BEFORE THE COPYRIGHT OFFICE
LIBRARY OF CONGRESS

IN THE MATTER OF
EXEMPTION TO THE PROHIBITION OF CIRCUMVENTION OF COPYRIGHT PROTECTION SYSTEMS FOR ACCESS CONTROL TECHNOLOGIES

Docket No. RM 2005-11

COMMENTS OF THE LIBRARY COPYRIGHT ALLIANCE AND THE MUSIC LIBRARY ASSOCIATION

Pursuant to the Notice of Inquiry (NOI) published by the Copyright Office in the *Federal Register* on October 3, 2005, the Library Copyright Alliance (LCA) and the Music Library Association (MLA) submit the following comments on exceptions that the Library of Congress should grant pursuant to 17 U.S.C. § 1201(a)(1)(C). The LCA consists of five major library associations—the American Association of Law Libraries, the American Library Association, the Association of Research Libraries, the Medical Library Association, and the Special Libraries Association. These five associations collectively represent over 139,000 libraries in the United States employing 350,000 librarians and other personnel. These five associations cooperate in the LCA to address copyright issues that have a significant effect on the information services libraries provide to their users. The LCA's mission is to foster global access to information for creative, research, and educational uses. The MLA is the professional association for music libraries and librarianship in the United States. It has an international membership of librarians, musicians, scholars, educators, and members of the book and music trades. The MLA's purpose is to promote the establishment, growth, and use of music libraries; to encourage the collection of music and music literature in libraries; to increase

efficiency in music library service and administration; and to promote the profession of music librarianship.

I. Legal Standards

LCA and MLA are pleased to observe that in the NOI, the Office seems to have backed away from rigid application of the "substantial adverse impact" standard articulated in the previous rulemakings. *See* 70 Fed. Reg. 57528. Moreover, the Office has qualified the standard for actual harm from always requiring a showing of "actual instances of verifiable problems" to "generally" requiring such a showing. *Id.*

Nonetheless, the Office continues to interpret the "likely" adverse effects standard as "require[ing] proof that adverse effects are more likely than not to occur." *Id.* The Office further states that the proponent of an exception must prove "that the expected adverse effect is more likely than other possible outcomes …." *Id.* This level of certainty has no basis in the language of section 1201(a)(1)(B) or (C). It places on the proponent a burden of prediction that is too difficult to meet. A fairer reading of the statute is that the proponent must show more than a theoretical possibility of an adverse impact, yet need not prove that there is a greater than 50% probability of such an outcome, nor that such an outcome is more probable than any other possible outcome.

The Office also continues to interpret the term "class of works" based upon "attributes of the works themselves, and not by reference to some external criteria such as the intended use or users of the works." *Id.* at 57529. However, the Assistant Secretary for Communications and Information of the Department of Commerce in her August 11, 2003 letter to the Register of Copyrights noted that "in some circumstances, the intended use of the work or the attributes of the user are critical to a determination whether to

allow circumvention of a technological access control." The Office appears, as a practical matter, to have recognized that a focus on the "attributes of the works themselves" may be too limiting. Thus, several of the exemptions granted in 2003 address attributes of the protection measures – e.g., "dongles that prevent access due to malfunction or damage," or "access controls that prevent the enabling of the ebook's read-aloud function and that prevent the enabling of screen readers to render the text into a specialized format." 70 Fed. Reg. 57529. We hope that the Office will continue to consider the attributes of the protection measures as well as the works they protect.

II. Renewal of Existing Exemptions

A. Classes of Works For Which Exemptions Are Requested

(1) Compilations consisting of lists of Internet locations blocked by commercially marketed filtering software applications that are intended to prevent access to domains, websites or portions of websites, but not including lists of Internet locations blocked by software applications that operate exclusively to protect against damage to a computer or a computer network or lists of Internet locations blocked by software applications that operate exclusively to prevent receipt of email.

(2) Computer programs protected by dongles that prevent access due to malfunction or damage and which are obsolete.

(3) Computer programs and video games distributed in formats that have become obsolete and which require the original media or hardware as a condition of access. A format shall be considered obsolete if the machine or system necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.

(4) Literary works distributed in ebook format when all existing ebook editions of the work (including digital text editions made available by authorized entities) contain access controls that prevent the enabling of the ebook's read-aloud function and that prevent the enabling of screen readers to render the text into a specialized format.

B. Argument

LCA and MLA support the renewal of the exemptions granted in 2003. The exemptions have had, to our knowledge, no adverse impact on the market for or value of

the classes of copyrighted works to which the exemptions applied. Even if the exemptions have been seldom used, that rare use may result from the exemption changing the behavior of content providers in a positive manner. For example, if the evidence shows that the screen reader exemption has been rarely used, that may be the result of ebook vendors' enabling the ebooks' read-aloud functions precisely because of the existence of the exemption. In other words, vendors may have decided not to use a technological measure to prevent a lawful use because they knew that users would be permitted to circumvent the measure for that lawful purpose. In that event, the exemption has fulfilled its purpose, and should be renewed.

If the exemption is not renewed, ebook publishers might "backslide," and start disabling the ebooks' read-aloud function to the detriment of the visually impaired community. After struggling for three years without an exemption, the visually impaired community in 2009 would likely succeed in convincing the Librarian to grant an exemption, at which point the ebook publishers would once again start enabling the read-aloud function. Obviously, a repeating cycle of three years with an exemption followed by three years without one makes no sense.

III. An Exemption Should Be Granted For Works Whose Access Controls Prevent The Creation of Clip Compilations And Other Educational Uses

A. Class of Works For Which Exemption Is Requested

Audiovisual works and sound recordings distributed in digital format when all commercially available editions contain access controls that prevent the creation of clip compilations and other educational uses.

B. Summary of Argument

Teachers of a wide variety of subjects at all educational levels need to assemble clip compilations to teach their classes effectively. Many films now are distributed only

on DVDs that are protected by the Content Scrambling System (CSS). Computers licensed to decrypt CSS will not make copies of the DVDs protected by CSS, making it impossible for teachers to assemble compilations of film clips. The increased use of technological measures by record companies and other distributors of sound recordings means that music teachers will encounter the same difficulty in assembling clips of sound recordings or making other educational uses.

C. Facts

Because of the pervasiveness of films and television in our culture, more high schools and colleges are offering courses in media studies. Moreover, many English and humanities courses now study films in addition to literature. In the past, films were often available in unprotected formats, such as VHS videotapes. But increasingly, films and television shows are being distributed to the public only on DVDs. The content on these DVDs typically is protected by the Content Scrambling System (CSS), a form of encryption. The consortium that controls CSS licenses the decryption algorithm only to device manufacturers that agree contractually not to allow their devices to make copies of DVDs protected by CSS. Thus, a computer that can decrypt a DVD protected by CSS cannot copy excerpts of the content on the DVD.

This means that a media studies professor cannot assemble a "clip compilation" for display to her class. Instead, if she wants to show clips of several different motion pictures in one class, she needs to advance each film manually to the precise location she wishes to display, wasting valuable class time. Further, many DVDs contain navigation restrictions that force viewers to watch advertisements or copyright warnings, consuming

more class time. Additionally, the teacher cannot show any part of a foreign film protected by regional coding.

This problem extends far beyond the media studies or humanities departments. A law professor, for example, cannot assemble of clip compilation of scenes of lawyers engaged in ethically questionable behavior, or police conducting unlawful searches or interrogations.

Moreover, record companies and other distributors of sound recordings are beginning to use a variety of technological measures; Sony's Super Audio CD (SACD), for example, cannot be played on PCs with unlicensed drives. Thus, it is likely that music teachers will soon encounter technological obstacles as they try to assemble clips of sound recordings to demonstrate points in music theory and history classes. The world premiere recording of Roy Harris's Symphony no. 2 and Morton Gould's Symphony no. 3 is available only on a SACD distributed by Albany Records (Troy 515). To include clips of these symphonies in a compilation, a teacher must circumvent the technological measure that prevents the SACD from playing on a PC. The inability to play an SACD on a PC prevents other lawful educational uses, such as streaming a sound recording for classroom use or electronic reserves.

In short, CSS currently prevents effective use of film clips in the educational environment, and other technological measures will prevent similar uses of music clips. And because the DVDs and CDs the instructors seek to use are part of the library collection at the institution that employs the instructors, technological measures prevent efficient use of library resources.

D. Argument

A teacher's performance of film or music clips in a classroom is permitted under 17 U.S.C. § 110(1). Likewise, the assembly of a clip compilation for classroom use is permitted under the fair use doctrine, 17 U.S.C. § 107. Thus, CSS and other technological measures prevent unquestionably lawful uses.

Because of the widespread availability of DeCSS, a program that decrypts CSS without the authorization of the CSS consortium, anyone who wants to make unlawful copies of protected DVDs can do so with little trouble. Nonetheless, CSS places enough of a technical barrier to prevent the vast majority of consumers from copying the DVDs they purchase or rent from the video store. Granting an exemption to section 1201(a)(1)(A) to media teachers will not remove this technical barrier. It will not make DeCSS any more prevalent, nor will it encourage more consumers to use DeCSS. Instead, it will simply permit media teachers to prepare the clip compilations necessary for them to teach effectively. The same will be true in the very near future with respect to music teachers.

IV. An Exemption Should Be Granted For Works Whose Access Controls Threaten Privacy and Critical Infrastructure.

A. Class of Works For Which An Exemption Is Requested

Sound recordings or audiovisual works (including motion pictures) embodied in copies and phonorecords; computer programs or video games; or pictorial, graphic, or literary works or compilations distributed in formats protected by access controls that threaten privacy and security.

B. Summary of Argument

The recent controversy over technological measures used by Sony BMG demonstrates that computer users must have the right to disable access controls that

threaten their privacy and the security of their computers. The existing exceptions to 1201 may not be broad enough to accommodate this critical activity.

C. Facts

Sony BMG employed a copy control technology with over 50 different CD titles which, when installed on a user's computer, reported back to Sony BMG concerning the user's activities. The XCP copy control also used a cloaking technology that prevented the user from detecting it. This cloaking technology had the unintended effect of opening up the computer to attack by hackers. Even worse, the technology was difficult to uninstall, and some of the removal patches caused additional security problems. At present it is unclear how many computers Sony BMG infected with this software – estimates rage from 500,000 to several million.

While this specific technology is a copy control rather than an access control, future technological measures with similar unfortunate – and perhaps unlawful – features may function as access controls. Libraries across the United States own tens of thousands of computers. Technological measures with features like XCP could compromise the security of these computers, and the privacy of the employees and patrons who use them. Moreover, libraries purchase large volumes of CDs and DVDs for circulation to patrons. Technological measures like XCP could place these patrons' computers at risk. Therefore, libraries and their patrons need an exception from section 1201(a)(1)(A) to disable such dangerous technological measures.

D. Argument

If a user learns that a technological measure violates his privacy and compromises his computer's security, he will not make any use of the work that the technological

measure protects. If, for example, an access control on a DVD maintains a log of the user's keystrokes while the DVD is in the computer, or scans the hard drive to see if the user possesses any content the copyright owner considers infringing, the user is unlikely to watch that DVD again. Moreover, if the user inadvertently permanently installs the technological measure in his computer, he may stop using his computer altogether; this obviously will adversely affect his lawful use of all the content stored on his computer.

It is not clear that the existing exceptions to section 1201 would allow the user to disable this technological measure. Section 1201(i) applies only if the measure collects personally identifiable information (PII). While PII is not defined in section 1201(i), the information collected by a keystroke log may not necessarily qualify as PII. Additionally, section 1201(i)(C) permits circumvention only to disable the information gathering capability. If the information gathering capability is tightly bundled with the access control function, a user might not be able to disable the former without also disabling the latter.

Similarly, Section 1201(j) may not permit the disabling of a technological measure that introduces security vulnerabilities. Section 1201(j) permits circumvention for purposes of "security testing," defined as "accessing a computer, computer system, or computer network, solely for the purpose of good faith testing, investigating or correcting, a security flaw or vulnerability …." Section 1201(j) appears to permit the ethical hacking into a computer system for the purpose of detecting security flaws in the firewall protecting the system. It is not clear that it permits the permanent disabling of a technological measure on a specific work when the measure causes a vulnerability.

The Sony BMG XCP episode is an example of technological protection run amok. A company placed content control above the legitimate security and privacy interests of its consumers. The Office should take this opportunity to send a clear signal to content providers that they will lose the benefit of section 1201 if they abuse it.

Respectfully submitted,

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