.<sup>3</sup> Bruce Turnbull, counsel for DVD CCA, confirmed this suggestion in a June 13, 2012 letter to Mr. Carson.

Mr. Carson encouraged the proponents of the exemptions and representatives from AACIS LA and DVD CCA to discuss the possibility of a licensing arrangement.<sup>4</sup> In the spirit of good faith and collaboration, representatives from Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), the National Association of the Deaf (NAD), and Gallaudet University met via teleconference on June 20, 2012 and again in person on July 12, 2012 with Mr. Marks, Mr. Turnbull, and other representatives from DVD CCA and AACIS LA.

Unfortunately, the parties were unable to reach an agreeable licensing arrangement that would obviate the need for proposed exemptions 9C and 9D. In particular, Mr. Marks and Mr. Turnbull were unable to explain with specificity how the provision of a license from DVD CCA or AACIS LA would obviate the applicability of Section 1201 to the activities contemplated by proposed exemptions 9C and 9D.

Section 1201(a)(1)(A) states that “[n]o person shall circumvent a technological measure that effectively controls access to a work protected under this title.” Section 1201(a)(3)(A) states that “to ‘circumvent a technological measure’ means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner.”

At the hearing, Mr. Marks took the position that accessing a copyrighted video on a DVD or Blu-ray disc with a license from DVD CCA or AACIS

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<sup>2</sup> *E.g., id.* at 67-68.

<sup>3</sup> *Id.* at 144-45.

<sup>4</sup> *Id.* at 166-67.

LA would obviate the need to “descramble,” “decrypt,” or “otherwise to avoid, bypass, remove, deactivate, or impair” the CSS or AACS technology on the disc.<sup>5</sup> But this position does not square with common understanding of the operation of CSS and AACS technology, which plainly involve *encrypting* video content and *decrypting* it for playback. Indeed, DVD CCA’s comments in this proceeding plainly state that “[CSS] 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.”<sup>6</sup> Mr. Marks and Mr. Turnbull were unable to explain at our meeting how a license from DVD CCA or AACS LA would transform the *decryption* of CSS-encrypted video on a DVD or AACS-encrypted video on a Blu-ray disc into a *non-decrypting activity*.

This raised the critical question of whether a license from DVD CCA or AACS LA would convey *permission from the copyright holders* of videos on DVDs or Blu-ray discs to perform decryption of CSS or AACS. At the hearing, Mr. Carson expressed skepticism that AACS LA and DVD CCA had authority from copyright owners to provide a license that would wholly eliminate the possibility of liability under 17 U.S.C. § 1201 for the decryption necessary to conduct activities pursuant to proposed exemptions 9C and 9D.<sup>7</sup> In particular, Mr. Carson asked Mr. Marks:

Is there anything in [AACS LA’s or DVD CCA’s] licenses with the content providers that could be construed as giving you the authority to act on behalf of the copyright owners so that, when you give permission to circumvent, that permission is being done . . . under or with the authority of the copyright owner?

Mr. Marks did not answer the question at the hearing. But at our meeting, Mr. Marks and Mr. Turnbull made clear that **neither DVD CCA nor AACS LA is in contractual privity with or otherwise authorized by the copyright holder of any motion picture or other audiovisual work to license or otherwise convey any permission from any copyright holder to engage in the decryption of an encrypted video on any DVD or Blu-ray disc**. Because apparently neither DVD CCA nor AACS LA can convey the requisite permission to decrypt encrypted video on a DVD or Blu-ray disc, conducting the proposed activities pursuant to a license from DVD

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<sup>5</sup> See *Hearing* at 105-06.

<sup>6</sup> Comments of DVD CCA, at 2, <http://www.copyright.gov/1201/2012/comments/DVD%20CCA.pdf> (emphasis added).

<sup>7</sup> *Id.* at 105-06.

CCA or AACCS LA is not a viable non-circumventing alternative to conducting the activities pursuant to proposed exemptions 9C and 9D.

We also discussed the possibility of other AACCS and CSS licensees developing an accessibility application programming interface (“API”) that might permit accessibility features to be built on top of licensed DVD and Blu-ray playback software. This possibility is an encouraging development, and we are of course open to continuing dialogue with members of the optical media industry. At this point, however, the proposed API is purely hypothetical, and we have not received any specific, binding commitment or tangible evidence that the API will be available within the three-year time period of proposed exemptions 9C and 9D or that the API will facilitate any of the activities contemplated by the proposed exemptions. As with the licenses proposed by DVD CCA and AACCS LA, the theoretical future availability of an accessibility API is not a viable non-circumventing alternative to conducting the activities pursuant to proposed exemptions 9C and 9D.

**Therefore, we reaffirm the need for proposed exemptions 9A, 9B, 9C, and 9D based on the extensive record established by the original proposal, supporting comments and reply comments, and testimony at the June 5 hearing, and encourage the Copyright Office and the Librarian of Congress to promulgate the exemptions as proposed.**

Even though the discussion was ultimately unsuccessful in obviating the need for the proposed exemptions, it nevertheless opened productive lines of communications that we hope will form a foundation for future collaboration between the optical media industry and representatives of people with disabilities. We thank Mr. Marks, Mr. Turnbull, and their respective associates and organizations for their willingness to engage with us on issues that are of paramount importance to people with disabilities. We also thank Mr. Carson for encouraging and helping to facilitate a productive alternative resolution of the matter, and we thank the Copyright Office for its ongoing consideration in this proceeding.

Please do not hesitate to contact us if you have any questions.

Respectfully submitted,

/s/

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