

considered “obsolete” if replacement or repair are not reasonably available in the marketplace. In addition to encouraging reasonable support to be made available to users, the exemption will allow users who are denied access as a result of a damaged or malfunctioning dongle to circumvent when repair or a replacement are unavailable. This exemption minimizes the adverse effects on noninfringing uses by users of software protected by these access control measures while also minimizing the adverse effects on copyright owners.

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.

This is a new exemption, in response to a proposal by The Internet Archive for “[l]iterary and audiovisual works embodied in software whose access control systems prohibit access to replicas of the works.” The Internet Archive, a non-profit library that maintains a collection of websites, software and other works in digital formats in a digital archive, migrates such works to modern storage systems (e.g., by transferring a computer program from a floppy diskette to a hard drive) that are more stable and that will ensure continuing access to the works.

The Internet Archive stated that works distributed in digital formats on physical media (such as floppy diskettes, CD-ROMs, etc.) have sometimes been accompanied by “original only” access controls, technological measures that, while technically permitting copies to be made, prevent those copies from functioning (so that, for example, a copy of a computer program made from the original floppy diskette will not run, or a copy of an audiovisual game made from the original CD-ROM cannot be played). This prevents the Internet Archive from migrating those works to its modern storage system.

The problem is particularly compelling when the physical format in which the copy was originally marketed has become obsolete. If the Internet Archive is given computer software that was marketed on 5¼-inch floppy diskettes, it will not even be able to access the work in its original format on the typical computer sold in the marketplace today, because computers sold today are not equipped with 5¼-inch floppy drives. However, Internet Archive also desires an exemption that addresses the “original only” problem even when the medium on which the original copy was marketed (e.g., CD-ROM) is not yet obsolete, noting that it

is crucial to archive digital works before they become inaccessible and before the information on the medium has degraded.

The Register has concluded that to the extent that libraries and archives wish to make preservation copies of published software and video games that were distributed in formats that are (either because the physical medium on which they were distributed is no longer in use or because the use of an obsolete operating system is required), such activity is a noninfringing use covered by section 108(c) of the Copyright Act. The exempted class is therefore limited to works distributed in such now-obsolete formats. Again, “obsolete” has the same meaning that is set forth in section 108(c). 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. The class is also limited to computer programs and video games because the evidence in the record of this rulemaking does not support a broader class of works.

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.” For purposes of this exemption, “specialized format,” “digital text” and “authorized entities” shall have the same meaning as in 17 U.S.C. 121.

The final exempted class is based upon proposals by the American Foundation for the Blind and five major library associations. It is in response to problems experienced by the blind and visually impaired in gaining meaningful access to literary works distributed as ebooks. Ebooks can offer accessibility to the blind and the visually impaired that is otherwise not available from a print version. Ebooks may allow the user to activate a “read-aloud” function offered by certain ebook readers. Ebooks may also permit accessibility to the work by means of screen reader software, a separate program for the blind and visually impaired that interacts with an ebook reader and that is capable of converting the text into either synthesized speech or braille.

By using digital rights management tools that implicate access controls, publishers of ebooks can disable the read-aloud function of an ebook and may prevent access to a work in ebook form by means of screen reader software. The record indicates that

many ebooks are distributed with these two functions disabled. The disabling of these functions is alleged to prevent the blind and visually impaired from engaging in particular noninfringing uses such as private performance, and to prevent access to these works by blind and visually impaired users altogether. The uses that such persons make by using the “read-aloud” function and screen readers are noninfringing, and are likely to be the most reasonable means of meaningful access for such persons to works that are published in ebook format.

To be included in the exempted class, a literary work must exist in ebook format. Moreover, the exemption is not available if any existing edition of the work permits the “read-aloud” function or is screen reader-enabled. Thus, a publisher may avoid subjecting any of its works to this exemption simply by ensuring that for each of its works published in ebook form, an edition exists which is accessible to the blind and visually impaired in at least one of these two ways.

B. Other Exemptions Considered, But Not Recommended

A number of other proposed exemptions were considered, but rejected. They are briefly discussed below. Similar proposed exemptions are discussed together.

1. Proposed class: All works should be exempt for noninfringing uses, e.g., fair use and private uses, and other use-based proposals.

Many comments declined to specify a “class of works” and instead designated the “class” to be exempted as “all works.” Because the proponents of an exemption for “all works” have utterly failed to propose “a particular class of copyrighted works,” but have simply asked, in effect, for a blanket exemption for all works—in effect, an administrative abrogation of section 1201(a)(1)—these proposals must be rejected.

2. Proposed classes: Several, including “Per se Educational Fair Use Works” and “Fair Use Works.”

Another group of proposals defined the class of works primarily by reference to the type of use of works or the nature of the users, e.g., fair use works. A “use-based” or “user-based” classification is not permitted. The statutory exemptions in section 1201 contain carefully crafted, use-based and user-based exemptions. Congress considered and declined to enact certain use-based exemptions similar to some of the proposals raised in this rulemaking. The statutory text and the legislative history