

As the proponent of this proposed class states the problem, “[m]ovie studios are able to make certain DVD content “unskippable” during playback. Some studios have abused this feature by preventing the skipping of advertising shown prior to the start of the feature presentation.” The technology which deactivates the fast-forward function of DVD players (UOP blocking) does not appear to be an access control. Nor does the record show that the “CSS, an access control used on motion pictures on DVDs, prevents the deactivation of UOP blocking. Therefore, an exemption does not appear warranted since it does not appear that access controls are preventing users from fast-forwarding on DVDs. Moreover, although the objections to DVDs which have the fast forwarding feature disabled with respect to advertising are understandable, the problem appears to be no more than *de minimis* and a mere inconvenience experienced with an unknown—but apparently small—quantity of available DVD titles.

10. Proposed class: Ancillary audiovisual works distributed on DVDs encrypted by CSS.

It is virtually uncontested that there are ancillary works on DVDs that are not available in another, unprotected format. Such ancillary material includes matter that is available along with the motion picture in DVD format but not available in videotape format, such as outtakes, interviews with actors and directors, additional language features, etc. The proponent of an “ancillary works” exemption asserts that the use of CSS on DVDs prevents “quotation [*i.e.*, reproduction], for purposes of commentary and criticism, of ancillary audiovisual works.”

While there is little doubt that the desired use for comment and criticism by weblog critics can be within the fair use exception, such critics have a number of options available for such “quotation.” Because users have means of making analog copies of the material on DVDs without circumventing access controls (and of redigitizing those analog copies), there is no need to permit them to circumvent. The desire to make a digital-to-digital copy, while understandable, does not support an exemption in this case. Existing case law is clear that fair use does not guarantee copying by the optimum method or in the identical format of the original. On balance, an exemption, which would permit circumvention of CSS, could have an adverse effect on the availability of such works on DVDs to the public, since the motion picture

industry’s willingness to make audiovisual works available in digital form on DVDs is based in part on the confidence it has that CSS will protect it against massive infringement.

11. Proposed class: Audiovisual works stored on DVDs that are not available in Region 1 DVD format and access to which is prevented by technological measures.

Many motion pictures distributed on DVDs are “region coded.” A region coded DVD may only be played on a DVD player that is set to play DVDs bearing the code for a particular region of the world. Proponents of an exemption included individuals who had acquired DVDs from a region outside the U.S. and then encountered difficulty in playing those DVDs on devices purchased in the U.S. Because such consumers have a number of options that will permit them to view such region coded DVDs, the need for an exemption that would permit circumvention of region coding has not been demonstrated.

12. Proposed class: Video games stored on DVDs that are not available in Region 1 DVD format and access to which is prevented by technological measures.

A similar issue was raised with respect to region coding on video games. However, supporters came forward with virtually no evidence relating to problems with region coding of video games. In the previous rulemaking, the Register noted that there was not enough evidence to support an exemption. Thus, the proponents were on notice that they needed to supply more and better evidence in order to sustain the proposed exemption. Such evidence has not been produced in this rulemaking.

13. Proposed class: Audiovisual works embodied in DVDs encrypted by CSS.

The comments in support of this exemption sought to engage in a variety of sometimes unspecified claimed fair uses with respect to audiovisual works on DVDs that do not necessarily appear to fall within the scope of the proposed exemptions discussed above. However, they failed to provide evidence of actual or likely harm and, therefore, the Register cannot recommend such an exemption. While some commenters mentioned uses that may theoretically qualify as a fair use, specific facts were not provided and it was not shown that the works were unavailable in an unprotected format.

14. Proposed class: Software designed for use on dedicated video game players.

This proponent of this exemption provided almost no evidence in support of his proposal, failing to identify a

technological measure that controls access to copyrighted works and failing sufficiently to identify what noninfringing activity is adversely affected.

15. Proposed class: Literary works (including ebooks), sound recordings, and audiovisual works protected by access controls that prevent post-sale uses of works; “tethered” works.

A number of commenters proposed exemptions for works that are tethered to particular devices, *i.e.*, works that cannot be copied to and used on other devices. The purpose of limiting access to particular devices or hardware is to enable varying degrees of control over certain uses. Many of these commenters focused on ebooks. An exemption for tethered ebooks cannot be sustained. The consumer often has choices between various ebook formats as well as between ebook formats and alternative formats for books, *e.g.*, hard copies or audio versions. Commenters who believe that users should be able to “space-shift” any work they purchase in order to access this work on any device of their choosing did not make a persuasive case that such “space-shifting,” involving reproduction of the work, is a noninfringing use. The purpose of tethering is to limit subsequent reproduction and distribution of the reproductions. While this may limit a user’s options, such user limitations would appear to represent only an inconvenience as long as alternative formats of the work are available for noninfringing uses.

Similar arguments were made with respect to tethering of motion pictures and of sound recordings of musical works. As with the space-shifting of ebooks, commenters seek to “platform-shift” their sound recordings or motion pictures. However, tethering and DRM policies serve a legitimate purpose for limiting access to certain devices in order to protect the copyright owners from digital redistribution of their works. Moreover, consumers have choices of formats and may decide whether their intended use is best served by a digital online version or by another available version of a work. While availability for use has been restricted in certain digital formats, the overall availability for use of these works has not been adversely affected. The effect of circumvention of the protection measures employed on these works would likely decrease the digital offerings for these classes of works, reduce the options for users, and decrease the value of these works for copyright owners.