

16. Proposed class: Audiovisual works, including motion pictures, the DVD copies of which are tethered to operating systems that prevent rendering on alternative operating systems.

A number of commenters sought exemption of a class of works consisting of motion pictures on DVDs playable on computers only when the computers have particular operating systems, *e.g.*, Windows or Macintosh, and that cannot be played on alternative systems, such as Linux.

Because there are a variety of devices that will play DVDs, the inability to play a DVD on a particular device or with a particular operating system is simply a matter of preference and inconvenience. Persons wishing to play CSS-protected DVDs on computers with the Linux operating system have the same options that other consumers have. As a general proposition, the DVD medium has increased the availability of motion pictures for sale and rental by the general public, and the motion picture studios' willingness to distribute their works in this medium is due in part to the faith they have in the protection offered by CSS. The balancing of the incremental benefit of allowing circumvention for the purposes of watching a movie on a Linux-based computer is outweighed by the threat of increased piracy that underlies Congress' motivation for enacting section 1201.

17. Proposed class: Sound recordings, audiovisual works and literary works (including computer programs) protected by access control mechanisms that require assent to End-User License Agreements as a condition of gaining access.

One commenter proposed an exemption for sound recordings, audiovisual works and literary works (including computer programs) protected by access control mechanisms employed by or at the request of the copyright holder which require, as a condition of gaining access, that the prospective user agree to contractual terms which restrict or limit any of the limitations on the exclusive rights of the copyright holder. Little evidence was offered in support of this proposed class. The proponent's complaint appears to be with the practice of requiring users of certain works to enter into End User License Agreements (EULAs) rather than with access controls as such. While technological measures may prevent access unless a user signals assent to the terms of a contract, the prohibition on circumvention does not appear to enforce the terms of a contract.

18. Proposed class: published sound recordings of musical works on compact discs that use technological measures that prevent access on certain playback devices.

One commenter proposed a class of "Sound recordings released on compact disc ("CDs") that are protected by technological protection measures that malfunction so as to prevent access on certain playback devices." In part, this proposal relates to copy controls that malfunction and inadvertently restrict access to sound recordings on CDs. The proponent itself expressed doubt whether these are actually access controls subject to the prohibition in section 1201(a)(1); opponents said they are not and the Register agrees. However, in some cases the technologies in question are intended to deny access to particular copies of sound recordings under certain circumstances, *e.g.*, CDs distributed with two sessions: a "first session" that is not accessible on certain devices and a compressed digital file of a "second session" that is accessible on those devices but which is protected from certain uses. The purpose of the second session is to permit playability on devices such as computers, but to hinder the ability of computer users to reproduce and disseminate the copies, *e.g.*, in a peer-to-peer network. In those cases, users have access to the work. The comments provided insufficient information to conclude that access controls have caused users to be denied access to a sound recording. Moreover, thus far the deployment of CDs protected by any technological measures in the United States has been minimal. The record does not support a conclusion that at present, access controls on CDs have had a substantial adverse effect on noninfringing uses of sound recordings on CDs.

19. Proposed class: Sound recordings on copy-protected Red Book Audio format compact discs.

The Digital Media Association ("DiMA"), on behalf of webcasters operating under a statutory license to transmit performances of sound recordings, sought an exemption that would permit circumvention of access controls in order to make ephemeral copies (as permitted in section 112 of the Copyright Act) of sound recordings on CDs protected by access controls. In particular, they wish to make server copies of the higher quality "first session" on CDs using the "second session" technology. Because section 112(e)(8) already provides licensed webcasters with a mechanism for circumventing access controls that prevent webcasters from making

ephemeral copies, there is no need for an exemption here, especially when webcasters thus far do not appear to have experienced actual problems.

20. Proposed exemption: Broadcast news monitoring.

A group of broadcast monitors, businesses that tape television news programs off the air for their customers, sought an exemption that would "exempt news and public affairs programming from the scope of the broadcast flag." This was a reference to a proposal pending before the Federal Communications Commission that would require certain consumer electronic devices to respond to a "broadcast flag" in television programming which would place certain limits on how digital broadcasts can be redistributed after receipt by a consumer. The broadcast monitors seek an exemption that would allow them to bypass the broadcast flag for the purpose of making copies of news segments for their customers.

The Register cannot recommend such an exemption. The "limited purpose" for which the broadcast monitors seek an exemption does not appear to constitute a noninfringing use. Moreover, the broadcast monitors' fears relating to the broadcast flag, which at this point is simply a proposal before another federal agency, are speculative. Even if the speculative adverse effects were to become a reality, such adverse effects would only cause an inconvenience with respect to the intended use, since broadcast monitors have other means to go about their business.

21. Proposed exemption: Reverse engineering for interoperability and the Static Control proposals.

Static Control Components, Inc. proposed exemptions to permit circumvention of access controls on computer programs embedded in computer printers and toner cartridges and that control the interoperability and functions of the printer and toner cartridge. Static Control is in litigation with computer printer manufacturer Lexmark, which sells laser printer toner cartridges that cannot be refilled by third-party remanufacturers because a technological measure contained on a microchip in those cartridges renders those cartridges useless when they are refilled by third-party remanufacturers. The Register concludes that an existing exemption in section 1201(f) addresses the concerns of remanufacturers, making an exemption under section 1201(a)(1)(D) unnecessary.