

Before the
U.S. COPYRIGHT OFFICE
LIBRARY OF CONGRESS

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

Docket No. RM 2011-07

Reply Comments of the Electronic Frontier Foundation

Submitted by:

Corynne McSherry
Marcia Hofmann
Mitchell Stoltz
Electronic Frontier Foundation
454 Shotwell St.
San Francisco, CA 94110
(415) 436-9333
(415) 436-9993 (fax)
corynne@eff.org
marcia@eff.org
mitch@eff.org

Of Counsel:

Jason Schultz
Samuelson Law, Technology &
Public Policy Clinic
University of California, Berkeley
587 Simon Hall
Berkeley, CA 94720
(510) 642-1957
jschultz@law.berkeley.edu

Pursuant to the Notice of Inquiry, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies¹ (“NOI”), the Electronic Frontier Foundation (EFF) submits these reply comments to provide additional legal and factual support regarding the following proposed classes of works:

Proposed Class 3: Computer programs that enable lawfully acquired video game consoles to execute lawfully acquired software applications, where circumvention is undertaken for the purpose of enabling interoperability of such applications with computer programs on the gaming console.

Proposed Class 5: Computer programs that enable wireless telephone handsets (“smartphones”) and tablets to execute lawfully obtained software applications, where circumvention is undertaken for the purpose of enabling interoperability of such applications with computer programs on the handset or tablet.

Proposed Class 7B: Audiovisual works on DVDs that are lawfully made and acquired and that are protected by the Content Scrambling System, where circumvention is undertaken for the purpose of extracting clips for inclusion in primarily noncommercial videos that do not infringe copyright, and the person engaging in the circumvention believes and has reasonable grounds for believing that circumvention is necessary to fulfill the purpose of the use.

Proposed Class 7C: Audiovisual works that are lawfully made and acquired via online distribution services, where circumvention is undertaken for the purpose of extracting clips for inclusion in primarily noncommercial videos that do not infringe copyright, and the person engaging in the circumvention believes and has reasonable grounds for believing that circumvention is necessary to fulfill the purpose of the use, and the works in question are not readily available on DVD.

I. Introduction

Several commenters who oppose EFF’s proposal appear to be less interested in the merits of the exemption requests than in trying to persuade the Register and the Librarian to press the reset button on their approach to the rulemaking process. EFF urges the Register and the Librarian to keep the focus where it properly belongs: on the actual exemptions proposed and the evidence in the record. EFF has proposed four exemptions, each of which is carefully crafted to apply only to lawful uses. EFF has submitted substantial evidence in support of these exemptions, as have various commenters. The exemptions should be granted.

EFF responds to specific concerns raised about its exemption requests below. However, we first address certain global comments offered by the Association of American Publishers, *et al.* (“Joint Commenters”) regarding the standards and procedures that should govern the rulemaking.

¹ 76 Fed. Reg. 60398 (Sept. 29, 2011).

II. The Register Can and Should Take Guidance from Previous Recommendations, Where the Previous Analysis Remains Applicable

A. The Copyright Office Considers Exemption Requests De Novo, But Does Not Have to Work With a Blank Slate

The Joint Commenters suggest that the Copyright Office is not bound by procedures, facts or conclusions reached in prior rulemaking proceedings.² EFF does not dispute that exemptions must be renewed in each proceeding, nor that the Copyright Office must take into account facts and developments that have occurred in the previous three years. Indeed, that very willingness to consider new factual evidence led, in part, to the Register's conclusion in the previous rulemaking that exemptions related to DVD encryption were appropriate.

EFF urges the Register and the Librarian to reject any suggestion that they must ignore procedures and conclusions developed in prior proceedings. While EFF has not always agreed with those conclusions, we believe that the Register, the Librarian, exemption proponents, and even exemption opponents have developed, together, a nuanced and balanced approach to the rulemaking process, learning more with each proceeding. Thus, a degree of predictability has emerged, which will hopefully lead to a more streamlined process going forward. As the Notice of Inquiry that launched the current rulemaking warns, "a persuasive case will have to be made to warrant reconsideration of previous decisions regarding interpretation of section 1201."³

In particular, we urge the Register and the Librarian to stand by three guideposts.

First, the Office should preserve the determination (applied in 2006 and 2010) that exemptions for classes of works may be refined by reference to the type of use and/or user to which the exemption shall be applicable. As the Register noted in her 2010 Recommendations, there is nothing in the legislative record to counsel against that type of refinement; rather, the contours of a given class must depend on the factual circumstances established in the record.⁴

Second, the rulemaking should focus on whether the access controls in question protect the interests of copyright owners, as opposed to pure business interests. The Joint Commenters cite to *MDY Industries, LLC v. Blizzard Entertainment*, 629 F.3d 928 (9th Cir. 2010), for the proposition that the "the DMCA is not only about preventing infringement." In that case, the Ninth Circuit Court of Appeals concluded that § 1201(a) created "a new form of protection, *i.e.*, the right to prevent circumvention of access controls." But the court's point was simply that this new right was supplemental to, rather than coextensive with, the rights granted in § 106. The prohibition on circumvention remains a right under Title 17, to be invoked only by copyright owners, and therefore is designed to protect copyright interests. That conclusion is entirely consistent with the Register's decision in the previous rulemaking to discount Apple's objections

² AAP, *et al.* Comments at 5.

³ 76 Fed. Reg. 60398, 60402.

⁴ Recommendation of the Register of Copyrights in RM 2008-8, Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, June 11, 2010 ("2010 Recommendation") at 16-17, available at <http://www.copyright.gov/1201/2010/initialed-registers-recommendation-june-11-2010.pdf>.

to jailbreaking to the extent that they appeared to “have nothing to do with its interests as the owner of copyrights” as opposed to “its interests as a manufacturer and distributor of a device[.]”⁵ It is also consistent with the bulk of court precedent on the question.⁶ Indeed, absent that tie, § 1201 could be read as an authorization to engage in anti-competitive activities.

Third, as in the 2010 rulemaking and in law generally, hypothetical and speculative harms should not be enough to defeat exemptions that have been justified with real evidence. Thus, for example, vague claims about a proposed exemption’s possible impact on a distribution “ecosystem” and baseless suggestions that access controls are always beneficial⁷ should carry little weight.

B. The Register and the Librarian Are Capable of Making Determinations About Fair Use and Other Lawful Uses; In Fact, They Must Do So.

The Joint Commenters suggest that demonstrations that a given use is protected by the fair use doctrine “must carry very little weight in the absence of a clearly controlling legal precedent.”⁸ To the extent that they mean that the Register cannot conclude that a given set of class of works would be lawful unless there has been a specific court ruling to that effect, this is nonsense.

First, the entire rulemaking process is premised on the Register and the Librarian’s ability to make determinations about what uses are, or are likely to be, non-infringing. Section 1201(a)(1)(C) explicitly requires the Librarian and the Register to “make the determination in a rulemaking proceeding . . . of whether persons who are users of a copyrighted work are, or are likely to be . . . adversely affected by the prohibition . . . in their ability to make noninfringing uses under this title[.]” This is a mandatory duty.

Second, one of the reasons the rulemaking is conducted every three years is so that appropriate exemptions can be considered in a timely fashion, as technology evolves. If the Copyright Office had to wait for a court to rule on whether a given use was fair, that timeliness would be lost.

Third, proponents often seek exemptions for classes of works that are so clearly noninfringing—such as videos that incorporate short clips from a movie in order to comment on its themes—that no sensible company would ever bring the matter to court, and, therefore, a relevant ruling may never occur. Indeed, as the Joint Commenters admit, “copyright owners very rarely take action against creators of remix videos that use short excerpts.”⁹

⁵ 2010 Recommendation at 94. Indeed, the joint commenters’ citation to *MDY* is a bit ironic, given that the court also specifically noted that the rulemaking is necessary precisely in order to ensure that the interests of information users are maintained—otherwise the new prohibition on circumventing access controls would create an imbalance between the public’s right to access and the owner’s interest in restricting access. 629 F.3d at 946. Further, the court referred to the 2010 jailbreaking exemption as an example of the importance of the rulemaking proceeding. *Id.*

⁶ *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, 381 F.3d 1178 (Fed. Cir. 2004); *Lexmark Int’l v. Static Control Components, Inc.*, 387 F.3d 522 (6th Cir. 2004).

⁷ AAP, *et al.* Comments at 6-7.

⁸ AAP, *et al.* Comments at 5.

⁹ AAP, *et al.* Comments at 39 n.60.

C. The Register May Grant Exemptions Pertaining to Interoperability Beyond Those That Fall Squarely Within 17 U.S.C. § 1201(f)

The Joint Commenters and several others suggest—without any statutory, legislative, or judicial support—that the Register may not grant exemptions that pertain to interoperability beyond those that fall squarely within § 1201(f). Similar arguments have been raised and rejected in previous proceedings. In 2009, for example, copyright owners argued that “where Congress has already legislated comprehensively and in detail on the circumstances in which circumvention should be allowed, this rulemaking, which is focused on making temporary adjustments and applying the prohibition flexibly in circumstances not anticipated by Congress, has little if any role to play.”¹⁰ The Register disagreed, observing that “this rulemaking is the appropriate forum to address whether an exemption to the prohibition is warranted as a result of the adverse effects on non-infringing uses.”¹¹

That conclusion was sound. Section 1201(a)(1)(C) clearly delineates the factors that the Register and the Librarian must consider and does not place any limitation on the possible subject matter of the classes of works that may qualify. There is nothing in this statutory language that limits the scope of these exemptions vis-à-vis those that are provided in other sections of the statute.¹²

Indeed, following the Joint Commenters’ argument to its logical conclusion would render this proceeding a virtual nullity. In 1998, Congress granted statutory exemptions where it was certain the benefits outweighed the harms, but that grant created a floor, not a ceiling. The purpose of this proceeding is to build on those statutory exemptions where necessary to address unanticipated situations where noninfringing uses are being limited by access controls and where the impact of granting an exemption would be to increase lawful access and use of works, and the creation and availability of new works and knowledge.

III. Response to Concerns Regarding Proposed Classes 3 and 5 (Jailbreaking)

A. Exemptions to Allow Consumers to Jailbreak Phones, Tablets, and Game Consoles Are Needed

As an initial matter, EFF notes that no smartphone or tablet manufacturer has opposed EFF’s exemption request for proposed class 5, nor has any commenter disputed the factual basis for the requested exemption. Indeed, only the Joint Commenters oppose the exemption request, along with all but one of the 22 proposed exemptions. Therefore, we focus here primarily on concerns raised about proposed class 3.

¹⁰ Comments of Association of American Publishers, *et al.*, Feb. 2, 2009, at 36.

¹¹ 2010 Recommendation at 85.

¹² The Joint Commenters’ theory also contradicts judicial authority. In *Sega Enterprises Ltd. v. Accolade, Inc.*, for example, the court rejected a similarly styled argument that the doctrine of fair use was limited in its applicability to computer programs by 17 U.S.C. § 117 because that section defined specific exemptions from infringement for computer program users. 977 F.2d 1510, 1520-21 (9th Cir. 1992) (“Nothing in the language or the legislative history of section 117, or in the CONTU Report, suggests that section 117 was intended to preclude the assertion of a fair use defense with respect to uses of computer programs that are not covered by section 117, nor has section 107 been amended to exclude computer programs from its ambit.”)

EFF's initial submission provided extensive factual evidence that the inability to run Linux and independently developed software on video game consoles has stymied researchers and the homebrew community. Sony Computer Entertainment America LLC ("Sony") and the Entertainment Software Association ("ESA") dispute that evidence, but both commenters' objections are misguided.

First, Sony and ESA minimize the statements EFF submitted from researchers, choosing to mischaracterize—and sometimes entirely ignore—the facts therein.¹³ For example, Dr. Guarav Khanna's statement makes clear that his PS3 cluster has been critical to his current, ongoing research.¹⁴ Other researchers still contact him who are interested in assembling their own PS3 clusters to perform research, and he has dissuaded them from doing so based on his experience.¹⁵ If research use of PS3 clusters is largely historical, as ESA suggests, it is only because Sony's decision to remove the OtherOS feature has made it highly impractical for most researchers to continue harnessing the computing potential of PS3s.

ESA and Sony also complain that EFF has not shown that Sony has been uncooperative with users who wish to use PS3s for research purposes.¹⁶ As Dr. Nicolas Pinto's statement suggests, however, researchers may well be unwilling to approach Sony for permission to perform acts that Sony believes are illegal,¹⁷ particularly when the company has filed suit against researchers for bypassing the PS3's technological protection measures as recently as last year. (Sony, of course, maintains its legal position in this proceeding.)

Sony and ESA cite the Folding@home project at Stanford as an instance in which Sony has supported researchers' work.¹⁸ But creating that type of computing model is not feasible without considerable assistance and approval from Sony, and academic researchers might need to perform their work free from such constraints. To build a similar project independently, a researcher would have to write a scientific application in the GameOS environment rather than in Linux, the platform of choice for scientific computing. This would require the researcher to learn to program for the GameOS environment, purchase a special software development kit from Sony, and pay licensing fees to Sony.¹⁹ Sony would then have to approve or "sign" the researcher's code in order for the application to run on a PS3. These financial and logistical barriers make a project like Folding@home a non-viable option for most independent scientific researchers.²⁰ Moreover, principles of academic freedom counsel against giving a device manufacturer an effective right to veto research it does not choose to support.

¹³ Sony Comments at 16. ESA Comments at 11.

¹⁴ Statement of Gaurav Khanna ¶ 9, Appendix C to EFF's December 1, 2011 comments.

¹⁵ Khanna Statement ¶ 14.

¹⁶ ESA Comments at 12; Sony Comments at 37-38.

¹⁷ Statement of Nicolas Pinto ¶ 13, Appendix D to EFF's December 1, 2011 comments ("When Sony dropped their support for Linux on the PS3, we were in the process of transitioning to other computer systems. Among the reasons was that, given Sony's prohibition on running your own software, you needed to hack and modify PS3 firmware to install the research applications in the first place. The legal ramifications of doing so are off-putting. Our lab would not want to hack PS3s for circumvention purposes if there were other risks involved.")

¹⁸ Sony Comments at 12, 16; ESA Comments at 12.

¹⁹ Sony's filing provides no indication of how much these costs might be, and those figures are not publicly available.

²⁰ Supplemental Statement of Professor Guarav Khanna, attached as Appendix 1.

Sony and ESA also contend that users can simply use old, unsupported devices with outdated firmware if they wish to use video game consoles for research purposes.²¹ But those older consoles will be increasingly difficult to find and maintain. And, as Andrew “bunnie” Huang pointed out in his comments, users may put themselves at legal risk if they have to jailbreak those older devices to perform basic console repairs, such as replacing a worn-out hard drive.²²

Further, contrary to Sony’s suggestion,²³ the PS3 homebrew community is thriving—in fact, it has grown substantially in recent months, largely a result of more widespread jailbreaking after Sony disabled the “OtherOS” feature in April 2010.²⁴ Since then, homebrew developers have created a free, open-source software development kit called PSL1GHT to build and run applications on consoles with jailbroken PS3 firmware.²⁵ The PS3 homebrew community shares games and applications on several online forums devoted in whole or part to homebrew development.²⁶

One particularly prolific homebrew developer known as ThatOtherDev has written and published more than fifteen games for the PS3.²⁷ Other homebrew games created for the PS3 include *Eskiss*,²⁸ *Paintown*,²⁹ and *PMW NATION*.³⁰ Homebrew developers are also creating non-gaming applications for the PS3. For example, CondorStrike has developed a highly creative homebrew screensaver that lets users interact with planets revolving around the solar system.³¹ Other developers have built homebrew media player applications for the PS3.³² One of these media

²¹ Sony Comments at 16; ESA Comments at 13-14.

²² Andrew “bunnie” Huang Comments at 1.

²³ Sony Comments at 17, 37.

²⁴ *Guide to Compile PS3 Homebrew via PSL1GHT Open Source SDK*, <http://www.ps3news.com/ps3-hacks-jailbreak/guide-to-compile-ps3-homebrew-via-psl1ght-open-source-sdk/> (last visited March 1, 2012) (“With the breaking out of PSJailbreak this summer, the homebrew scene didn’t wait so long to appear on PlayStation 3.”).

²⁵ See PSL1GHT—Lightweight PS3, <http://psl1ght.com/> (last visited Feb. 28, 2012); PSL1GHT Wiki, http://psl1ght.net/wiki/Main_Page (Nov. 30, 2011).

²⁶ See, e.g., PS3 Hacks, <http://ps3.dashhacks.com/articles/ps3-homebrew> (last visited Feb. 28, 2012); PS3Hax Network, <http://www.ps3hax.net/category/ps3-hacks/homebrew> (last visited Feb. 28, 2012); Homebrew Café, <http://blackbird.usask.ca/> (last visited Feb. 28, 2012); Quick Jump Gaming Network, <http://www.qj.net/ps3/homebrew> (last visited Feb. 28, 2012); PSX Scene, <http://psx-scene.com/forums/tags/homebrew/> (last visited Feb. 28, 2012).

²⁷ ThatOtherDev, <http://thatotherdev.com> (last visited Feb. 28, 2012); see also, e.g., Greg, *ThatOtherDev: Homebrew and Source Code*, <http://ps3.dashhacks.com/2011/10/15/thatotherdev-homebrew-and-source-code> (Oct. 15, 2011); Greg, *ThatOtherDev: Source Code and Homebrew Updates*, <http://ps3.dashhacks.com/2011/12/14/thatotherdev-source-code-and-homebrew-updates> (Dec. 14, 2011); Tranced_1, *PS3 Homebrew Game by ThatOtherDev*, <http://ps3.dashhacks.com/2012/02/13/ps3-homebrew-game-by-thatotherdev> (Feb. 12, 2012).

²⁸ Greg, *Eskiss—Now w/ Move Support!*, <http://ps3.dashhacks.com/2011/10/01/eskiss-now-w-move-support> (Oct. 1, 2011).

²⁹ Tranced_1, *Paintown Update Released*, <http://ps3.dashhacks.com/2011/12/26/paintown-update-released> (Dec. 26, 2011).

³⁰ Grandy, *PS3 Homebrew Takes a Leap Forward — First Person Shooter Engine Displayed*, <http://psx-scene.com/forums/content/ps3-homebrew-takes-leap-forward-first-person-shooter-engine-displayed-1254> (July 22, 2011).

³¹ *[Released] Solar 4.0*, <http://www.ps3hax.net/2012/02/released-solar-4-0/> (Feb. 8, 2011).

³² Ryan F., *XBMK Runes on PS3 via OtherOS*, <http://www.qj.net/qjnet/playstation-3/xbmc-runs-on-ps3-via-otheros.html> (May 14, 2010); Lonely Coder, *Showtime*, <https://www.lonelycoder.com/showtime> (last visited Feb. 28, 2012); *Showtime (HTPC Media Player) v3.2*, <http://ps3.dashhacks.com/downloads/showtime-htpc-media-player> (last visited Feb. 28, 2012).

players, Showtime, has enjoyed remarkable success, and thousands of users are making use of the application:

About a year ago Showtime had approximately 5 users. When the PS3 jailbreak was announced I quickly bought a PS3 myself and started to port Showtime to it So far I've not used my console for anything else. I've never played a game on it, nor do I own a game. After Showtime was released for the PS3 sometime during March 2011 it gained a userbase of a few thousand users instead. Very encouraging!³³

Finally, Sony and ESA claim that permitting researchers and homebrew developers to jailbreak video game consoles to install alternative operating systems and run independently developed programs will somehow open the floodgates for copyright infringement.³⁴ This is pure speculation. EFF is seeking narrowly defined exemptions to allow users to install and run software of their choice for very specific purposes on their own lawfully purchased gaming consoles. Users who circumvent technological protection measures for unlawful purposes will not benefit from the exemption. Sony and ESA concede, as they must, that tools already exist to enable users to run infringing games and other programs.³⁵ EFF's proposed exemption will not foster infringement or create any problem that does not already exist.

B. Jailbreaking of Phone Handsets, Tablets, and Game Consoles Is A Lawful Use

Opponents of the proposed jailbreaking exemptions attempt to challenge the well-established principle that copyright law favors copying and modification of software where necessary to achieve interoperability with other software. The Register and the Librarian should decline this invitation to discount two decades of settled fair use jurisprudence.

With regard to the first fair use factor, the purpose and character of the use for which EFF seeks exemptions for proposed classes 3 and 5 is precisely the purpose recognized in *Sega* and *Sony*: to permit and encourage the creation of original software programs.³⁶ EFF's proposal contains ample evidence that those who circumvent the digital locks in the firmware of game consoles, phones, and tablets do so for this reason.³⁷

In *Sony Computer Entertainment v. Connectix*, the Ninth Circuit held that enabling the development of new independent software is a "transformative" purpose.³⁸ Nonetheless, as the Register concluded correctly in 2010, fair use does not turn on whether the label of "transformative" applies.³⁹ Rather, the first factor looks at whether the user is "seeking to

³³ Lonely Coder, *Showtime 3.4 Released*, <https://www.lonelycoder.com/showtime/news> (Jan. 24, 2012).

³⁴ Sony Comments and ESA Comments at *passim*.

³⁵ Sony Comments at 13 ("Today, even novice users can easily purchase a USB drive that contains the tools that will allow them to run illegal copies of any video game or other applications on a PS3 that has not had firmware updates.").

³⁶ See *Sega v. Accolade*, 977 F.2d 1510 1522 (9th Cir. 1992) (finding "public benefit" in the "increase in the number of independently designed video game programs offered for use with the Genesis console").

³⁷ EFF's December 1, 2011 comments at 3-5, 20-31.

³⁸ 203 F.3d 596, 607 (9th Cir. 2000).

³⁹ 2010 Recommendation at 94

exploit or unjustly benefit from any creative energy” that went into the original work—in this case, device firmware.⁴⁰ Owners of devices, including game consoles, do not unjustly benefit from the firmware when they use it to run lawful but unauthorized software any more than when they use it to run authorized software. The small modifications that users must make to the firmware to enable this use are not exploitative because the device manufacturer is never denied compensation for the firmware. As the firmware has no function apart from the device it runs, and only lawfully owned devices qualify for the proposed exemptions, any user who will benefit from the exemptions must necessarily be in lawful possession of a copy of the firmware, for which the manufacturer received compensation.

It is irrelevant that, as ESA argues, “the hacked firmware is a substitute for the original firmware.”⁴¹ The same was true in *Sony*, in which defendant Connectix wrote a program that completely replaced Sony’s firmware as an engine for running other software. 203 F.3d at 598. The essential point—there as here—is that the user of the original copyrighted work derives no unjust benefit from it, nor seeks to use it without payment. *See Sega*, 977 F.2d at 1522 (“[T]here is no evidence in the record that Accolade sought to avoid performing its own creative work.”).

ESA nonetheless goes to great lengths to distinguish established precedents on the theory that the final products in those cases did not contain any copied code.⁴² It does not succeed: because fair use is an “equitable rule of reason,” *Sega* and *Sony* cannot be limited narrowly by their facts.⁴³ Indeed, the *Sony* court chastised the district court below for doing just that, finding that *Sega*, the earlier precedent, was not a ceiling on fair use for interoperability.⁴⁴ Later courts have found that copying of device firmware is a fair use even where, unlike in *Sega* and *Sony*, the defendant’s final product included some of the plaintiffs’ code.⁴⁵

The second factor also favors a finding of fair use. The nature of the copyrighted work in question—the device firmware—is essentially functional: it exists to run programs on the device. In particular, the portion of the firmware that users of the proposed exemptions seek to modify is the portion that prevents certain programs from running. This lock-out code plays no role in generating creative graphics, sounds, game mechanics, or other “highly creative” functions described by Sony and ESA.

To the extent the firmware performs other functions or contains code that falls closer to the creative and artistic end of the spectrum in a fair use analysis, users who jailbreak their devices do not copy or modify this code in any permanent way—any copying is incidental and necessary to performing the jailbreak, and is transitory.

⁴⁰ *Lexmark*, 317 F.3d at 544.

⁴¹ ESA Comments at 23.

⁴² .. ESA Comments at 19-21. The Joint Commenters suggest that the Office should ignore *all* applicable fair use precedents based on two cases, decided 19 and 26 years ago, holding only that copying a computer program is a *prima facie* infringement. AAP, *et al.* Comments at 20 n.32. Fair use was not raised or considered in either case. The Office should decline this request to ignore controlling law.

⁴³ *Sega*, 97 F.2d at 1522 (quoting *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560 (1985) (quoting H.R. Rep. No. 1476, 94th Cong., 2d Sess. 65, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5679)).

⁴⁴ *Sony*, 203 F.3d at 604.

⁴⁵ *Static Control Components, Inc. v. Lexmark Int'l, Inc.*, Civ. 02-571, 2007 WL 1485770, at *4 (E.D. Ky. Apr. 18, 2007) (on remand from the Sixth Circuit).

ESA's suggestion that lock-out code is actually entitled to *stronger* copyright protection because it is intended to restrict access to *other* creative works is backwards. *See* ESA Comments at 25. As the Sixth Circuit Court of Appeals observed, "Generally speaking, 'lock-out' codes fall on the functional-idea rather than the original-expression side of the copyright line."⁴⁶ The effectiveness of access controls is enforced not by copyright law but by § 1201 of the DMCA, and then only where the Office and the Librarian have not determined that enforcement would impair lawful uses.

The third factor also tilts firmly toward fair use. First, as discussed above, users of the proposed exemptions modify only a small portion of the work at issue on a permanent basis; the vast majority of the work is neither copied nor modified except incidentally to the installation of the jailbreak code. Second, and even more importantly, modifying the firmware is necessary to achieve the purpose of the proposed exemptions—to allow lawful programs to interoperate with programs on the device. Where the portion used is no more than necessary to achieve the stated goal, the third factor favors fair use, or is at least neutral.⁴⁷

Finally, jailbreaking does not cause market harm. Narrowly crafted exemptions 3 and 5 do not permit nor encourage infringement of copyrighted programs that run on personal devices, and remedies under both the Copyright Act and the DMCA would remain available for all such infringement.⁴⁸ The uses being made of phones, tablets, and game consoles that require circumvention, as described in EFF's proposal and in other comments, increase the functionality, and thus the value, of these devices.⁴⁹

The purported harms to the market that Sony and ESA predict flow from a loss of monopoly control over what software can run on lawfully owned devices.⁵⁰ This is not the type of harm that copyright law is designed to address:

The Copyright Act was not designed to prevent such indirect negative effects of copying. The fourth factor is aimed at the copier who attempts to usurp the demand for the original work. The copyright laws are intended to prevent copiers from taking the owner's intellectual property, and are not aimed at recompensing damages which may flow indirectly from copying.⁵¹

⁴⁶ *Lexmark* 387 F.3d at 536.

⁴⁷ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 589 (1994) (substantial copying from original song as necessary to achieve the purposes of a parody did not weigh against fair use).

⁴⁸ Sony incorrectly and misleadingly paraphrases *Campbell*, 510 U.S. at 590 to say that the fourth fair use factor considers whether the use in question "would diminish the value of copyrighted works." Sony Comments at 27. In fact, that opinion addressed "the effect of the use upon the potential market for or value of the copyrighted *work*," following the actual language of 17 U.S.C. § 107(4). The opinion does *not* suggest that the market for *other* copyrighted works plays any role in assessing the fourth factor.

⁴⁹ *See, e.g.*, Mozilla Corporation Comments at 3 ("Without regression testing, Mozilla's ability to conduct open source development at such a vast scale would be seriously undermined. At present, regression testing of code for Android devices requires root access.").

⁵⁰ ESA Comments at 27-28; Sony Comments at 26-29.

⁵¹ *Consumers Union of the United States, Inc. v. General Signal Corp.*, 724 F.2d 1044 (2d Cir. 1983); *see also Lexmark*, 387 F.3d at 545 ("Lexmark's market for its toner cartridges . . . may well be diminished by [defendant's] SMARTEK chip [which contained Lexmark's copyrighted software], but that is not the sort of market or value that

The harms suggested (without evidentiary support) by Sony and ESA would not, in any case, bear on the fourth fair use factor.

C. Sony's Secondary Infringement Argument Concerns Trafficking in Circumvention Devices, Which Is Beyond the Scope of This Rulemaking

Sony argues that the Register and Librarian should consider whether circumvention “undertaken *purportedly* under the authority of proposed exemption 3 *may* also be infringing” because it might constitute one element of a claim of secondary copyright infringement.⁵² Specifically, Sony believes that an exemption for proposed class 3 would empower “[p]ersons who circumvent and, in so doing, create or modify a tool and who then provide that tool to others.” This hypothetical possibility is irrelevant to this proceeding, because it would constitute trafficking in circumvention devices, which is prohibited by § 1201(a)(2). The exemptions to § 1201(a)(1) enacted in this proceeding have no bearing on the trafficking prohibition, and trafficking would not be authorized “under the auspices of proposed exemption 3.”

IV. Response to Concerns Regarding Exemptions 7B and 7C (for Primarily Noncommercial Videos)

EFF is aware that the Organization for Transformative Works (“OTW”), a nonprofit organization dedicated to promoting and defending the vidding community, is filing detailed reply comments in support of Proposed Classes 7B and 7C. OTW’s comments will provide substantial evidence on issues such as remix artists’ continuing need for access to high-quality source material, and the inadequacy of available alternatives. In order to avoid repetitive filings, and because OTW is well-positioned to offer this additional evidence and argument, EFF will keep its remarks on these proposed exemptions brief.

Opponents of these proposed exemptions offer five principal arguments. None withstands serious scrutiny.

First, they complain that the exemption should not be granted because some remix videos might not fall within the fair use doctrine, *i.e.*, they would be infringing.⁵³ EFF’s initial submission pointed to numerous examples of remix videos that would clearly be protected by the fair use doctrine, such as Joe Sabia’s production for the Lear Center.⁵⁴ It is notable that the various commenters do not even attempt to explain why those works might violate copyright. Rather, they dredge up a different video that they insist is *not* protected by fair use. EFF disagrees with their fair use analysis, but regardless: **if the use infringes copyright, the exemption doesn’t apply.**

copyright law protects.”); *Sony*, 203 F.3d at 607 (“Sony understandably seeks control over the market for devices that play games Sony produces or licenses. The copyright law, however, does not confer such a monopoly.”).

⁵² Sony Comments at 30-31 (emphasis added).

⁵³ See, e.g., AAP, *et al.* Comments at 33.

⁵⁴ EFF’s December 1, 2011 comments at n.277.

Second, the Joint Commenters contend that the proposed limit to lawful uses is ineffective because some people will misinterpret the exemption to authorize infringing activities.⁵⁵ That is an argument for better education about the DMCA, not an argument against granting an exemption. Moreover, absent an exemption, the problem is significantly worse: rather than engaging in “guessing games” about whether their activities are legal, many artists are faced with a counterintuitive choice between taking source materials from videos and services that they have paid for (potentially violating § 1201, likely unknowingly) or downloading from unauthorized sources. It is also notable that the commenters are unable to muster a smidgen of evidence that the existing exemption for noncommercial videos has caused harm to any market, or impaired the creation, distribution, or value of copyrighted works.

Third, commenters suggest that vidders do not *always* need high quality source to make their videos.⁵⁶ These commenters effectively ask the Register to create an artistic “second class.” Such an approach necessarily devalues an extraordinarily vibrant form of creativity and would impair the availability of copyrighted works by discouraging their creation and distribution. As explained in EFF’s initial submission (and recognized by the Register in the last proceeding), access to high quality source content often helps artists accomplish their transformative, critical purposes. Video creator Jon Monday observed in his comments, “the video quality directly translates to the ‘watch-ability’ of the final product.”⁵⁷ That “watch-ability” is essential to reach a broader audience. For example, as commenter Johanna Blakely of the Lear Center noted, the video Joe Sabia created for the Lear Center (discussed on EFF’s initial submission) “was picked up by the New York Times, Variety and The Daily Beast and promoted across the Web by BoingBoing, one of the most popular blogs in the world, and digg, an influential social bookmarking service.”⁵⁸ That doubtless happened, in part, because of the excellent quality of the work.

Nor is it true that the limitation of the proposed exemption to situations where the creator “believes and has reasonable grounds for believing the circumvention is necessary” is meaningless. Rather, that limitation ensures that whether the exemption applies does not depend entirely on the subjective belief of the remix artist. One would expect exemption opponents would support it.

Fourth, the DVD-CCA insists that adequate alternatives exist and, therefore, even the current exemption for noncommercial videos is no longer needed. As OTW’s Reply Comments explain in more detail, nothing could be further from the truth. Anyclip.com is hardly an adequate alternative for vidders: its collection is woefully limited. For example, it does not contain television shows, news footage, or many movies—as of February 28, 2012, there were just 34 documentaries, most of recent vintage. And it does not permit vidders to download and manipulate the excerpts that are available.

Nor is clip licensing a reasonable alternative. Of course, the works covered by the exemptions should not require a license, because they are non-infringing fair uses. Moreover, content owners

⁵⁵ See, e.g., AAP, *et al.* Comments at 39.

⁵⁶ *Id.* at 40; DVD-CCA Comments at 11-15.

⁵⁷ New Media Rights Comments at 10.

⁵⁸ Johanna Blakeley Comments at 2.

should not have a licensing “veto right” where, as will often be the case, the use in question is critical of the original content. And while the process may have been streamlined, it requires the creator to map out in detail and in advance exactly what clips she’ll need. But as renowned remix artist Elisa Kreisinger explains, “There is no way to know how many and which clips you’ll need ahead of time. This is like purchasing only specific vowels and consonants when really you need the whole alphabet in order to write something comprehensible.”⁵⁹

Finally, while screen capture technology may have improved, it still falls well short of what remix artists need to engage in sophisticated commentary. As an initial matter, neither the DVD-CCA nor the Joint Commenters are prepared to concede screen capture is actually permissible under § 1201.⁶⁰ But even if they were willing to do so, the available technologies do not provide a practical means of accomplishing the transformative purposes of many remix artists. For example, the Replay Video Capture software DVD-CCA celebrates does not work on the Apple computers most vidders use.⁶¹ Further, the technology only captures video from websites, which usually are highly compressed in order to load quickly. Image quality is further degraded once screen-captured and transferred to video-editing friendly formats. The format Replay enables, WMV and MPEG-2, are the worst formats for editing due to quality degradation. And, of course, not all content is available via websites.⁶² Finally, as noted by a vidder quoted in EFF’s initial submission, in many instances screen capture results in source material that is branded with unwanted “screen bugs.”⁶³

Fifth, the Joint Commenters express vague concerns that allowing an exemption for circumvention of access control used in connection with streaming and download services would threaten “the viability of new, sensitive business models.”⁶⁴ However, they offer no evidence of any actual threat. Indeed, as demonstrated in EFF’s initial submission, remix videomakers are already extracting clips from numerous sources—doubtless unaware of the legal risk inherent in doing so—yet new services are flourishing.⁶⁵

By contrast, comments submitted in support of the proposed exemption provide additional evidence that it will help promote the availability of copyrighted works, particularly where those works are intended to comment on current events. As feminist videomaker Anita Sarkeesian observes:

It is of utmost importance that I can access video clips of current events, whether it be news footage or movies still screening in theaters. If I am making a video about a current screening film, I need to access footage of that film in order to provide evidence for my argument. If I waited until the film was released on DVD or Blu-ray to make and release my video, I

⁵⁹ Statement of Elisa Kreisinger, attached hereto as Appendix 2.

⁶⁰ AAP, *et al.* Comments at 38 n. 59.

⁶¹ Kreisinger Statement.

⁶² *Id.*

⁶³ EFF December 1, 2011 Comments at 43.

⁶⁴ AAP, *et al.* Comments at 40.

⁶⁵ See, e.g., Cory Berman, *Hulu Not Selling to Pursue “Even Greater Success,”* <http://www.lostremote.com/2011/10/13/hulu-not-selling-to-pursue-even-greater-success> (Oct. 13, 2011).

would lose my audience since the film is no longer current, interesting or compelling to my potential viewers.⁶⁶

Simply put, removing the legal cloud that now hangs over transformative works such as Sarkeesian's is precisely what the rulemaking was designed to accomplish. The exemptions should be granted.

V. Conclusion

For the reasons described herein, as well as the arguments presented in conjunction with EFF's December 1, 2011 comments, EFF urges the Librarian of Congress to grant exemptions for proposed classes 3, 5, 7B and 7C.

DATED: March 2, 2012

Respectfully submitted,

ELECTRONIC FRONTIER FOUNDATION

/s/ Corynne McSherry
Corynne McSherry
Marcia Hofmann
Mitchell Stoltz
Electronic Frontier Foundation
454 Shotwell St.
San Francisco, CA 94110
(415) 436-9333
corynne@eff.org
marcia@eff.org
mitch@eff.org

Counsel for Electronic Frontier Foundation

Jason M. Schultz
SAMUELSON LAW, TECHNOLOGY &
PUBLIC POLICY CLINIC
U.C. Berkeley School of Law
396 Simon Hall
Berkeley, CA 94720-7200
(510) 642-1957
jschultz@law.berkeley.edu

Of Counsel to Electronic Frontier Foundation

⁶⁶ New Media Rights Comments at 13.

APPENDIX 1

Supplemental Statement of Prof. Gaurav Khanna

Associate Professor of Physics
University of Massachusetts, Dartmouth

March 2, 2012

1. I am an associate professor of Physics at the University of Massachusetts, Dartmouth. My research focuses on theoretical and computational astrophysics. My work depends upon access to supercomputers, and I created a Sony PlayStation 3 cluster to conduct my research, as detailed in the statement I submitted to support the Electronic Frontier Foundation's exemption request for proposed class 3.
2. I am familiar with the Folding@home project discussed in the comments filed by Sony Computer Entertainment America LLC (Sony) and the Entertainment Software Association (ESA).
3. To build a similar computing project without substantial assistance from Sony, a researcher would have to write a scientific application in the GameOS environment rather than in Linux, the platform of choice for scientific computing. To do so would require the researcher to learn how to program for the GameOS environment, purchase a special software development kit from Sony, and pay licensing fees to Sony. Sony would then have to approve or "sign" the researcher's code in order for the application to run on a PS3.
4. In my opinion, these financial and logistical barriers make a distributed computing model like the Folding@home project a non-viable option for most independent scientific researchers.

APPENDIX 2

Statement of Elisa Kreisinger

Video Remix Artist

March 1, 2012

1. I am video remix artist writing for TV with TV. My most recent work includes the Queer Housewives of New York City, Sex and the Remix: QueerCarrie and the forthcoming MadWomen/MadMen remix series. My work has been featured on Art 21, on Bravo TV.com, Salon, Jezebel, on the front page of the Boston Globe and in galleries and festivals throughout the US and Germany. I speak about the importance of women talking back to pop-culture most recently at Harvard, University of Southern California, Eileen Fisher, National Conference for Media Reform, Museum for Film and Television, Berlin and SXSW. I am currently a media fellow at the Center For Social Media at American University and teach workshops for girls and women on putting media literacy into practice through video production.
2. I have reviewed several claims made by the DVD Copy Control Association (DVD-CCA) regarding “marketplace offerings” for remix artists to obtain and use short portions of clips, and submit this statement to explain why these offerings do not present a viable alternative.
3. DVD-CCA points to www.anyclip.com as a source for short portions of movies. DVD-CCA Comments at 8. However, anyclip.com doesn’t allow you to download and edit the clips, it only allows you to make a playlist. It also relies on AnyClip to provide the movies and clip them which means only certain films and only portions of those films are available. It does not offer works in their entirety. Remixers, like other editors, directors and videographers, require 6 hours of content to produce 1 minute of content.
4. DVD-CCA also suggests that videomakers should license the clips they need. Such a process requires, among other things, the preparation of a detailed list of potential clips. This is a highly cumbersome process; remixing is an art, and a given remix may take a number of different directions as you experiment with the various source materials. Thus, there is no way to know how many and which clips you’ll need ahead of time. This is like purchasing only vowels and consonants when really you need the whole alphabet in order to write something comprehensible.
5. DVD-CCA identifies Replay Video Capture Software as a potential means of obtaining video. There are several problems with this service. First, this solution only applies to personal computers. Most video editors and content creators are Mac based. Second, it captures content as a WMV or MPEG-2 file. WMV and MPEG-2 are the worst formats for editing due to quality degradation. Third, it only captures videos from websites. This is problematic because videos on websites are highly compressed in order to load quickly which means quality is further degraded once screen captured and then transferred to video-editing friendly formats. In addition, many networks such as Bravo do not put episodes of their shows online.