Library of Congress
Copyright Office

Notice of Inquiry	)	
	)	
In re Exemption to Prohibition on	)	Docket No. RM 2002-4
Circumvention of	)	
Copyright Protection Systems for	)	
Access Control Technologies	)	

Comments of the Computer & Communications Industry Association

The Computer & Communications Industry Association (CCIA) is an association of computer, communications, Internet and technology companies that range from small entrepreneurial firms to some of the largest members of the industry. CCIA was founded over 30 years ago and our members include equipment manufacturers, software developers, providers of electronic commerce, networking, telecommunications and online services, resellers, systems integrators, and third-party vendors. Our member companies employ nearly one million people and generate annual revenues exceeding $300 billion.

CCIA was actively engaged in the debate on digital copyright issues from its outset, and we argued before Congress and the Library of Congress that portions of the DMCA were unworkable and needed to be modified in dramatic respects. Fortunately, we were able to help effectuate positive modifications to the legislation that allowed for substantial legitimate reverse engineering to promote interoperability, encryption research, security testing, safe harbors for ISPs, and other changes that were sorely lacking in original drafts. However, even with the ameliorative changes we were able to achieve, we were nonetheless concerned that some of the remaining provisions would have the effect of stifling free speech and innovation, hallmarks of the research process, and impeding open competition in technology and related industry sectors. As we feared, a great deal of research and innovation by scientists and academics has been stifled, and dominant copyright holders have been empowered to employ professed rights under the DMCA to harm competition and impair consumers' rights.

In order to address some of these concerns, we believe the following exemption from DMCA should be enacted:

Sound recordings and audiovisual works (including motion pictures) embodied in copies and phonorecords, protected by access control mechanisms which require the use of a computer operating system, media player, codec or digital rights management system specified by the copyright holder[1] *in order to gain lawful access.*

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[1] We note that nothing in this exemption would stand in the way of independent competitors offering copyrighted works which require the use of playback devices and systems specified by them.

Summary of Argument for Exemption:

The development of the technology and software industry has evolved such that the dissemination of copyrighted works often relies upon delivery systems or software programs owned or controlled by others. Historically, book publishers relied upon printers and paper mills, player piano roll manufacturers relied upon player piano manufacturers, vinyl record manufacturers relied upon record player manufacturers, radio and television broadcasters relied upon radio and television manufacturers, and so on. This paradigm persists today as the digital dissemination of copyrighted works relies upon increasingly complex systems, including electronic hardware (computers, routers, servers, drives, video and sound cards, monitors, speakers) and computer software (operating systems, browsers, media players, codecs and security software).

However, the goals of copyright are not advanced when copyright holders are permitted to leverage their lawful copyright monopolies into control over which computer operating systems, browsers, media players, codecs or digital rights management systems must be used by those exercising licensed exclusive rights of reproduction or public performance or, worse, by those exercising rights that have never belonged to the copyright holder, such as the right to perform a work privately.

American jurisprudence is replete with cases condemning the use of copyright to leverage market power in related or adjacent markets for other products or services, copyrighted or not.[2] Although the question whether prosecutors or private parties may obtain relief from such abusive practices is not before us, provision of an exemption is a necessary corollary to respect for the limits upon the copyright established by Congress and reaffirmed in the courts. Allowing competition in the development of competing technologies used in the dissemination or use of copyrighted works serves, rather than hinders, the public interest in copyright law. Allowing such competition in no way impairs the exclusive rights of copyright holders and inherently benefits consumers and innovation.

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[2] As recently as last year, the District of Columbia Court of Appeals forcefully reasserted this principle, brushing aside the copyright claims of Microsoft Corporation in justifying its anticompetitive behavior in *U.S. v. Microsoft*. Microsoft attempted to justify anticompetitive software license restrictions by claiming that the company was simply "exercising its rights as the holder of valid copyrights." The D.C. Circuit, in its unanimous decision against the company, brushed aside these claims:

> Microsoft's primary copyright argument borders upon the frivolous. The company claims an absolute and unfettered right to use its intellectual property as it wishes: "[I]f intellectual property rights have been lawfully acquired," it says, then "their subsequent exercise cannot give rise to antitrust liability." Appellant's Opening Br. at 105. That is no more correct than the proposition that use of one's personal property, such as a baseball bat, cannot give rise to tort liability. As the Federal Circuit succinctly stated: "Intellectual property rights do not confer a privilege to violate the antitrust laws.'' *In re Indep. Serv. Orgs. Antitrust Litig*., 203 F.3d 1322, 1325 (Fed. Cir. 2000*). United States v. Microsoft Corp., 253 F.3d 34, 63 (D.C. Cir. 2001) (per curiam)*.

Factual and Evidentiary Basis for Exemption:

The practice of wedding distribution technology to copyrighted content is quite common. The most prominent examples are from the joint ventures formed by some of the major copyright holding companies:

Musicnet conditions access to the copyrighted works reproduced from its service upon installation and use of the RealOne Player or RealOne Player Plus, a product of one of its joint venture partners.

Press*play* conditions access to the copyrighted works reproduced from its service upon installation and use of the Windows Media Player.

Movielink conditions access to the copyrighted works reproduced from its service upon installation and use of the Windows Media Player.

Legal Argument in Support of Exemption:

Traditionally, copyright holders had very little control over the means by which their content was distributed, even by authorized intermediaries. Record and book stores could locate their stores and create their displays however they wished. Similarly, movie theater and video store owners could design their theaters in any manner they saw fit. In addition, libraries and schools have been permitted to offer broad access to copyrighted works without permission or notice to the owners of those works. The copyright holder has no power to dictate which of the competing ancillary goods and services will be selected by the bookseller, video store, theater, music shop, or library, and the retailer can improve its competitive posture by wise and creative selection from among these goods and services. The copyright confers no power to determine where a retail establishment or library may be located, or to restrict who can purchase, rent, or view copies from a given location. Consumers are also free to choose their own means by which to read, view, or listen to a copyrighted work. They are likewise unconstrained from using whatever technology (computers, software, monitors, sound systems and other electronic hardware) they choose to perform their phonorecords, and copies of sound recordings and audiovisual works.

However, in the online world, copyright holders are increasingly making it difficult or impossible for consumers to access copyrighted works unless they also acquire and use completely separate goods and services needed to carry out the online transaction or to perform the work. Copyright owners employ such things as DRMs, codecs, and media players to impede lawful access to copyrighted work, except through the use of technology authorized by the copyright owner. (Some of these systems, in turn, may integrate or support a variety of related sub-systems.) The ability to reproduce a work in copies (downloading) or to perform publicly a work (streaming), for example, is often only possible with the use of a specific codec, DRM, or media player.

Such bundling of copyrights with separate and non-essential goods and services should not be permitted. It stands to reason that if it is unlawful to grant a license to publicly perform certain television shows on condition that the licensee agree to pay cash for another television show,[3] so, too, the limiting of access to a vast library of copyrighted

[3] *MCA Television Ltd. v. Public Interest Corp.*, 171 F.3d 1265 (11th Cir. 1999).

works based on the use a particular vendor's codec, DRM or media player would also be unlawful – particularly if there are competing technologies that can also meet any legitimate copyright-related interests of the copyright holder.

Even when carried out by a single copyright holder acting alone, such bundling runs afoul of copyright and antitrust law when the option to choose the copyrighted work unbundled is not made available. *United States v. Paramount Pictures*, 334 U.S. 131 (1948); *United States v. Loew's, Inc*., 371 U.S. 38 (1962); and *MCA Television Ltd. v. Public Interest Corp.*, 171 F.3d 1265 (11th Cir. 1999). When such bundling occurs on a wider scale by major copyright holding companies joint venturing with each other, the anticompetitive impact is much more significant. At one point, all seven major motion picture studios had become part of one of two joint ventures: Movielink (formerly MovieFly) , a joint venture of AOL Time Warner, MGM Studios, Sony Pictures Entertainment, Viacom's Paramount and Vivendi Universal's Universal Studios; and movies.com, a joint venture of News Corp.'s Twentieth Century Fox and Walt Disney's Disney Studios (from which News Corp. subsequently withdrew).

Movielink's service requires, as a precondition for access to lawful reproductions of copyrighted works, that licensees also agree to use Microsoft's Windows operating system and Microsoft's Windows Media Player. MusicNet, a joint venture of RealNetworks, BMG Entertainment, EMI Music and Warner Music Group, utilizes RealNetworks as the exclusive supplier of media player and related technologies, while press*play*, a joint venture of Universal Music Group and Sony Music Entertainment, has selected Microsoft's Media Player.[4]

But "the granted monopoly power [in specific works] does not extend to property [such as DRMs, codecs, media players or retail outlets, nor to rights such as the consumer's right of private performance or the owner's entitlement, under Section 109(a), to dispose of a lawfully made copy without the copyright owner's consent] not covered by the patent or copyright."[5] This is because the public policy granting copyrights "excludes from it all that is not embraced" in the original copyrighted work, and "equally forbids the use of the copyright to secure an exclusive right or limited monopoly" beyond the scope of the Copyright Act and which is "contrary to public policy to grant."[6]

The conduct at issue in *Kodak*[7] pales in comparison. In that case, owners of Kodak equipment who objected to being forced to use Kodak service had the option of providing

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[4] In a parallel intellectual property scenario, the Department of Justice has raised concern about the effects of pooling where the pool includes non-essential patents. "Inclusion in the pool of one of the patents, which the pool would convey along with the essential patents, could in certain cases unreasonably foreclose the competing patents from use by manufacturers; because the manufacturers would obtain a license to the one patent with the pool, they might choose not to license any of the competing patents, even if they otherwise would regard the competitive patents as superior." Letter from Joel I. Klein to Garrard R. Beeney, Esq., December 16, 1998, at p.10. It stands to reason that this concern would be just as valid where pooled copyrighted works were made available only on condition that certain non-essential technologies or business models were employed, thereby foreclosing competition in competing and possibly superior technologies and business models.

[5] *Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970, 976 (4th Cir. 1990) (citations omitted).

[6] *Id.* at 977 (quoting with revisions from *Morton Salt*, 314 U.S. at 492) (brackets omitted).

[7] *Eastman Kodak Co. v. Image Technical Services*, 504 U.S. 451 (1992).

their own service[8] or, despite the switching costs, selling the Kodak equipment and purchasing another brand capable of performing just as well. When it comes to copyrighted works, there is no "self service" option for a customer who objects to having to use only the DRM, codec, player and so on, specified by the copyright holder. To the degree that any of these effectively control access to the lawfully reproduced work, self-service could invite criminal liability for circumvention. Second, the option not to sacrifice the right of private performance or the Section 109(a) right to transfer a lawfully made copy is not available. Finally, copyrights present a more onerous situation than Kodak's because, instead of a patented product for which there were ample market substitutes, each copyrighted work is unique.[9] The consumer who objects to the copyright holder's restraints may reject them, but would then be unable to enjoy access to even a lawfully reproduced copy or phonorecord using other software or services, and would not be able to obtain "market substitutes" for that copyright holder's works.

The power of a copyright owner to use a single copyrighted work to restrain trade and unlawfully expand the reach of the lawful copyright monopoly has already been demonstrated with works as diverse as *Gone With the Wind*[10] and *Harry and the Hendersons*.[11] It is, therefore, safe to say that if only one title can be unlawfully leveraged, even a modest collection of titles can be pooled by a single copyright holding company to leverage serious restraints on trade and a more dramatic extra-judicial enlargement of the copyright. But the Librarian of Congress need not look to the Department of Justice for relief, for Congress has provided the tools needed to minimize the impact on lawful uses. The Librarian of Congress needs only make lawful the circumvention of such bundled products – to guarantee, for example, that persons who object to having to gain access to their lawful copies using Microsoft's Windows Media Player will not be prosecuted for accessing their lawful copies using QuickTime or some other media player instead.[12]

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[8] *Id.* at 458.

[9] *See, e.g.*, n.10, *infra*, and accompanying text.

[10] *Loew's*, 371 U.S. at 48, n.6. The Supreme Court's reaction to the district court's findings are instructive:

> The district judge found that each copyrighted film block booked by appellants for television use "was in itself a unique product"; that feature films "varied in theme, in artistic performance, in stars, in audience appeal, etc.," and were not fungible; and that since each defendant by reason of its copyright had a "monopolistic" position as to each tying product, "sufficient economic power" to impose an appreciable restraint on free competition in the tied product was present, as demanded by the *Northern Pacific* decision. We agree. These findings of the district judge, supported by the record, confirm the presumption of uniqueness resulting from the existence of the copyright itself.

Id. at 48 (citation to the lower court and footnote 6 omitted). Surely, the movies of today are no less unique, and no more fungible.

[11] *MCA Television Ltd. v. Public Interest Corp.*, 171 F.3d 1265 (11th Cir. 1999)

[12] It is not uncommon -- and certainly advisable -- for copyright owners seeking broad dissemination of content to offer downloads or streaming of their copyrighted works in multiple formats. *See, e.g.,* www.bmwfilms.com (offering over a dozen delivery formats for BMW films).

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