



UNITED STATES COPYRIGHT OFFICE

Long Comment Regarding a Proposed Exemption Under 17 U.S.C. § 1201

Although we will not be providing multimedia evidence in connection with this comment, we provide in-text hyperlinks throughout the comment (represented as blue, underlined words) that link to documentary evidence and/or some cited documents.

ITEM A. COMMENTER INFORMATION

These comments are submitted on behalf of the Motion Picture Association of America, Inc. (“MPAA”), the Entertainment Software Association (“ESA”), the Recording Industry Association of America (“RIAA”), and the Association of American Publishers (“AAP”). They are collectively referred to herein as the “Joint Creators and Copyright Owners.” They may be contacted through their counsel at Mitchell Silberberg & Knupp LLP, J. Matthew Williams, 202-355-7904, mxw@msk.com, 1818 N. Street, NW, 8th Floor, Washington, D.C. 20036.

The Motion Picture Association of America, Inc. (“MPAA”) is a trade association representing some of the world’s largest producers and distributors of motion pictures and other audiovisual entertainment material for viewing in theaters, on prerecorded media, over broadcast TV, cable and satellite services, and on the internet. The MPAA’s members are: Paramount Pictures Corp., Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corp., Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc.

The Entertainment Software Association (“ESA”) is the United States trade association serving companies that publish computer and video games for video game consoles, handheld video game devices, personal computers, and the internet. It represents nearly all of the major video game publishers and major video game platform providers in the United States.

The Recording Industry Association of America (“RIAA”) is the trade organization that supports and promotes the creative and financial vitality of the major music companies. Its members are the music labels that comprise the most vibrant record industry in the world. RIAA members create, manufacture and/or distribute approximately 85% of all recorded music produced in the United States.

The Association of American Publishers (“AAP”) represents the leading book, journal, and education publishers in the United States on matters of law and policy, advocating for outcomes that incentivize the publication of creative expression, professional content, and learning solutions. As essential participants in local markets and the global economy, our members invest in and inspire the exchange of ideas, transforming the world we live in one word at a time.

The Joint Creators and Copyright Owners all rely on technological protection measures to offer innovative products and licensed access to consumers. Access controls make it possible (i) for consumers to enjoy recorded music through subscription services like SiriusXM, Spotify, Amazon Music Unlimited, YouTube Red, Apple Music and Pandora, including on mobile devices, through in-home voice assistants, and in their vehicles; (ii) for consumers to view motion pictures at home or on the go via discs, downloadable copies, digital rental options, cloud storage platforms, TV Everywhere, video game consoles, and subscription streaming services; (iii) for consumers to play their favorite video games on consoles, computers, and mobile devices; and (iv) for consumers to enjoy and learn from books, journals, poems and stories (including through subscription, lending, and rental options) on dedicated e-book readers, such as the Kindle and the Nook, on tablets and smartphones, and via personal computers. As the Register concluded in the recent Section 1201 Study, “[t]he dramatic growth of streaming

services like Netflix, Spotify, Hulu, and many others suggests that for both copyright owners and consumers, the offering of access—whether through subscriptions, *à la carte* purchases, or ad-supported services—has become a preferred method of delivering copyrighted content. . . .

[T]he law should continue to foster the development of such models.” U.S. Copyright Office, [Section 1201 of Title 17: A Report of the Register of Copyrights](#) 45-46 (2017) (“1201 Study”).

ITEM B. PROPOSED CLASS ADDRESSED

Proposed Class 3: Audiovisual Works – Space-Shifting

ITEM C. OVERVIEW

The Register has repeatedly declined to recommend a space-shifting exemption because, *inter alia*, she “has consistently found insufficient legal authority to support the claim that these activities are likely to constitute fair uses under current law.” U.S. Copyright Office, [Section 1201 Rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention: Recommendation of the Register of Copyrights](#) 108 (2015) (“2015 Rec.”). The law is now even clearer on this issue. In *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 862 (9th Cir. 2017), the Ninth Circuit validated the Register’s prior analyses of space-shifting, and stated that “[t]he reported decisions unanimously reject the view that space-shifting is fair use under § 107.” It is therefore not only the case that it is *unlikely* that space-shifting is a fair use – it is clear that space-shifting *is not* a fair use.

In addition, the marketplace for access to digital copies and transmissions of motion pictures continues to develop for the benefit of consumers, such that a space-shifting exemption has become progressively less necessary in each successive rulemaking cycle. This cycle is no exception. Motion pictures are available to consumers in numerous formats and via numerous

authorized platforms, products and services that facilitate remote access, family sharing, and back-up access.

Petitioner OmniQ seeks to compete with these legitimate offerings by hacking discs and then selling unauthorized access to copies of motion pictures. However, OmniQ’s purported “invention” to enable “non-reproductive space-shifting” (for which it *still* has no working prototype after three years since filing its patent application) is nothing more than a scheme to profit from disseminating copyrighted works created by members of MPAA and others. The OmniQ process would illegally reproduce copyrighted works so that OmniQ could then illegally distribute the unauthorized copies to paying members of the public. Although OmniQ claims that it can lawfully transfer a digital copy of a motion picture from a disc to a computer without reproducing the motion picture, and then transfer it again (without copying) to a consumer’s computer, this fantastic claim is, as discussed *infra*, factually and legally incorrect.

Chris De Petris submitted a similar petition requesting an exemption related to space-shifting or back-up copying. However, neither he, nor anyone else, offered any comments to support the need for the requested exemption or its legitimacy.¹ Given that the time for submitting supporting evidence has now expired, the only proposal that should remain at issue is that of OmniQ. See [Exemptions To Permit Circumvention of Access Controls on Copyrighted Works: Notice of Proposed Rulemaking](#), 82 Fed. Reg. 49,550, 49,558 (Oct. 26, 2017) (“NPRM”) (“Proponents of exemptions should present their complete affirmative case for an exemption during the initial round of public comment, including all legal and evidentiary support for the

¹ Consumers Union and Free Software Foundation (“FSF”) submitted supportive comments, which expressed general philosophical objections to copyright law and the use of access controls, rather than evidence or legal arguments. FSF attached a list of 163 purported “signatures” in support of every proposed class of works; most of the signatures were from outside the United States. This reflects not necessarily support for space-shifting specifically, but marginal support for FSF’s general, well-worn, anti-copyright rhetoric.

proposal.”). As discussed further below, the Register should decline to recommend any exemption related to Proposed Class No. 3.

ITEM D. TECHNOLOGICAL PROTECTION MEASURE(S) AND METHOD(S) OF CIRCUMVENTION

In their respective comments, OmniQ and De Petris limited the proposed classes of works to circumventing the Content Scramble System (“CSS”) applicable to DVDs and the Advanced Access Content System (“AACS”) applicable to Blu-ray discs.² OmniQ, [Class 3 Long Comment](#) at 14-15 (Dec. 18, 2017) (“OmniQ 2017 Comment”); De Petris, [Class 3 Petition](#) at 2 (Sept. 13, 2017). Those are the only access controls the Register should consider when analyzing issues related to whether to recommend a space-shifting exemption. No evidence exists in the record to suggest that these access controls are applied to any works other than motion pictures. Thus, the proposed class of works being considered is necessarily limited to motion pictures on discs protected by CSS or AACS. Other audiovisual works, such as video games, are not at issue because they are not generally protected by the access controls identified by the petitioners.

ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGING USES

Neither petitioners, nor commenters, have demonstrated any adverse effects on noninfringing uses. MPAA member companies, and other distributors of motion pictures, have fully embraced digital methods of disseminating movies and television shows. Thus, consumers have access to motion pictures in a variety of digital formats at a variety of price points. These offerings demonstrate that copyright owners have developed markets for selling copies and/or access to works with which unauthorized space-shifting would directly compete. These offerings also demonstrate that alternatives to circumvention exist. *See* 2015 Rec. at 124 (“[T]he 1201 exemption process is about access to copyrighted works; it is not meant to guarantee

² AACS2, used to protect Ultra HD discs, is a distinct access control from AACS.

consumers the ability to access content through their preferred method or format.”). Even if OmniQ could demonstrate that its purported invention could achieve space-shifting without illegally reproducing copyrighted works, which it cannot, the § 1201(a)(1)(C) factors would still counsel that the Register decline to recommend the proposed exemption.

1. The Marketplace Is Overflowing With Options For Consumers Seeking Access To Digital Copies And Transmissions Of Motion Pictures.

The digital ecosystem for enjoying motion pictures continues to evolve to the benefit of both copyright owners and consumers. MPAA’s members, and other producers of quality motion pictures, now have the opportunity to reach viewers with content they want to watch, in a format that they desire, for a price that is reasonable, and via the device on which they prefer to watch movies and TV shows. Copyright owners are seizing this opportunity to expand their reach and to make their creative works available to broader audiences than ever before.

(a) Digital Copies Available With “Bonus Pack” Disc Purchases

DVDs, Blu-ray Discs, and Ultra HD Discs are often sold in “bonus packs” that include a “redeem code” the consumer can use to acquire an internet accessible and downloadable digital copy of the motion picture through a variety of channels. For example, each MPAA member studio provides an avenue for redeeming digital copy codes through its website or through the [UltraViolet](#) or [Movies Anywhere](#) websites (discussed further below). For years, discs have been sold with redeem codes, or with actual digital copies included on discs in the package at the time of purchase. These offerings are usually sold at a higher price than offerings that include only a disc with no access to a separate digital copy.

(b) *Disc-To-Digital Through Vudu*

If a consumer does own a disc that was sold without a digital copy included in the purchase price, that consumer can obtain a digital copy through the Vudu mobile application, or by inserting the disc into a computer's optical drive and logging into the Vudu website. This "Disc-to-Digital" program enables a consumer to obtain a [standard-definition digital copy for \\$2.00 or a high-definition digital copy for \\$5.00](#). Or, a consumer can obtain a high-definition copy of a movie for \$2.00 if the consumer already owns a Blu-ray disc or Ultra HD disc. The Vudu mobile app offers a similar experience, but instead of inserting the disc, a consumer simply uses her phone to scan the barcode on the disc packaging to establish her ownership of the disc.

(c) *Digital Retailers And Associated Locker Services (Movies Anywhere and UltraViolet)*

Since the last triennial rulemaking concluded in 2015, [UltraViolet](#) has grown from almost 20 million accounts to over 30 million accounts. Titles from nearly every MPAA member are available for storage and access on UltraViolet.³ Titles are also available from Lionsgate, BBC Worldwide, and Anchor Bay Entertainment.

UltraViolet enables a consumer who has downloaded an authorized copy of a movie from an online retailer, such as Vudu, Fandango Now, Kaleidescape, Verizon, Sony Pictures or Paramount, or purchased the movie on a disc, to add that movie to a personal library within the UltraViolet ecosystem and access it at any time via Internet accessible devices or downloaded copies. This way, content obtained from a variety of sources can be made accessible on a single platform even if the original devices on which the content was purchased are unavailable. Even better, UltraViolet access is completely free.

³ Disney's titles are not available on UltraViolet, but are available through its own Movies Anywhere service.

[Movies Anywhere](#), which was formerly known as Disney Movies Anywhere, also provides similar benefits for free via its “KeyChest” technology. In October 2017, Movies Anywhere announced that the service would be expanded to include titles not only from Disney, Marvel and Lucasfilm, but also from almost every other MPAA member.⁴ Titles obtained through the redemption of digital copy codes included with Ultra HD, Blu-ray, and DVD discs, as well as through retailers Amazon Video, Google Play, iTunes, and Vudu, are accessible through Movies Anywhere, and any title obtained from one of those retailers also becomes available via the other retailers’ platforms (*i.e.*, once you synch multiple retailer accounts to Movies Anywhere, you can view movies purchased from, for example, Vudu, within your Amazon, Google Play and iTunes accounts). The availability of titles obtained through Amazon Video, Google Play and iTunes represents a significant expansion of the number of consumers who will have access to a remote storage service like Movies Anywhere. These retailers were not previously participating in UltraViolet. As of January 12, 2018, Movies Anywhere had allowed consumers to stream 3,000,000 hours of content since the service launched. Movies Anywhere had also been used to store close to 80 million movies in customer lockers.⁵

Movies Anywhere members may download movies from Movies Anywhere to as many as eight permitted devices for viewing at any given time. These downloads are in addition to downloads that may be permitted by the participating retailers through linked accounts. The number of times a consumer may download a single movie through a Movies Anywhere account to devices associated with the account is unlimited. A consumer may download movies to a maximum of sixteen different devices within a rolling twelve-month period. Given the large

⁴ Stephanie Prange, [Movies Anywhere App Launches With Joint Studio Backing](#), VARIETY (Oct. 11, 2017). Paramount has thus far declined to participate, but participates in UltraViolet.

⁵ Janko Roettgers, [Movies Anywhere Streams 3 Million Hours of Content Since Launch](#), VARIETY (Jan. 12, 2018).

number of devices that may be used to access content using Movies Anywhere and linked accounts with participating digital retailers, a consumer's movie library becomes accessible to her entire family. Through Movies Anywhere, viewers can start streaming a movie on one device and finish it on another; two viewers can watch the same title on different devices at one time; and up to four viewers can stream different content on different devices at the same time.

(d) Digital Rental

Online retailers like [iTunes](#), [Google Play](#), [Amazon Video](#), [Vudu](#), and others make motion pictures available for temporary rental at low prices. Once rented, the movies may be streamed directly from these services or downloaded temporarily to devices to enable mobile viewing. Some services, like [Amazon Video](#), give the user up to 30 days to begin watching the movie after the rental price is paid. New release titles are often made available for \$5.99, even in high definition quality. Older titles are available for as little as \$2.99.

(e) Online Streaming Services And Over-The-Top Services

Consumers continue to embrace streaming services like [Hulu](#), [Netflix](#) and [Amazon Prime Video](#) for viewing of both movies and TV shows on mobile devices, computers, smart televisions, and cable boxes. Many of the movies and TV shows distributed by MPAA's members are licensed to be publicly performed through these services. Streaming services offer consumers access to numerous titles for low monthly fees—basic access to Hulu is currently available for [\\$7.99 per month](#); similarly, basic Netflix access is also available for [\\$7.99 per month](#); and Amazon Prime Video is [free to Amazon Prime members](#). Many titles available on these services may also be downloaded for offline viewing if the user remains a subscriber.

Several of these services have also begun to offer add-on subscription access to additional sources of programming. For example, Hulu provides subscription access to [HBO](#),

[SHOWTIME](#), and [Cinemax](#) programming, as well as to a number of other networks traditionally associated with network, satellite, and cable television. This includes a “[Live TV](#)” option where consumers can view more than fifty live and on-demand TV channels, including sports, news, and entertainment on Android devices, iOS devices, Xbox One, Apple TV and Chromecasts.

Another subscription television service that launched during the 2015 rulemaking cycle is [Sony’s PlayStation Vue](#). This service is accessible through apps for Sony’s video game console, mobile devices, smart televisions, TV-connected devices, or the company’s website. PlayStation Vue offers [four main plans](#), with a variety of live linear sports, movies, news, and lifestyle channels. Additionally, users can add a number of premium channels to plans, or purchase channels on a standalone basis. The service also offers a remote DVR service, as well as on-demand titles. Other “over-the-top” services that deliver subscription programming via the internet have also launched, including [SlingTV](#) and [DIRECTV NOW](#). This demonstrates that the market for online access to television programming is becoming quite robust.

Each service allows for the use of multiple devices by single accounts, which enables access throughout the household by multiple family members.

(f) Cable, Satellite, IPTV And Fiber-Optic Subscriptions

Subscription television providers like Comcast, Cox, Spectrum, AT&T U-verse, Verizon Fios, DISH Network, and DIRECT TV continue to offer large numbers of channels for real-time, in-home viewing. In addition, their on-demand and remote access options are growing rapidly. A subscriber to [Comcast Xfinity](#), for example, can, on a laptop or mobile device, sign into an account, and watch all of the content stored on an in-home DVR associated with that account. The consumer can also order on-demand movies and TV shows on mobile devices, for limited-time rental or for long-term access. Finally, the consumer can stream live TV programming

from major broadcasting and cable networks and premium channels. These “TV Everywhere” services have revolutionized the way consumers enjoy their television and on-demand programming.

(g) *TV Shows And Movies Accessible Directly From Networks And Apps*

Networks continue to make more and more programming available for viewing directly to consumers, through websites and mobile applications, sometimes for free (usually in exchange for watching advertising) and sometimes for subscription fees. For example, [HBO NOW](#) is also available directly to consumers who may not already have access to the network through another subscription package, for a stand-alone price of \$14.99 per month. Many networks also make their back catalogues of programming available for free, on-demand viewing.

2. OmniQ’s Assertion That Movies Are Less Available Than Before The Widespread Adoption Of Digital Dissemination Is False and Misleading.

OmniQ contends that “the public’s access to movies is shrinking dramatically.” OmniQ 2017 Comment at 32. To support the flawed notion that consumers have less access to fewer movies than they had prior to the advent of internet-based dissemination, OmniQ cites a *Newsweek* article about whether specific classic titles are available on Netflix. Of course, these titles need not be available on that specific service for consumers to access the titles in digital formats.⁶ Many classic titles are available through streaming services.

⁶ The *Newsweek* article cited by OmniQ actually notes that some of the titles not available through Netflix were available through Amazon Video. Although OmniQ misquotes the article as calling Amazon’s library “abominable,” that word in the article actually referred to Netflix’s classic library. The article says that Amazon has “a pretty robust streaming catalog.” Indeed, the article states that “[y]ou can find plenty of classic cinema on streaming if you know where to look.” Zach Schonfeld, [Netflix, Streaming Video and the Slow Death of the Classic Film](#), NEWSWEEK (Sept. 15, 2017).

For example, the [Warner Archive website](#) streams movies from the Warner Bros. catalogue and includes movies grouped by decade, going back to the 1920s. For \$7.99 per month, a consumer can gain unlimited access to streams of these movies. Many of these titles may also be ordered on DVD through Amazon, which offers “manufacture-on-demand” disc ordering. Once obtained on an authorized disc, digital copies of the titles may be obtained through the Vudu Disc-to-Digital program, which renders them accessible through Movies Anywhere.⁷ Vudu itself offers hundreds of titles [from prior to 1950 for online streaming](#). Vudu also offers hundreds of titles [from the 1960s](#) (currently including *Spartacus* and *Psycho*, which the *Newsweek* article lamented were not available on Netflix). [Tribeca Shortlist](#), which can be added to an Amazon account for \$4.99 per month, streams many classic titles as well (currently including *The Apartment* and *Peeping Tom*, which the *Newsweek* article also lamented were not available on Netflix). [Filmstruck](#), which offers subscriptions starting at \$6.99 per month, also streams many classic movies. Regardless, OmniQ’s position that “what isn’t available to stream doesn’t exist” is an illogical fallacy. OmniQ 2017 Comment at 33.

3. The Register Should Reject OmniQ’s “Non-Reproductive Space-Shifting” Proposal For The Same Reasons That It Failed In 2015.

Perhaps because it knows that a fair use argument is specious (*see infra*), OmniQ attempts to avoid the issue by claiming that it can enable space-shifting (and digital resale, one of its actual end goals) without engaging in infringement of any exclusive right belonging to copyright owners under 17 U.S.C. § 106. This scheme is bogus – OmniQ’s “invention” would undoubtedly infringe the reproduction right. However, the Register need not reach the factual or

⁷ Of course, if the consumer already has a classic title on disc, which OmniQ’s proposal presumes, the Disc-to-Digital program is already available to the consumer.

legal issues involved in making that conclusion, because OmniQ’s “invention,” which it has been touting for several years, still does not exist.

In 2015, the Register concluded that she could “not credit OmniQ’s arguments in light of its failure to establish that the technology it advocates has actually been developed.” 2015 Rec. at 123. Now, three years later, OmniQ concedes that it *still* has not developed a prototype of its purported invention. OmniQ 2017 Comment at 18. The lack of a working prototype makes it unlikely that adverse effects will be felt on any noninfringing use in the next three years.

To excuse its failure to actually develop the system, OmniQ argues that requiring a prototype is a form of “entrapment.” *Id.* This position is misguided. There are plenty of copies of motion pictures that are not protected by access controls that OmniQ could use to exhibit the basic functionality of its invention and to demonstrate that it does not make a copy of the underlying work. Moreover, if access controls limit access to works in the public domain, § 1201 would not stand in OmniQ’s way.⁸

Next, OmniQ argues that it should not have to produce a prototype because that is not required to file a patent application. *Id.* OmniQ’s position is completely irrelevant and attempts to establish a false equivalency. The standard for granting an exemption under 17 U.S.C. § 1201(a)(1)(C) is entirely distinct from the standard for reviewing patent applications and as such, has no bearing on this proceeding.

4. OmniQ’s Purported Invention Would Reproduce Works.

As OmniQ has previously stated, its invention “marries a scanner with a shredder.” OmniQ, [Comments Regarding Mass Digitization](#) at 1 (Oct. 9, 2015). Its hypothetical

⁸ OmniQ maintains that some ripping technologies do not involve circumventing access controls, only copy controls. OmniQ 2017 Comment at 14. As discussed in the comments submitted by AACS LA, this is incorrect. However, if OmniQ were correct that ripping technologies did not require circumvention of access controls, there would be no need for an exemption.

technology is therefore distinguishable from transferring physical copies of images onto new objects, which is the conduct at issue in the primary cases OmniQ cites for support. *See* OmniQ 2017 Comment at 24-27; *see also* 2105 Rec. at 123 (distinguishing cases involving “physical rather than digital copies of copyrighted works”). The copy resident on the new machine after OmniQ delivered it to a consumer would be physically distinct from the copy deleted from the disc. It would constitute an entirely new thing, consisting of different electrons, that is capable of enabling perception of the same work (*i.e.*, a copy). *See* 2015 Rec. at 123, n. 773 (“It is beside the point that the original phonorecord no longer exists. It matters only that a new phonorecord has been created.”), quoting *Capitol Records, LLC v. ReDigi, Inc.*, 934 F. Supp. 2d 640, 650 (S.D.N.Y. 2013).

This would remain true even if OmniQ’s technology was able to delete an existing copy on a disc, store the work in a “more convenient substrate,” OmniQ 2017 Comment at 2, in a temporary manner, and then deliver a copy to another machine. *See* U.S. Copyright Office, [DMCA Section 104 Report](#) 123 (Aug. 2001) (“Section 104 Report”). The temporary copies generated by OmniQ prior to delivery would implicate the reproduction right, as would the copy transmitted to the new end user.

(a) *OmniQ’s Argument Conflicts With The Copyright Act, Its Legislative History, Case Law, And International Agreements.*

“Copies,” as defined in the Copyright Act, “are material objects ... in which a work is fixed by any method ... and from which the work can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device.” 17 U.S.C. § 101. “A work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy or

phonorecord . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” *Id.*

Courts have held that temporary copies are reproductions. *E.g.*, *MAI Sys. Corp. v. Peak Computer Inc.*, 991 F.2d 511, 519 (9th Cir. 1993); *Stenograph LLC v. Bossard Assocs., Inc.*, 144 F.3d 96, 101-02 (D.C. Cir. 1998). The Copyright Office has reached the same conclusion. Section 104 Report at 111. Moreover, the United States is obligated under binding international agreements to protect temporary copies. *See, e.g.*, *U.S. - Korea FTA*, June 30, 2007, 46 I.L.M. 642, art. 18.4.1 (“Each Party shall provide that authors, performers, and producers of phonograms have the right to authorize or prohibit all reproductions of their works, performances, and phonograms, in any manner or form, permanent or temporary (including temporary storage in electronic form).”); *U.S. – Australia FTA*, May 18, 2004, 43 I.L.M. 1248, art. 17.4.1 (same); *U.S. – Singapore FTA*, May 6, 2003, 42 I.L.M. 1026, art. 16.4.1 (same); *Berne Convention for the Protection of Literary and Artistic Works*, Sept. 9, 1886, as revised July 24, 1971, and as amended Sept. 28, 1979, S. Treaty Doc. 99-27, 1161 U.N.T.S. 3., art. 9(1); *WIPO Copyright Treaty*, Dec. 20, 1996, 36 I.L.M. 65 (1997), art. 1(4).

In the Section 104 Report, the Copyright Office reasoned as follows:

[A] general rule can be drawn from the language of the statute. In establishing the dividing line between those reproductions that are subject to the reproduction right and those that are not, we believe that Congress intended the copyright owner’s exclusive right to extend to all reproductions from which economic value can be derived. The economic value derived from a reproduction lies in the ability to copy, perceive or communicate it. Unless a reproduction manifests itself so fleetingly that it cannot be copied, perceived or communicated, the making of that copy should fall within the scope of the copyright owner’s exclusive rights. The dividing line, then, can be drawn between reproductions that exist for a sufficient period of time to be capable of being “perceived, reproduced, or otherwise communicated” and those that do not.

Section 104 Report at 111.

The Office based its reasoning on a careful review of the Copyright Act’s legislative history. *Id.* at 121 (“Except for reproductions that do not persist long enough to be perceived, reproduced or otherwise communicated, the text and legislative history of the Copyright Act support the conclusion that Congress intended temporary reproductions in RAM to be ‘copies.’”). The Office also concluded that its interpretation was consistent with international norms. *Id.* at 111 n. 338 (“It is also consistent with ‘a quite well-established position at the international level’ that ‘fixation means sufficient stability of form so that what is ‘fixed’ may be perceived, reproduced or otherwise communicated.’”), quoting Mihály Ficsor, *Copyright for the Digital Era: The WIPO “Internet” Treaties*, 21 Colum. VLA J. L. and the Arts 197, 205 (1997).

(b) *Cartoon Network Does Not Render OmniQ’s Scheme Lawful.*

Without addressing the Section 104 Report, OmniQ relies on *Cartoon Network, LP v. CSC Holdings, Inc.*, 536 F.3d 121, 127 (2d Cir. 2008). However, OmniQ does not demonstrate that even under *Cartoon Network* its temporary copying would not implicate the reproduction right. There, the court arbitrarily concluded that if a temporary copy only exists for 1.2 seconds, it is not actionable. OmniQ does not demonstrate that its invention is capable of delivering copies of motion pictures to end users after storing the works in its own servers for less than 1.2 seconds.

In addition, *Cartoon Network* contains an erroneous analysis of the Copyright Act that is inconsistent with the Copyright Office’s prior, sound interpretation of the statute (which was based on the statute, the legislative history, and the international norms with which Congress has strived to comply). As discussed above, the Office’s approach to determining whether a temporary copy implicates the reproduction right was based on the economic significance of the copy. OmniQ’s temporary copies would clearly have economic significance, as they are the

generative input for its commercial enterprise. Any other standard is too difficult to apply. *See* Section 104 Report at 112 (“[A]ttempting to draw a line based on duration may be impossible. . . . How temporary is temporary? Hours? Minutes? Seconds? Nanoseconds? The line would be difficult to draw, both in theory and as a matter of proof in litigation.”). The Register should take this opportunity to once again articulate an interpretation of the reproduction right that is consistent with the statute, Congressional intent, and our international obligations.

5. Space-Shifting Is Not Fair Use.

(a) The Register’s Prior Fair Use Analyses Have Now Been Confirmed By The Ninth Circuit.

As stated in the NPRM, “in the 2006, 2012, and 2015 triennial rulemakings, the Librarian rejected proposed exemptions for space-shifting or format-shifting, finding that the proponents had failed to establish under applicable law that space-shifting is a noninfringing use.” NPRM at 49,560. None of the commenters attempted to explain why the Register should reach a different conclusion today. If anything, the Register’s past position has been validated by recent judicial proceedings. Since the last rulemaking cycle, the Ninth Circuit definitively rejected the notion, frequently relied upon by proponents in past cycles, that its prior decisions – in *RIAA v Diamond Multimedia*, 180 F.3d 1072, 1079 (9th Cir. 1999) and *Fox Broad. Co., Inc. v. Dish Network LLC*, 747 F.3d 1060, 1068-69 (9th Cir. 2014) – held that space-shifting is a fair use. *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 862 (9th Cir. 2017) (“The reported decisions unanimously reject the view that space-shifting is fair use under § 107.”). In doing so, the Ninth Circuit credited the Register’s prior determinations that “the law of fair use, as it stands today, does not sanction broad-based space-shifting or format-shifting.” *Id.* (quoting [Exemption to Prohibition](#)

[on Circumvention of Copyright Protection Systems for Access Control Technologies: Final Rule](#), 80 Fed. Reg. 65,944, 65,960 (Oct. 28, 2015)); *see also* 2015 Rec. at 121-22.

(b) *The Fair Use Factors Weigh Against Space-Shifting.*

Even without clear precedent, an analysis of space-shifting using the familiar four-factor fair use test weighs heavily against a finding of fair use. Under the first factor, the purpose and character of the use is to reproduce works to be used in the same manner as they were initially released – for entertainment purposes. Put differently, the practice of space-shifting is not transformative. 2015 Rec. at 122 (“proponents plainly seek to use works for the same entertainment purposes as were originally intended”). It is also commercial, in that it involves obtaining a benefit (access to multiple, digital copies) that requires paying more at the point of sale in the marketplace. *See Soc’y of Holy Transfiguration v. Gregory*, 689 F.3d 29, 61 (1st Cir. 2012) (“In effect, the commercial-noncommercial distinction the law draws centers not on whether a user intends to line his own pockets, but rather on ‘whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.’”) (citation omitted); *see also A & M Records, Inc. v. Napster, Inc.*, 239 F. 3d 1004, 1015 (9th Cir. 2001) (Napster users were engaged in commercial use because they “get for free something they would ordinarily have to buy”) (quoting *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 912 (N.D. Cal. 2000)). Moreover, space-shifting is not for the purpose of criticism, commentary, news reporting, or education, and OmniQ’s true purposes are not of a nonprofit or educational nature. OmniQ 2017 Comment at 1.

Under the second factor, virtually all professionally-produced motion pictures are creative and expressive works receiving the full protection of the Copyright Act. 2015 Rec. at 123. Under the third factor, fair use is disfavored because entire works would be copied. *Id.*

Under the fourth factor, the fact that MPAA members and other copyright owners are exploiting the market for providing access to multiple digital copies, as described at length *supra*, weighs against a finding that OmniQ’s intended use is fair. *Id.* (“[Opponents submitted extensive evidence concerning existing markets for DVD and Blu-ray discs, as well as a variety of emerging internet-based distribution services. Opponents assert that unfettered personal copying will harm these distribution models, some of which are specifically aimed at allowing consumers to access works already owned on physical media through online channels. The burden lies with proponents to show lack of market harm.”). The fourth factor weighs especially heavily against OmniQ’s proposal because it does not actually seek to enable personal copying. To the contrary, OmniQ admits it wants “to build the world’s biggest video store” by hacking encryption and offering digital transmissions of movies to paying members of the public. OmniQ 2017 Comment, Declaration of Mark Vrieling at 1.⁹

Given that not one factor favors a fair use finding with respect to space-shifting, the Register should once again conclude that space-shifting is unlikely to be a fair use. Indeed, based on the clarity of the *VidAngel* opinion, and on the continued development of the commercial marketplace for accessing digital copies, the Register should conclude that space-shifting of motion pictures is *not* a fair use.

6. Alternatives To Circumvention Exist.

As discussed above, consumers can access digital copies and transmissions through a variety of offerings and services, at different price points. *See* 2015 Rec. at 124 (“Nor have proponents sufficiently demonstrated that services, including online download or streaming

⁹ OmniQ claims that it is distinct from Zediva, the DVD streaming business found to be infringing in *Warner Bros. Entm’t Inc. v. WTV Sys.*, 824 F. Supp. 2d 1003 (C.D. Cal. 2011). OmniQ 2017 Comment at 23-24. However, OmniQ’s business model is the same. Only the minutiae of the technology is different.

services, Disc-to-Digital services, digital rights locker systems, ‘TV Everywhere’ or similar on-demand services, do not provide reasonable alternatives to circumvention. Opponents introduced detailed evidence of a wide variety of platforms and media that can serve as alternatives to circumvention.”).

There is absolutely no need for a consumer to circumvent any access control for the purpose of space-shifting when an authorized digital copy is already included in the purchase price of “bonus packs” and available by simply redeeming a code on a website. There is also absolutely no need for a consumer to circumvent any access control for the purpose of space-shifting when authorized digital copies are already available for rental, or as long-term downloads, or via the Disc-to-Digital program, all at very reasonable prices. Nor is there a need to circumvent an access control if the work at issue is available through a subscription service for streaming or time-limited downloading.

The proponents have not established a record to demonstrate there is any content that can only be accessed via physical media such as Blu-ray discs or DVDs. Moreover, even if such content exists, consumers can connect disc players to laptops to watch movies when out of the home. *See* 2015 Rec. at 125 (“[I]t remains possible to access disc media through the use of peripheral devices.”); *see also* [Computer Optical Drives](#). OmniQ’s complaints about how supposedly inconvenient this is do not form a sufficient basis to grant an exemption. OmniQ 2017 Comment at 43. As the Register has noted previously, exemptions cannot be issued simply to remedy “mere inconveniences.” *See* 2015 Rec. at 15-16 (“To prove the existence of adverse effects, it is necessary to demonstrate ‘distinct, verifiable and measurable impacts’ occurring in the marketplace, as exemptions ‘should not be based upon *de minimis* impacts.’ Thus, ‘mere inconveniences’ or ‘individual cases’ do not satisfy the rulemaking standard.”) (citations

omitted); U.S. Copyright Office, [Section 1201 Rulemaking: Fifth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention: Recommendation of the Register of Copyrights](#) at 165 (2012) (“2012 Rec.”) (“[C]onsumers’ inability to ‘access all of their media in a single interface and launch the video of their choice at the touch of a button’ goes to convenience rather than necessity.”).

7. Each of the Section 1201(a)(1)(C) Factors Disfavors An Exemption For Space-Shifting.

(a) A Space-Shifting Exemption Would Not Increase The Availability For Use Of Copyrighted Works.

OmniQ has acknowledged that it wants to “to build the world’s biggest video store” by ripping movies from discs and renting or selling them to consumers. OmniQ 2017 Comment, Declaration of Mark Vrieling at 1. Such a model would clearly deprive copyright owners of the ability to exercise their exclusive rights; decrease revenue from the lawful sale of digital content in favor of unlawful copies; and ultimately threaten the viability of creative output made available commercially. Whether consumers space-shifted their owns discs, or OmniQ circumvented to build its own business based on unauthorized copies, the outcome would be to undermine digital business models that would be forced to compete with unauthorized, so-called space-shifting, decreasing the availability of works in multiple formats.

If OmniQ were to proceed, copyright owners would be less likely to make available lower priced options that limit the number of copies a consumer might make, or which restrict platforms through which a work could be accessed. Instead, copyright owners would have to price all formats based on the assumption that consumers would make an unlimited number of copies for each authorized copy sold, and that each of those copies would be accessible on

multiple devices, to multiple consumers. *See* 2012 Rec. at 163 (“[C]opyright owners typically have the legal authority to decide whether and how to exploit new formats.”).

(b) *There Are No Non-Profit Archival, Preservation or Educational Uses At Issue.*

Space-shifting is unrelated to archival, preservation or educational purposes. As the Register previously concluded, space-shifting “is simply a means for an individual consumer to access content for the same entertainment purpose as the original work.” 2012 Rec. at 164. Although OmniQ makes passing references to its desire to market its services to libraries as a “public benefit corporation,” OmniQ 2017 Comments at 1, these claims are clearly inserted into its comments in a transparent attempt to shoehorn its otherwise admittedly for-profit scheme into something that, OmniQ apparently believes, will appear more palatable to the Register. The bottom line is that “OmniQ is a joint venture *for the commercial development* of a method for nonreproductive substitution of the material object in which a work is fixed.” OmniQ 2017 Comment at 1 (emphasis added).

(c) *Space-Shifting Does Not Involve Criticism Or Commentary.*

Space-Shifting is unrelated to criticism or commentary. OmniQ argues that its proposal benefits criticism and commentary because those activities “require some manner of access to the work.” OmniQ 2017 Comment at 35. But if that were the standard, all of the proposed exemptions could be said to benefit criticism and commentary because every exemption, by definition, immunizes circumvention for the purpose of gaining access. OmniQ’s proposal is about nothing more than enabling OmniQ to sell access to works it had no role in creating. While some may engage in protected criticism or commentary as a result of such access, for the

reasons stated previously, there are ample other channels from which to source motion pictures, and separate exemptions applicable to criticism and commentary.

(d) *A Space-Shifting Exemption Would Negatively Impact The Market For And Value Of Copyrighted Works.*

The proponents' desired uses would negatively impact the value of motion pictures because space-shifting not only results in the generation of in-the-clear (or "in the wild," as OmniQ calls it (OmniQ 2017 Comment at 4)) copies that can be disseminated widely, but also directly competes with authorized offerings. OmniQ's claim that it would encrypt copies while transferring them is suspect, and its explanation of how this would be done is insufficient. OmniQ 2017 Comment at 15-17. Regardless of whether OmniQ's copying would enable post-circumvention dissemination of works through peer-to-peer networks or cyberlockers, OmniQ's business model would lower the value of works because copyright owners who sell access to copies in one format at a particular price point would be deprived of the ability to sell access to that work in other formats, or to charge higher prices for bundled access to works in multiple formats. *See* 2015 Rec. at 124 ("[C]onsumers pay lower prices for movies on DVD or Blu-ray discs than they would pay if those movies could be converted to any digital format and/or copied an unlimited number of times."). This would actually harm consumers, who enjoy having options with respect to price for different formats or licensed copying options.

(e) *Other Factors Disfavor A Space-Shifting Exemption.*

OmniQ's claims that the Register should recommend an exemption because it will facilitate digital resale of motion pictures.¹⁰ The Register should reject this contention, as

¹⁰ OmniQ inexplicably also claims that "OmniQ's petition for an exemption for non-reproductive space-shifting has nothing to do directly with the first sale doctrine." OmniQ 2017 Comment at 9.

OmniQ is seeking to engage in the provision of a circumvention service or the dissemination of circumvention tools, which is outside the scope of this rulemaking. *See, e.g.*, OmniQ 2017 Comment at 26 (describing service that would rip DVDs for “customers”). Moreover, OmniQ vastly overstates the supposedly positive impact that digital resale would have on the marketplace for accessing motion pictures. Indeed, as discussed previously, the flourishing market for digitally distributed motion pictures illustrates how the market is already serving consumers well in the absence of OmniQ’s proposed exemption.

Those who have studied this issue, including the Copyright Office, have consistently declined to recommend the creation of a so-called “digital first sale doctrine.” The Office’s 2001 Section 104 Report on the DMCA specifically did not recommend the creation of a digital first sale doctrine. Section 104 Report at 96-97. In 2015, the Register reaffirmed the Copyright Office’s recommendation that Congress not legislate to create a digital first sale defense. *See Register’s Perspective On Copyright Review, hearing Before the Committee on the Judiciary, House of Representatives, 114th Cong. 1st Sess., Apr. 29, 2015, at 55* (statement of Ms. Pallante) (“I would probably monitor that situation at this point. I don’t see a need for congressional legislation, anyway, at this point.”). Finally, the Commerce Department Internet Policy Task Force concluded that existing legal offerings already provide many of the benefits of first sale:

[T]he marketplace for online delivery of works is providing a number of the benefits of the first sale doctrine to varying degrees. A number of popular online services permit copies to be shared with or lent to family and friends, although sharing features do not necessarily mirror the ease of the first sale doctrine. Other services offer rental of copies or access-based equivalents. While they generally do not permit transfers of ownership of a digitally transmitted copy, they typically do deliver a principal benefit of secondary markets—lower prices than for the purchase of new copies.¹¹

¹¹ This conclusion was endorsed in the Register’s December 2016 Study of Software-Enabled Consumer Products. *See* U.S. Copyright Office, [Software-Enabled Consumer Products: A Report of the Register of Copyrights](#) 30-31 (2016).

Department of Commerce Internet Policy Task Force, [White Paper on Remixes, First Sale, and Statutory Damages](#) 58 (2016).

Not only do the licensed digital services described *supra* provide many of the benefits of the first sale defense, as described by the White Paper, but they also offer *additional* benefits that in many cases go well beyond what the first sale defense enables. These benefits include portability, cross-platform compatibility, the ability to share multiple copies with family or friends, the availability of cloud storage, and the ability to re-download copies of purchased titles in the event of loss or even for convenience of storage. *See* 2015 Rec. at 16 (“[W]eighing these factors requires the consideration of the benefits that the technological measure brings with respect to the overall creation and dissemination of works in the marketplace, in addition to any negative impact. As Congress explained, ‘the rulemaking proceedings should consider the positive as well as the adverse effects of these technologies on the availability of copyrighted materials.’”) (citation omitted). The Register should reject the proposed class of works.

DOCUMENTARY EVIDENCE

The Joint Creators and Copyright Owners are not submitting any exhibits for this proposed class. Throughout the comment, links are provided for documentary evidence.

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