

**BEFORE THE**  
**COPYRIGHT OFFICE LIBRARY OF CONGRESS Washington, D.C.**

In the matter of exemption to prohibition on circumvention of  
copyright protection systems for access control technologies

Docket No. RM 2008-08

**COMMENTS OF NEW MEDIA RIGHTS**

New Media Rights submits the following comments in response to the Notice of Inquiry of Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies<sup>1</sup>. In its Notice, the Copyright Office seeks comments on all proposed exemptions submitted before December 2, 2008.

These comments address the proposed exemptions supported by the Electronic Frontier Foundation (“EFF”), Proposed Classes 1 and 2.<sup>2</sup>

Proposed Class 1 includes “[c]omputer programs that enable wireless telephone handsets to execute lawfully obtained software applications, where circumvention is accomplished for the sole purpose of enabling interoperability of such applications with computer programs on the telephone handset.”

Proposed Class 2 includes “[a]udiovisual works released on DVD, where circumvention is undertaken solely for the purpose of extracting clips for inclusion in noncommercial videos that do not infringe copyright.” New Media Rights strongly

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<sup>1</sup> 73 Fed. Reg. 58083 (Oct. 6, 2008).

<sup>2</sup> Comments of the Electronic Frontier Foundation (hereinafter “EFF Proposal”), In the matter of exemption to prohibition on circumvention of copyright protection systems for access control technologies, Docket No. RM 2008-08, at < [http://www.eff.org/files/filenode/dmca\\_2009/EFF+RM+proposals.pdf](http://www.eff.org/files/filenode/dmca_2009/EFF+RM+proposals.pdf)>, (January 29, 2009) at 1.

supports the EFF's proposals as they would not only benefit consumers, but are in harmony with the spirit, purpose, and law of the Copyright Act.<sup>3</sup>

## **I. COMMENTING PARTY**

New Media Rights (NMR) is a project of the non-profit Utility Consumers' Action Network. NMR provides legal information and assistance to emerging artists, software and web developers, and creators of all types on the legal issues surrounding new media (copyright, licensing, and trademark law, particularly fair use, parody, mash-ups, sampling, re-mixing, and open source licensing). NMR seeks to facilitate the creation of new and exciting content that is not currently supported or funded by mainstream business models.

NMR seeks to expose artists to open-source creative tools, licensing options, and new media distribution alternatives, while educating users and creators on their rights under current copyright/IP law. NMR encourages the use of open-source technology and creative commons licenses out of our belief that the public benefits from less restrictive and more flexible content rights.

NMR believes no one should hold a monopoly over creativity, and seeks to encourage a vibrant grassroots, non-hierarchical creative community that provides alternatives to traditional, hierarchical media. Further information regarding New Media Rights' mission and activities can be obtained at <http://www.newmediarights.org>.

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<sup>3</sup> United States Constitution, Section 8, "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

## I. COMMENTS

### A. **The EFF's proposal that the Librarian modify its approach when evaluating an assertion of fair use or other statutory exemption.**

The Electronic Frontier foundation proposes a three level approach to evaluating an assertion of fair use or other statutory exemption that should be adopted by the Librarian. The approach addresses one of the most significant negative legacies of the DMCA, its inability to accommodate fair use and statutory exceptions for use of copyrighted works. Moreover, the EFF's proposal succeeds in leaving, or indeed restoring, the task of adjudicating, interpreting and applying fair use and statutory exceptions to the courts who are rightfully entrusted with the task.

1. "If, based on existing precedents, the Librarian is satisfied that the activity in question is likely to be deemed to be a fair use or otherwise covered by a statutory exception, then the Librarian should conclude that the activity is noninfringing and proceed to weigh the other factors that must be considered in evaluating a proposed exemption;
2. If the Librarian is satisfied that the activity in question might plausibly be a fair use or be protected by any other statutory exception, but has some doubt on the question, then the Librarian should narrow the proposed exemption to apply only so long as the activity in question is noninfringing;
3. If the Librarian concludes that no reasonable court could find that the activity in question would constitute a fair use or fall within any other statutory exception, it should reject the proposed exemption."<sup>4</sup>

Step 2 in particular successfully keeps the Librarian and the Copyright Office from becoming a "forum in which to break new ground on the scope of fair use,"<sup>5</sup> while ensuring the courts' role as a testing and development ground for jurisprudence surrounding fair use and statutory exemptions.

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<sup>4</sup> EFF Proposal at 2-3.

<sup>5</sup> Recommendation of the Register of Copyrights in RM 2002-4; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies (Oct. 27, 2003) at 106

**B. Strict adherence to Section 1201(a)(1) needlessly prevents cellular phone owners from using lawfully obtained software programs on their own devices.**

NMR agrees with the EFF that allowing cellular phone owners to bypass anti-circumvention technology on their devices in order to utilize lawfully obtained software programs does not violated copyright law nor threaten rights of copyright holders.

Smart phone adoption and use in particular necessitates this exception to the DMCA. Recent statistics show more than a doubling year-over-year in penetration rates of smart phones.<sup>6</sup> For instance, Nielsen reports an adoption rate of smart phones amongst consumers of 9.9% for Q1 2008 versus 4.8% in 2007 in the United States.<sup>7</sup> The smart phone, then, is no longer for the high end user, and is quickly becoming the consumer standard.

Thus, restrictions on innovation or competition in the cell phone industry, and particular with regards to smart phones, is critical. These are the devices that can play music, video, browse the Internet, and provide global positioning system technologies to users, amongst countless other capabilities. They bring personal, mobile computing to a handheld device. Yet, in their current form, these smart phones are nowhere near as open and accommodating to various software as users of personal computers are accustomed to expecting.

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<sup>6</sup> [http://news.portalit.net/fullnews\\_us-mobile-sales-increase-smartphones-carry-the-flag\\_579.html](http://news.portalit.net/fullnews_us-mobile-sales-increase-smartphones-carry-the-flag_579.html)  
(reporting a 163% increase in smart phone adoption from Q3 2006 to Q4 2007)  
<http://www.articlesbase.com/cell-phones-articles/smart-phones-sales-and-growth-show-no-sign-of-stopping-533424.html>

(While adoption rates are increasing at approximately 30% worldwide, they increased at a rate of 106% in North America from Q1 2007 to Q1 2008.)

<sup>7</sup> <http://www.nielsenmobile.com/html/press%20releases/SmartphoneStatistics.html>

Device manufacturers as well as service providers create artificial monopolies for themselves by tying consumers' basic telecommunications services (voice and text messaging) to limited sets of services and software that the manufacturer or service provider chooses are appropriate. This is unlike the basic concept behind personal computers, where there is significantly less gate keeping, and users can often choose between a multitude of services and software such as various media players and music providers that are compatible with the user's particular choice of software and devices. We must ensure that statutes such as 1201(a)1 do not create artificial barriers to competition, innovation, and openness. Despite many barriers to openness and innovation in services on mobile devices such as smart phones, the EFF's proposal to create an exception for interoperability of software at least removes one artificial barrier to real competition on mobile devices.

The EFF's evidence concerning manufacturers' intentions for including anti-circumvention measures in their cellular devices is persuasive, and allowing cellular phone manufacturers to exploit Section 1201(a)(1) in order to limit competition not only prevents consumers from obtaining the full benefit of owning their device, but affords manufacturers rights and protections which fall outside of the intended scope of copyright law.<sup>8</sup> As the EFF noted in their proposal, the Copyright Office has already acknowledged that an exception to Section 1201(a)(1) may be warranted in circumstances such as these.<sup>9</sup> The EFF correctly notes that the companies behind both "closed" smart phones,

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<sup>8</sup> EFF Proposal at 7.

<sup>9</sup> Recommendation of the Register of Copyright in RM 2005-11, Rulemaking on Exemption from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Nov. 17, 2006 at 6 (citing H.R. Rep. No. 105-551, pt.2 ("DMCA Commerce Comm. Report"), at 35. "When application of the prohibition on circumvention of access controls would offer no apparent benefit to the author or copyright owner in relation to the work to which access is controlled, but simply offers a benefit to a third party who may use §1201 to control the use of hardware which, as is increasingly the case, may

such as Apple, as well as relatively “open” smart phones, such as Google, have restricted interoperability.<sup>10</sup> Typically these restrictions benefit certain application providers over others, and have no economic impact “in relation to the work to which access is controlled,” the operating firmware on the smart phone.<sup>11</sup> Further, these restrictions make otherwise legitimate behavior that does not infringe Copyright illegal for the hundreds of thousands of users who simply wish to use their lawfully obtained device and software with the software, services, and devices of their choosing.<sup>12</sup>

Accordingly, we agree with the EFF that an exemption for Proposed Class 1 should be adopted by the Copyright Office, allowing consumers to circumvent the anti-circumvention measures utilized by manufacturers of cellular phones.

**B. Strict adherence to Section 1201(a)(1) needlessly limits the ability for creative artists to obtain high-quality media clips for fair uses.**

Continuing the practice of artificially restricting grassroots creators’ ability to use pieces of their own culture is like taking colors of paint from a painter’s palette. Just as section 1201(a)(1) restricts interoperability and creates an artificial monopoly in service offerings on cell phones, it ties the hands of grassroots creators and provides an artificial advantage to traditional and commercial sources of culture and media.

NMR agrees with the EFF that strict adherence to section 1201(a)(1) has a significant negative impact on the ability for creative artists to obtain clips from DVD media in order to create works which would otherwise be protected under fair use. In particular NMR believes that as a matter of policy, strict adherence to section 1201(a)(1)

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be operated in part through the use of computer software or firmware, an exemption may well be warranted.” While the Copyright Office was only commenting on the possibility of an exemption, the proposed exemption here justifiably qualifies under their criteria.

<sup>10</sup> EFF Proposal at 5-6

<sup>11</sup> Id.

<sup>12</sup> Id. at 8

will place an unnecessary and impractical burden on the rapidly expanding phenomenon referred to as remix culture. While remix artists may lawfully bypass anti-circumvention measures through various methods, these methods tend to either be expensive or yield video samples of lesser or fundamentally poor quality.

The ability to extract samples from DVD media allows creators of all types to produce high-quality videos to communicate their intended message. Fair use is not contingent upon the quality of the media used to create a derivative work, and the Copyright Office should be wary of policies which discourage fair use by severely limiting access to high quality media through cost and limited technology without protecting real and legitimate interests of copyright owners. The ability to communicate a creator's contemplated message may in some circumstances depend on the quality of the video sample acquired, especially as high definition video becomes the standard.

NMR recognizes the proposed exemption may lead to an increase in circumvention technology creation, distribution, and use; nevertheless, the absence of an exemption for fair uses of circumvention technology not only discourages remix culture by significantly restricting access to high-quality video samples but also endangers the ability for remix artists to display their creations online.<sup>13</sup>

Furthermore, NMR agrees with the EFF that those who participate in remix culture rarely have access to competent legal counsel for guidance as to whether their actions in obtaining media for their works comply with the restrictions inherent in the strict adherence to section 1201(a)(1). This unfortunate systemic flaw needlessly

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<sup>13</sup> Id. at 20. The EFF describes how online video hosting services such as YouTube frequently remove user remix videos after receiving takedown notices from copyright holders without allowing users to assert their fair use rights.

criminalizes behavior which should not only be encouraged by copyright law, but which is actually encouraged by the Constitution itself.

## **II. CONCLUSION**

For the forgoing reasons we encourage the librarian of the Copyright Office to follow the recommendations of the EFF concerning their proposed exemptions to Section 1201(a)(1).

Respectfully submitted,

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