

the prohibition on circumvention has had a “substantial” adverse effect on noninfringing uses of a particular class of work. Use of the term “substantial” does not impose a “heightened” requirement; it imposes the requirement found throughout the legislative history, which is variously stated as “substantial adverse impact,” “distinct, verifiable, and measurable impacts,” and more than “*de minimis* impacts.” As is apparent from the dictionary definition of “substantial” and the Supreme Court’s treatment of the term (e.g., in its articulation of the substantial evidence rule), requiring that one’s proof be “substantial” simply means that it must have substance. The Assistant Secretary’s fear that the Register has imposed a heightened burden is misplaced. When all is said and done, the Register believes that she and the Assistant Secretary view the burden on proponents in much the same way.

## II. Solicitation of Public Comments and Hearings

On October 15, 2002, the Librarian and the Register initiated the second rulemaking proceeding pursuant to section 1201(a)(1)(C) with publication of a NOI.<sup>4</sup> The Copyright Office received 51 written comments proposing a class or classes of works for exemption. Supporters and opponents of these proposals filed 338 reply comments. Six days of public hearings were conducted in Spring 2003 in Washington, D.C., and Los Angeles, California. Following the hearings, the Office sent follow-up questions to some of the hearing witnesses, and responses were received during the summer. The entire record in this and the previous section 1201(a)(1)(C) rulemaking are available on the Office’s Web site.<sup>5</sup>

The Register has now carefully reviewed and analyzed the entire record in this rulemaking proceeding to determine whether any class of copyrighted works should be exempt from the prohibition against circumvention during the next three years. The Register recommends that noninfringing users of four classes of works be exempt from the prohibition on circumvention of access controls.

## III. Discussion

### A. The Four Exempted Classes

Based on the Register’s review of the record, the case has been made for exemptions of the following four classes of copyrighted works.

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 computer network or lists of Internet locations blocked by software applications that operate exclusively to prevent receipt of e-mail. For purposes of this exemption, “Internet locations” are defined to include “domains, uniform resource locators (URLs), numeric IP addresses or any combination thereof.”

This is similar to an exemption made in the previous rulemaking, but with some modifications. The class consists of lists of blocked Web sites that are used in various filtering software programs sometimes referred to as “censorware.” These programs are intended to prevent children and other Internet users from viewing objectionable material while online. It was alleged that although the software is intended to serve a useful societal purpose, the emphasis of the programs is on blocking rather than accuracy. Critics contend that the result of this focus is that filtering software used to prevent access to objectionable material tends to over-block, thereby preventing access to legitimate information resources. In order to comment on this software and expose what they claim is the excessive blocking of Web sites, critics claim they need to gain access to the lists of blocked Web sites, which typically are protected by access controls.

Opponents argued that filtering software companies serve a critical societal purpose and that an exemption would undermine the integrity of filtering software. They also argued that filtering software companies provide reasonable means for ascertaining the material or sites that a particular filtering software blocks. They also stated that even if the Register found that an exemption was warranted, the particular class articulated in the previous rulemaking was overly broad and that repeating an exemption for that class could create adverse consequences for other types of software, such as antivirus and spam software.

Although a similar class was exempted in the first rulemaking, proponents are required to make their case anew every three years. The record in the current rulemaking warrants a new exemption. While providers of filtering software offer some information about the Web sites their software blocks, it is too limited to permit comprehensive or meaningful analysis. Persons wishing to review, comment on

and criticize this software as part of an ongoing debate on a matter of public interest should be permitted to gain access to the complete lists of blocked Web sites.

The particular class of works designated in this rulemaking covers the lists of websites blocked by commercially marketed filtering software applications that are intended to prevent access to domains, websites or portions of Web sites. However, the exempted class specifically excludes lists of Internet locations blocked by software designed to protect against damage to computers, such as firewalls and antivirus software, or software designed to prevent receipt of unwanted e-mail, such as anti-spam software.

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

The second exempted class is also similar to a class exempted in 2000, but again the class exempted in this proceeding is somewhat more limited. Many commenters supported a renewal of the previous exemption for “literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage or obsolescence.” Few commenters, however, provided any factual support for such an exemption. The facts that were presented related to a narrower class of works: computer programs using “dongles,” or hardware locks, which control access to the programs. Accordingly, the exempted class is limited to such computer programs. When a dongle is damaged or malfunctions in such a way that the authorized user of the software cannot gain access to the software, the authorized user should be given a means to make the software work. The exempted class includes only that software that actually cannot be accessed due to a damaged or malfunctioning dongle, and only when the dongle cannot be replaced or repaired. The class is formulated as including “computer programs protected by dongles that prevent access due to malfunction or damage and which are obsolete.” Copyright law already provides a definition of obsolete, found in section 108(c) of the Copyright Act, which captures the circumstances under which an exemption is justified: “a [dongle] shall be considered obsolete if [it] is no longer manufactured or is no longer reasonably available in the commercial marketplace.” For purposes of this exemption, a dongle would be

<sup>4</sup> 67 FR 63578; <http://www.copyright.gov/fedreg/2002/67fr63578.html>.

<sup>5</sup> <http://www.copyright.gov/1201/index.html>.