



Copyright Office Issues New Set of Digital Millennium Copyright Act (“DMCA”) Exemptions in Third Triennial Rulemaking

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INTRODUCTION

On November 27, 2006, the Librarian of Congress, on the recommendation of the Register of Copyrights, announced the classes of works subject to the exemption from the Digital Millennium Copyright Act (“DMCA”). The announcement marked the third time that the Librarian of Congress granted a series of exemptions to the DMCA. This third rulemaking resulted in more exemptions being granted than the number granted in the first two rulemakings of 2000 and 2003. This third rulemaking also marks a significant change in the way in which the Library of Congress defines a “class of works” exempt from the DMCA, by defining a “class of works” based at least partially on the intended use of the works in addition to intrinsic characteristics of the works.

BACKGROUND

The Digital Millennium Copyright Act (“DMCA”), Pub. L. 105-304 (1998), amended Title 17 of the United States Code to add a new chapter 12. One of the provisions of chapter 12 prohibits circumvention of access control technologies employed by or on behalf of copyright owners to protect their works. Specifically, subsection 1201(a)(1)(A) provides, inter alia, that “No person shall circumvent a technological protection measure that effectively controls access to a work protected under this title.”

Subparagraph (B) of subsection 1201(a)(1) provides a safety valve against the sweeping nature of subsection (A). Specifically, subparagraph (B) provides that the prohibition against circumvention “shall not apply to persons who are users of a copyrighted work which is in a particular class of works, if such persons are, or are likely to be in the succeeding 3-year period, adversely affected by virtue of such prohibition in their ability to make noninfringing uses of that particular class of works under this title” as determined in this rulemaking. This prohibition against circumvention became effective two years after the date of enactment, on October 28, 2000.

2000 RULEMAKING

In the first rulemaking, the Librarian of Congress exempted two classes of works from 17 U.S.C. §1201(a)(1)(A). The two exempted classes included “compilations consisting of lists of websites blocked by filtering software applications” and “literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage, or obsolescence.” Explaining why the vast majority of proposed exemptions were recommended to be rejected, the Register noted that “proponents attempted to define classes of works by reference to the intended uses to be made of the works, or the intended user”, and that “for almost all the proposed classes, the proponents failed to demonstrate that there have been or are about to be adverse effects on noninfringing uses that have ‘distinct, verifiable, and measurable impacts.’”¹

In the recommendation, the Register explained that defining a “class” of works meant defining the works based on intrinsic characteristics of the works themselves. The Register reasoned that “the view that a ‘class’ of works can be defined in terms of the status of the user or the nature of the intended use appears to be untenable” because the statutory language appeared to require that “the Librarian identify a ‘class of works’ based upon attributes of the works themselves”, because “the dictionary defines ‘class’ as ‘a group, set or kind sharing common attributes’”, and because “the term is used throughout the copyright law to refer to a work of authorship, rather than to a material object on which the work appears or to the

¹ Federal Register, Vol. 65, No. 209, Friday, October 27, 2000, Rules and Regulations, p. 64562



readers or users of the work”.² Nevertheless, the Register admitted that “the statutory language is arguably ambiguous.”³

2003 RULEMAKING

In the second rulemaking, the Librarian of Congress doubled the number of classes exempted from the previous rulemaking, exempting four classes of works. Two of the four exempted were substantially similar to the two classes exempted in the first rulemaking of 2000. The two new classes included “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” and “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.” The Register again recommended rejecting the vast majority of proposed exemptions proposed in 2003 for substantially the same reasons relied upon in 2000, namely because “proponents failed to propose a true ‘particular class of copyrighted works’ and failed to demonstrate that users of such works have been or will be adversely affected in their ability to make noninfringing uses of those works.”⁴

The Register once again recommended that a class of works be defined based upon “attributes of the works themselves”, relying on the same arguments used in the 2000 recommendation. The Register stated that the class might be “defined in part by reference to the medium on which the works are distributed, or even to the access control measures applied to them.”⁵ The Register emphasized, however, that “it is not permissible to classify a work by reference to the type of user or use.”⁶

2006 RULEMAKING

In the third rulemaking, the Librarian of Congress exempted six classes of works. The Librarian granted an exemption for one class of works for audiovisual works included in the educational library of a college or university’s film or media studies department, when used for the purpose of making compilations. The Librarian granted two more exemptions related to obsolete technology, included one exemption directed towards archived versions of obsolete computer programs and video games, and another exemption directed towards obsolete dongle technology. The Librarian granted a fourth exemption for ebooks which closely resembled the exemption granted in 2003, a fifth exemption for computer programs in the form of firmware used to lawfully connect to a wireless telephone communication network, and a sixth exemption for sound recordings distributed in compact disc (CD) format, when used for the purpose of good faith testing, investigating, or correcting security flaws and vulnerabilities.

As indicated by these six exemptions, the Register departed from the methodology used in the previous two rulemaking proceedings and recommended defining a “class of works” based at least somewhat on the use of the proposed class of works. Four of the six classes of works granted in the third rulemaking (other than the dongle and ebook exemptions) are defined at least partially by the intended use of the works. Defending this departure from the previous manner of defining classes of works, the Register explained: “based on the proposals made in the past rulemaking proceedings, proponents had failed to satisfy certain threshold requirements that would have necessitated consideration of whether a class that was primarily defined by reference to a section 102 category of works could be further narrowed by reference to the user or use.”⁷ The Register clarified, however, that classes of works still

² Id. at 64559

³ Id.

⁴ Recommendation of the Register of Copyrights, October 27, 2004, p. 82

⁵ Id. at 12.

⁶ Id. at 13.

⁷ Recommendation of the Register of Copyrights, November 17, 2006, p. 17.



should not be *initially defined* by reference to a particular type of use or user, but rather, should be *refined* by such, when supported by sufficient evidence.⁸

IMPACT AND SIGNIFICANCE OF NEW EXEMPTIONS

One significant impact of these new exemptions is the limiting effect that the “use-based” definitions have on the four classes of works partially defined by use. In the previous rulemakings, the Register recommended and the Librarian granted exemptions for classes of works which were defined based upon intrinsic attributes of the works themselves. To fall under the protection of these previous exemptions, as long as a user used a copyrighted work which satisfied the intrinsic attributes according to the class definition (e.g., “computer programs and video games distributed in obsolete formats and that require the original media or hardware as a condition of access”), any noninfringing use of the copyrighted work fell outside of the scope of DMCA liability.

Now, however, protection is limited to works which not only have the intrinsic attributes as defined by the class definition (e.g., “computer programs and video games distributed in obsolete formats and that require the original media or hardware as a condition of access”), but which are also used in the specific manner defined by the class definition (e.g., “when circumvention is accomplished for the purpose of preservation or archival reproduction of published digital works by a library or archive”). Thus, by refining the definitions of classes of works based on specific intended uses, these new exemptions are more narrowly circumscribed than previous exemptions.

IMPACT OF FIRST EXEMPTION ON CLASSROOM USE OF MEDIA

The impact of these six exemptions should be significant within the industries which they relate to. For example, the first exemption grants film professors the right to circumvent technological protection measures⁹ to use audiovisual works included in the educational library of a college or university’s film or media studies department for the purpose of making compilations. This first exemption should play a key role in enabling film professors across the country to use DVD film compilations in the classroom. Accordingly, this first exemption should save valuable classroom time (otherwise spent loading and unloading DVDs) for film professors across the country, improving the efficiency of film and media classes.

IMPACT OF SECOND EXEMPTION ON ARCHIVAL USE OF LEGACY SOFTWARE

The second exemption, granting an exemption to computer programs and video games distributed in obsolete formats and that require the original media or hardware as a condition of access, could potentially prove valuable for companies looking to archive old software. The second exemption arose from the need of the Internet Archive, a nonprofit digital library which archives old software and video games, to emulate floppy disk drives in order to “migrate” obsolete software and video games from one hard drive to another. Manufacturers designed floppy disks with “original-only” access controls which prevented access to the contents of the disk unless the disk was loaded into the original corresponding disk drive. Since storage units inevitably begin to deteriorate, the Internet Archive needed to migrate the contents of these disks from one storage unit to another, in order to verify the authenticity of the migrated version.¹⁰

Without the recently granted exemption, this emulation triggered DMCA liability, since the emulation of disk drives to circumvent original-only access control measures constituted a circumvention of “technological protection measures,” as prohibited by §1201(a)(1)(A). Now, however, this emulation is

⁸ Id.

⁹ The primary technological protection measure found in DVDs is the Content Scrambling System (“CSS”), which encrypts the content of the DVD so that only authorized DVD players with authorized decryption devices may access the contents. See Recommendation of the Register of Copyrights, November 17, 2006, p. 12.

¹⁰ Recommendation of the Register of Copyrights, November 17, 2006, p. 27-28.



exempted from the scope of DMCA liability. Thus, under this new exemption, companies may emulate technological protection measures, such as floppy disk drives, in order to access the contents of computer programs and video games, assuming that the use is for archival purposes, and that the computer programs and video games are distributed in obsolete¹¹ formats and require the original media or hardware as a condition of access.

CONCLUSION

The six exemptions granted in the third triennial rulemaking reflect a willingness on the part of the Library of Congress to carve out more exemptions to the DMCA than in the previous two rulemakings. On the other hand, by refining the definitions of classes of works based in part upon the intended uses of the works, many future exemptions may be significantly narrower than the exemptions granted in the first and second rulemaking proceedings. These six exemptions should prove valuable tools for the specific industries to which they relate.

¹¹ Obsolete is defined as “no longer manufactured or...no longer reasonably available in the commercial marketplace.” *Id.* at 25.