



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 4: Audiovisual Works – HDCP/HDMI

ITEM C. OVERVIEW

Proposed Class 4 is a brand new proposal without meaningful support in the record. Only two, conclusory submissions were filed in support of the proposal. Neither submission provided sufficient facts or legal argument to justify recommending an exemption for circumventing the High-Bandwidth Digital Content Protection (“HDCP”) encryption used on High-Definition Multimedia Interface (“HDMI”) cable transmissions. As discussed in the comments filed by Digital Content Protection, LLC, this critical access control protects some of the highest-value, creative content available to consumers today, including cable and satellite television programming, on-demand movie rental streams, and video games.

Petitioner Andrew “Bunnie” Huang (“Huang”), who apparently resides in Singapore, submitted the only supporting comment containing any substance.¹ However, his comment did not adequately address the four questions posed by the Notice of Proposed Rulemaking: (1) Which specific types of audiovisual content need to be accessed? (2) Which noninfringing uses

¹ One commenter, the Free Software Foundation (“FSF”), submitted 163 purported “signatures” with a supportive comment. However, FSF submitted these same names in support of every proposed class of works. These individuals, most of whom reside outside the United States, appear to support FSF’s general, anti-access controls message, not necessarily the need for an exemption related to this specific proposed class.

are implicated? (3) Do viable alternatives to circumvention exist? (4) Would the market for works be harmed? *Exemptions To Permit Circumvention of Access Controls on Copyrighted Works: Notice of Proposed Rulemaking*, 82 Fed. Reg. 49,550, 49,560 (Oct. 26, 2017) (“NPRM”).

With respect to the first two questions, his response was that the proposed class should include all audiovisual works for the purpose of making any lawful use. Huang, *Class 4 Long Comment* at 5 (Dec. 18, 2017) (“Huang 2017 Comment”). The Register has never recommended such a broad, improper exemption.

With respect to the third question, Huang ignores many alternatives to circumvention, including the existing exemptions for creating criticism and commentary of motion pictures; licensed devices that enable consumers to engage in the activity he claims he will facilitate; and his own device, the “NeTV,” which appears to enable much of the conduct, he claims, without circumvention.² See Complaint, *Green v. U.S. Department of Justice*, Case No. 1:16-cv-01492, paras. 88-98 (D.D.C. filed July 21, 2016) (“Green Complaint”).

With respect to the final question, Huang ignores the threat of piracy entirely and brushes over the fact that what he seeks to do is to distribute an illegal circumvention tool, the “NeTVCR.” *Id.* ¶¶ 88-113. Such conduct would constitute a trafficking violation under 17 U.S.C. § 1201(a)(2). As the Register recently concluded in the Section 1201 Study, encouraging the creation of such tools is not only outside the scope of this rulemaking; it is also bad policy. 1201 Study at 56 (“[T]he Office agrees with the commenters who argued that it would be impossible to control the downstream uses of any circumvention tools once distributed, even if they were produced with the intent that they be used only to assist authorized circumvention.”).

² The Joint Creators and Copyright Owners do not have sufficient information to judge the accuracy of Huang’s claim that the NeTV device does not engage in circumvention.

The petitioner has the burden to establish an entitlement to an exemption, and here he has failed to do so.

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

HDCP technologies protect high-value digital transmissions of motion pictures, television programs, video games, and audio against unauthorized interception and copying while a digital set-top box, disc player, video game console, or digital video recorder delivers the content to a television or computer for viewing. *See [Digital Content Protection, LLC Website](#).* HDCP is a specification developed by Intel Corporation to protect digital entertainment across a wide variety of devices' digital interfaces.

The system is also designed to prevent HDCP-encrypted content from being played on unauthorized devices that expose works to copying, unauthorized viewing or listening, and redistribution. The technology enables a service provider to identify whether a particular receiver is authorized to receive the content before transmitting encrypted copyrighted works. If the receiver is an authorized device, the transmitter provides the content, but encrypts it to prevent interception.

HDCP is recognized as the industry standard by content providers and device manufacturers. More than five-hundred companies license the HDCP technology, and to date, Digital Content Protection, LLC ("DCP") has issued billions of HDCP keys. Licenses are available through [DCP's website](#).

Efforts to enable circumvention of HDCP present a real threat to legitimate entertainment offerings. According to DCP, it has taken action to remove over 4,000 online listings for devices designed to circumvent HDCP. Such devices devalue creativity and harm the market for copyrighted works because, for example, video-on-demand business models based on charging

lower prices for time-limited access to movies are undermined when end users can create complete digital copies of transmitted works to add them to their permanent digital libraries while paying only for temporary access. Without HDCP to prevent unauthorized access to such transmissions, low-priced movie rentals would easily supplant purchases of discs and other digital copies of motion pictures. This would harm consumers, who benefit from having lower-priced options available in the marketplace.

The comments submitted by DCP provide a more detailed description of the HDCP technology and the entertainment ecosystem it supports.

ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGEMENT USES

1. HDCP Protects Subscription, On-Demand, And Other Content, Thereby Making Works More Readily Available To Consumers.

To deliver digital content to consumers via innovative means, it is crucial that secure access controls are in place to facilitate the business models that generate the revenue that enables recoupment, reinvestment, and creation of the content. Common technological specifications like HDCP benefit consumers greatly because copyright owners and device manufacturers can agree upon methods of protection that need not vary significantly across devices. These standards have led to broader availability of content and devices designed for accessing entertaining motion pictures, audio, and video games.

Although over-the-air, high-definition, network television can be received through a digital antenna and viewed on televisions without implicating any HDMI cable protected by HDCP, many of the most popular methods of accessing audiovisual works involve HDCP protection.

(a) *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. These providers also offer access to music-focused channels, such as [Music Choice](#). In addition, their on-demand and remote access options are growing rapidly. A subscriber to [Comcast Xfinity](#), for example, can use a laptop to 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 for limited-time rental or for longer-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. HDCP is a key aspect of the technological systems used to protect the content.

(b) *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. [YouTube Red](#) also offers premium, subscription access to music videos and other videos. 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 so long as 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 also provides subscription access to [HBO](#), [SHOWTIME](#), and [Cinemax](#) programming, as well as to a number of other networks traditionally associated with network 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.

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 TV programming is becoming quite robust.

Each service allows for the use of multiple devices associated with a single account, thereby enabling access throughout a household by multiple family members. Once these services deliver protected content to the home, HDCP protects the transmission of the content between the receiving device and computers, smart TVs and other devices. HDCP also ensures usage and access rules are properly followed.

(c) 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 viewing.

(d) *Digital Rental*

Online retailers like [iTunes](#), [Google Play](#), [Amazon Video](#), [Vudu](#), and others make motion pictures available for short-term rental at relatively low prices – lower than the prices charged for permanent access, or for optical discs. Once rented, the movies may be streamed directly from these services or downloaded temporarily to devices to enable mobile viewing during the rental period. Some services, like [Amazon Video](#), give the user up to 30 days to begin watching the movie after the rental transaction. 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) *Video Game Consoles*

As discussed above, video game consoles have evolved to provide access to motion pictures through subscription services, on-demand rentals, and other offerings. Of course, consoles also continue to enable consumers to enjoy playing innovative video games. Consoles sold by Microsoft, Sony, and Nintendo even enable consumers to record and edit video of their game play. *See* ESA, Class 4 Long Comment (Feb. 12, 2018). These recordings can then be uploaded to the Internet, for enjoyment on websites like Twitch and YouTube.

(f) *Discs*

Of course, discs include encrypted copies of motion pictures that require their own keys to permit access and viewing. DVDs utilize the Content Scramble System (“CSS”); Blu-ray discs utilize the Advanced Access Content System (“AACS”); and Ultra HD discs utilize

AACS2. However, once the motion picture is decrypted using licensed keys, the transmission from the player to the television is encrypted using HDCP. Thus, it serves as the last link in the chain of protection.

2. The Petitioner Has Failed To Identify Any Substantial Adverse Effect On A Noninfringing Use.

Huang's comments, like the federal complaint from which they are largely paraphrased, take the approach of throwing mud at the wall to see if anything will stick. *See generally* Green Complaint. Rather than articulate a specific noninfringing use that has been substantially impacted by the prohibition on circumvention, he instead posits that the Register should recommend an exemption covering circumvention of HDCP for any lawful purpose. Huang 2017 Comment at 2-3.³ Such requests do not comport with the requirements of the law. Indeed, as the Register has repeatedly determined, such an approach to crafting exemptions is improper. *See* U.S. Copyright Office, [Section 1201 Rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention: Recommendation of the Register of Copyrights](#) 99 (2015) (“2015 Rec.”) (“A mere requirement that a use be ‘noninfringing’ or ‘fair’ does not satisfy Congress’s mandate to craft ‘narrow and focused’ exemptions. Accordingly, the Register has previously rejected broad proposed categories such as ‘fair use works’ or ‘educational fair use works’ as inappropriate. An exemption should provide reasonable guidance to the public in terms of what uses are permitted, while at the same time mitigating undue consequences for copyright owners.”).

³ Huang asserts that his hypothetical examples “demonstrate the broad constellation of uses that are adversely effected, and attempting to craft a piecemeal exemption will inevitably leave numerous important and legitimate uses lost in the cracks.” Huang 2017 Comment at 5. This bald assertion is insufficient to support recommending an exemption.

Huang does offer a list of hypothetical examples of uses he proffers consumers could engage if they could circumvent HDCP. Huang 2017 Comment at 2-3. However, this list provides very little detail regarding each individual use at issue or why circumvention is required to engage in the use. *See* NPRM at 49,558 (“[T]he Office favors specific, ‘real world’ examples supported by evidence over speculative, hypothetical observations.”); U.S. Copyright Office,

Section 1201 Rulemaking: Fifth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention: Recommendation of the Register of Copyrights 155 (2012)

(“2012 Rec.”) (“[U]nless the burden of showing a *prima facie* case is met, the statutory standard established for the rulemaking does not permit the designation of a class of works. Presenting strong arguments in favor of exempting a class of works from the prohibition on circumvention is only one part of the process; a proponent must also provide sufficient facts to justify a finding that the prohibition is actually having or is likely to have an adverse effect on noninfringing uses.”).

Because Huang has not provided nearly enough detail to assess whether HDCP “is actually having or is likely to have an adverse effect” on any of these uses, Huang has failed to meet his burden. *See* NPRM at 49,558 (“Proponents of exemptions should present their complete affirmative case for an exemption during the initial round of public comment …”).

Moreover, at least some of the uses Huang claims he wants to facilitate are likely infringing. For example, Huang states that “circumvention of HDCP is necessary to recapture the functionality of VCR machines that once allowed for time, format, and space-shifting of ephemeral signals.” Huang 2017 Comment at 3. Of course, the Register has repeatedly concluded that space-shifting is likely infringing, *e.g.*, 2015 Rec. at 123, and the Ninth Circuit recently validated those conclusions. *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.”). Huang does not address with any detail the Register’s prior analyses of the issue, instead electing to simply cite *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), for support despite the Register’s previous conclusions that the opinion does not support a holding that space-shifting is a fair use. 2015 Rec. at 121.

Indeed, even with respect to time shifting, the Register has concluded that the *Sony-Betamax* opinion is not as expansive as exemption proponents claim. *Id.* at 107 n. 645 (“[T]he Supreme Court defined [time-shifting] in the context of broadcast television as ‘record[ing] a program [one] cannot view as it is being televised and to watch it once at a later time.’”) (citing *Sony*, 464 U.S. at 421). The Register has also noted the *Sony-Betamax* opinion “declined to address the practice of ‘librarying,’ or maintaining long-term copies of works. ‘Librarying,’ however, is clearly one of the uses contemplated by proponents here.” *Id.* at 121.

Other uses identified by Huang are also legally suspect. For example, he states that he wants to circumvent HDCP to “identify content inappropriate for minors.” Huang 2017 Comment at 3. Understanding the details of the process he is suggesting would be critical to assess whether Huang is describing a lawful use. *See VidAngel*, 869 F.3d at 861 (“Although removing objectionable content may permit a viewer to enjoy a film, this does not necessarily ‘add[] something new’ or change the ‘expression, meaning, or message’ of the film. … *Star Wars* is still *Star Wars*, even without Princess Leia’s bikini scene.”) (emphasis in original).

The “commercial expression” that Huang claims he wants to enable, such as “a business rescaling the video to display targeted advertisements in the margins, such as ads for local businesses or certain products,” Huang 2017 Comment at 2, could also involve infringing the adaptation right or public performance right. In addition, this is hardly the type of conduct that

Congress created this proceeding to address. *See* 17 U.S.C. § 1201(a)(1)(C) (instructing Register to focus on nonprofit archival, preservation and educational purposes, as well as criticism, comment, news reporting, teaching, scholarship, or research).

In sum, Huang's cursory discussion of whether his list of hypothetical uses would qualify as fair fails to establish that they would. It is not enough to simply assert that everything at issue is transformative and thus that no copyright owner would be harmed. Huang 2017 Comment at 4. Indeed, some of the uses clearly are not transformative and supplant authorized copies, including space-shifting.

3. Viable Alternatives to Circumvention Exist.

Although some of the hypothetical uses listed by Huang might qualify as noninfringing,⁴ these uses are either already achievable by virtue of some other exemption, or can be readily achieved without the need to circumvent. First, to the extent that time shifting of broadcast television programming is a fair use, it is already facilitated by numerous devices. For example, time-shifting devices are provided by [TiVo](#); by cable, satellite, and over-the-top television providers who enable the use of in-home and remote DVRs; and by those same providers, and by networks and channels directly, through provision of on-demand, online access to subscribers.⁵

Second, Huang tries to piggy-back on existing exemptions for educators seeking to create compilations of short portions of motion pictures for use in the classroom, and noncommercial remix video creators. However, those categories of users already have exemptions and have

⁴ Huang does not provide enough details about any specific use to determine whether the use would be lawful.

⁵ As discussed above, space-shifting is not a lawful use. Regardless, there are many alternatives to circumvention that enable consumers access to digital copies of motion pictures, including via electronic sell through, rental options, the Vudu Disc-to-Digital program, streaming services, and the cloud storage services Movies Anywhere and UltraViolet. *See* Joint Creators and Copyright Owners, Class 3 Long Comment (Feb. 12, 2018).

never demonstrated that it is necessary to circumvent HDCP in order to engage in the relevant criticism and commentary.

Third, several of the uses on which Huang is focused involve creating visual overlays, split screens, and rescaling. It appears that the NeTV device that is already available for purchase and was developed by Huang is designed to enable similar uses.⁶ See [NeTV Starter Pack](#) (“NeTV enables overlaying your web content on existing HDMI video feeds, such as those from a Blu-ray player or cable box. . . . Out of the box, the reference firmware enables the overlay of Facebook and Twitter feeds, and SMSes from Android phones.”). Moreover, although the Joint Creators and Copyright Owners have not analyzed the issue, he claims that this device does not involve circumvention. Green Complaint ¶ 98.

Other licensed devices also enable some of these uses. For example, televisions with split-screen capability are easily located. See [How to use the Twin Picture function on Sony's Android TV?](#); YouTube Video, [How to use PiP \(Picture in Picture\) on a Samsung TV to Watch 2 Screens at once](#); Sony Support Page, [Displaying picture-in-picture \(PIP\)](#). Even if a screen view cannot be split, two devices could be placed side-by-side for essentially the same experience. In fact, if a person wants to watch a political debate and read a blog at the same time, a mobile phone in one’s hand can achieve the purpose. Moreover, Huang has not demonstrated, even assuming *arguendo* that no device currently on the market can achieve one of the uses he describes, that a person could not get a DCP license to market such a device.

Fourth, Huang references “scientific research to automatically generate subtitles, [to] flag flashing imagery to protect viewers with epilepsy, [or to] analyze the portions of lines spoken by

⁶ Huang claims that the new device he wants to sell, the NeTVCR would provide the added functionality of recording content. Green Complaint ¶ 90. However, the examples of uses related to screen overlays, split screens and rescaling do not appear to necessitate any copying.

different demographics.” Huang 2017 Comment at 3.⁷ But he fails to explain how HDCP or DCP licensing practices prevent these activities or how he intends to enable them. As the Register has concluded in other contexts, it is not enough to speculate about hypothetical uses. *See* 2015 Rec. at 123 (“The Register cannot credit OmniQ’s arguments in light of its failure to establish that the technology it advocates has actually been developed. The question therefore appears to be a hypothetical one.”).

Finally, Huang mentions in passing that the proposed exemption would enable recording of video game play. As discussed above, and in more detail in the individual comments filed by ESA, such recording and editing is already facilitated by video game consoles. *See, e.g.*, Xbox YouTube Video, [Twitch Broadcast Walkthrough \(for Xbox One\)](#); PlayStation YouTube Video, [SHAREfactory: Tools of the Trade \(for PlayStation 4\)](#); Nintendo Support Page, [How to Capture and Edit Gameplay Video \(Nintendo Switch\)](#). A thriving ecosystem of online commentary regarding recorded excerpts from video game play already exists. *See* Sarah Perez, [YouTube Gaming grew its streamer base by 343% in 2017, Twitch by 197%](#), (Jan. 25, 2018). In sum, Huang has not demonstrated that any noninfringing use cannot be achieved via a method other than circumvention.

4. Enabling Circumvention Of HDCP And Distribution Of Huang’s NeTVCR Would Harm The Value Of Audiovisual Works Because HDCP Increases Their Availability By Ensuring Secure Delivery.

As discussed above, HDCP is a critically important component of the secure ecosystem through which content is delivered for home entertainment. Prior to passage of the DMCA,

⁷ Huang’s flippant reference to subtitles is out of place. There is a separate proposed class related to accessibility being considered. *See* Joint Creators and Copyright Owners, Class 2 Long Comment (Feb. 12, 2018).

Congress repeatedly emphasized that the statute's purpose was to encourage copyright owners to make digital access to works available. *E.g.*, S. Rep. No. 105-190, at 8 (1998) ("[C]opyright owners will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy."). As the Register recently concluded, the statute has succeeded in this regard, in part because copyright owners feel secure that their works will not be exposed to widespread theft.

Congress recognized that the growth of the digital marketplace depends on copyright owners having the ability to enforce the terms they establish for online access to their works. In particular, Congress sought to facilitate the development of online content delivery platforms in which the consumer pays for access to copyrighted material rather than for possession of a copy. Section 1201(a) reflects Congress' understanding that such models will succeed only if copyright owners have the legal right to prohibit persons from evading electronic paywalls or other technical measures used to limit access to users who satisfy the rightsholder's specified terms. It also indicates Congress' recognition that in the online context, unauthorized access by itself poses a significant threat to the value of copyrighted works.

1201 Study at 44.

HDCP encryption underpins many of the business models to which consumers now have access as a result of the marketplace shift that Congress helped to encourage. Many movies and television shows are available for rental directly through cable set-top boxes and video game consoles, for example. They are also available through subscription streaming services. These same movies and television shows are also often available for purchase through the same devices. Of course, the purchase price is higher than the rental or subscription price. However, without HDCP, a user could gain permanent access to a work after paying only the rental or subscription price. The harm is self-evident.

The threat posed by the broad exemption proposed by Huang is severe because he does not simply seek to engage in a specific form of lawful copying – he seeks to distribute his NeTVCR device to consumers. It is settled that the Register cannot recommend an exemption

that would allow Huang to engage in this trafficking. *See* 1201 Study at 56 (“Subsections (a)(2) and (b) make it unlawful to ‘offer to the public, provide, or otherwise traffic in any . . . service . . . or part thereof’ that is primarily designed for the purpose of circumvention, has only limited commercially significant purpose other than circumvention, or is marketed for use in circumvention. The Librarian is not authorized to adopt exemptions to those provisions.”). However, that Huang is open about his ultimate motive being circulation of circumvention tools should also weigh heavily against recommending an exemption. *See id.* (“[P]erhaps the primary value of the anti-trafficking provisions has been to prevent the development of mainstream business models based around the production and sale of circumvention tools. Permitting the distribution of such tools could significantly erode that important benefit.”). The Register should recommend the proposed class be denied.

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.

DATE: February 12, 2018

/s/ J. Matthew Williams
J. Matthew Williams
Dima S. Budron
Mitchell Silberberg & Knupp LLP (MSK)
1818 N Street, N.W., 8th Floor
Washington, D.C. 20036
mxw@msk.com
202-355-7904