

provide no evidence that Congress intended this rulemaking to second-guess congressional determinations. Rather, Congress created this rulemaking as a "fail-safe" mechanism to focus on evidence of adverse effects in particular sub-categories of works that could be ameliorated by appropriately crafted, short-term exemptions.

3. Proposed classes: (1) Musical recordings and audiovisual works protected by access control mechanisms whose circumvention is reasonably necessary to carry out a legitimate research project where the granted exemption applies only to acts of circumvention whose primary purpose is to further a legitimate research project; and (2) Musical recordings and audiovisual works protected by access control mechanisms whose circumvention is reasonably necessary to carry out a legitimate research project.

These two related classes were proposed by one commenter. Each proposed class consists of "musical recordings and audiovisual works," apparently occupying virtually the entire field of works in the category of audiovisual works (section 102(6)) and a substantial part of the categories of sound recordings (section 102(7)) and musical works (section 102(2)). The proposed class is further narrowed only by reference to the necessary or intended use by persons wishing to circumvent the access controls. Because each of these proposed classes is defined largely in terms of the purpose of the circumvention, they cannot be considered. They are simply variants of the type of use-based class that is beyond the scope of this proceeding.

4. Proposed class: Any work to which the user had lawful initial access (and variations).

This proposal also failed to propose "a particular class of copyrighted works." Moreover, commenters proposed this class without providing any factual support whatsoever. Proponents failed to specify particular access controls that have caused adverse effects on noninfringing uses, and have failed to describe what noninfringing uses have been adversely affected.

5. Proposed class: Copies of audiovisual works, including motion pictures, and phonorecords of musical sound recordings that have been previously licensed for reproduction but can no longer be reproduced for private performance after the lawful conditions for prior reproduction have been met.

This class was proposed by a commenter seeking an exemption to permit persons who have obtained digital copies of motion pictures or sound recordings, under agreements that limit the circumstances (typically, a

time limitation) under which they may view or hear them, to circumvent access controls that enforce those agreements. The examples cited by the commenter relate primarily to online services that deliver music or movies to subscribers under an agreement that permits the subscriber to obtain access to the work only so long as the subscriber continues to subscribe to the service. The commenter seeks to exempt such works from the prohibition on circumvention so that users of such works would be able to continue to play them even when the agreed-on conditions for their use no longer apply.

A consumer who enters into an agreement to pay a particular sum for the right to listen to or view a copyrighted work for a limited period of time can have no reasonable expectation of continued access once that time has expired. Especially when the works that are the subject of this proposed exemption—motion pictures and sound recordings—are widely available for purchase in formats that have no time restrictions on use, the case for an exemption has not been made. In fact, the DMCA was intended to encourage such use-facilitating services that give consumers the option to pay lower prices for more limited uses of copyrighted works.

6. Proposed class: "Thin copyright" works.

The proposed exemption for "thin copyright works" suffers from the same flaws as the proposals to exempt classes such as "fair use works." Although it was stated that these "thin copyright" works contain "limited copyrighted subject material," there was no showing of any present or likely harm to users wishing to engage in noninfringing uses. There was no showing that any such works were unavailable in an alternative, unprotected format. Without any demonstration of an adverse effect, any specific allegation of any particular technological measure protecting access to works, or any discussion of the unavailability of the material cited in unprotected formats, there is little basis for consideration.

7. Proposed class: Public domain works or works distributed without restriction.

Several comments sought an exemption for works that are either public domain, open source or "open access," but to which access controls are applied. The commenters addressing open source and open access works provided absolutely no information in support of their requests. Aside from a proposal relating to public domain material on DVDs, there was a paucity of information relating to other public

domain works. These commenters have overlooked that if a work that is entirely in the public domain is protected by an access control measure, the prohibition on circumvention will not be applicable. Therefore, no exemption is needed.

In the DVD context, a proponent provided a series of lists of audiovisual works that it contended are in the public domain, some of which it alleged are distributed bundled with copyrighted material. However, opponents of the proposed exception indicated that many if not all the works named by the proponent are available in unencrypted (VHS) format, are not bundled with copyrighted material, are themselves still subject to copyright protection, or are not encrypted by the Content Scrambling System ("CSS") or otherwise subject to an access control, effectively rebutting the proponent's showing.

8. Proposed class: Musical works, sound recordings, and audiovisual works embodied in media that are or may become inaccessible by possessors of lawfully-made copies due to malfunction, damage, or obsolescence.

Supporters of this proposed class wanted to be able to transfer sound recordings and musical works from one medium to another. Some commenters also believe that they should be able to convert these works to new or different formats or to back up the works for archival purposes, *e.g.*, to "refresh" the media from time to time to ensure that the works are available both for their use and for future generations. However, these proponents have not clearly stated or demonstrated that access controls are preventing these activities.

In the case of audiovisual works on DVDs, the proponents desire to make backup copies of their DVDs for a variety of purposes: They claim that DVDs are inherently fragile and subject to damage; they are concerned about loss or theft of the original during travel; they wish to duplicate collections to avoid the burdens and risks of transporting DVDs; they assert that some titles are out of print and cannot be replaced in case of damage; and they claim that the duration of a DVD's lifespan is limited. The Register concludes that the proponents have not made the case with respect to fragility of DVDs, nor have they shown that the making of backup copies of DVDs is a noninfringing use.

9. Proposed class: Audiovisual works released on DVD that contain access control measures that interfere with the ability to defeat technology that prevents users from skipping promotional materials.