

## **I. Class of work**

Ancillary audiovisual works distributed on Digital Versatile Discs (DVDs) using the Content Scrambling System (CSS) of access control.

## **II. Summary of Argument**

The Content Scrambling System (CSS) is an access control device for ancillary audiovisual works distributed on Digital Versatile Discs (DVDs), a fact affirmed by the 2nd Circuit Court of Appeals. CSS prevents quotation of ancillary audiovisual works distributed on DVDs for purposes of commentary and criticism, which is a noninfringing use under current law. Consideration of the factors enumerated in § 1201(a)(1)(C) supports the conclusion that an exemption is warranted. An exemption will have no effect on the availability for use of copyrighted works: the vast number of ancillary audiovisual works are not available in unprotected formats; CSS access control on DVDs does not support a model beneficial to the public; and, availability of ancillary works on DVDs is driven by consumer demand and filmmaker enthusiasm. The effect on the availability for use of copyrighted works for nonprofit archival, preservation, and educational purposes is negative. The impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism and comment is highly negative: fair use criticism and comment are a core concern of the First Amendment and must be granted special solicitude; the DMCA is a criminal statute and effects on free speech concerns must be scrutinized with particular care; ancillary materials are particularly important elements to quote for purposes of comment and criticism; the mere possibility of copying without violating § 1201(a)(1) is not sufficient to protect strong First Amendment rights; and, there is significant harm to an amateur reviews website and its contributors. The effect of circumvention of technological measures on the market for or value of copyrighted works is slightly positive, with no negative effects. In the alternative, the Librarian of Congress may determine that CSS is not an access control device because it does not control access to a work. This interpretation is supported by Congressional intent and statutory analysis, at best CSS is copy protection.

## **III. Factual Support/Legal Argument**

LawMeme<sup>1</sup> is a collaboration between the Information Society Project at Yale Law School, the Yale Law and Technology Society and the Yale Journal of Law and Technology. The joint project is a collaborative weblog (“blog”) that publishes up-to-date commentary and analysis concerning recent law, technology and policy news. LawMeme published its first article in July 2001. LawMeme thanks you for giving us the opportunity to provide input as you try to formulate your recommendations on whether noninfringing uses of certain classes of works are, or are likely to be, adversely affected by prohibition of circumvention of access control devices.

This rulemaking presents a unique opportunity to identify the intent and develop a logical interpretation and implementation of the anti-circumvention provisions of the Digital Millennium Copyright Act (the “DMCA”) 17 U.S.C. § 101 *et seq.* The DMCA was adopted by Congress and signed into law October 28, 1998 following the passage of two intellectual property treaties by

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<sup>1</sup> <<http://research.yale.edu/lawmeme/>>

the World Intellectual Property Organization (“WIPO”), the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, which were signed in Geneva, Switzerland in December 1996.<sup>2</sup> Those two new WIPO treaties included substantively identical provisions on technological measures of protection, also commonly referred to as the “black box” or “anticircumvention” provisions. The WIPO treaties contained provisions requiring signature parties to provide “adequate legal protection and effective legal remedies against the circumvention of effective technological measures” that are used by the holders of intellectual property rights. H.R. REP. No. 105-796 at 64 (1998).

The DMCA was enacted with certain anti-circumvention provisions. Section 1201(a)(1) of the DMCA governs the *act* of circumventing “a technological measure that effectively controls access to a work protected under this title” and is the focus of this rulemaking. However, in order to understand fully and interpret properly §1201(a)(1), § 1201(a)(2) and § 1201(b) are discussed herein. For example, § 1201(a)(2), which “supplements the prohibition against the act of circumvention in paragraph (a)(1) with prohibitions on creating and making available certain technologies . . . developed or advertised to defeat technological protections against unauthorized access to a work.”<sup>3</sup> A second anti-trafficking provision is § 1201(b), which “prohibits devices primarily designed to circumvent effective technological protection measures that limit the ability of the copyrighted work to be copied, or otherwise protect the copyright rights of the owner of the copyrighted work.”<sup>4</sup>

The distinction between §§1201(a) and 1201(b) is important. Section 1201(a) prohibits *use* of and trafficking in certain devices that perform access control, while § 1201(b) does not prohibit the act of circumventing, but only seeks to prevent the distribution of certain devices that perform copying.

**A. The Content Scrambling System (CSS) is an access control device for ancillary audiovisual works distributed on Digital Versatile Discs (DVDs)**

DVDs contain copies of the motion pictures as well as ancillary audiovisual materials in digital form. DVDs are the latest generation of technology allowing consumers to view motion pictures in their homes.<sup>5</sup> DVDs provide very high quality images that are digitally formatted on a convenient 5-inch disc that is resistant to wear and damage and allows for attractive consumer features not presently available in other video formats. Generally, the video DVDs released by the major motion picture studios incorporate the Content Scrambling System (CSS). CSS is a proprietary encryption scheme.

CSS involves encrypting, according to an encryption algorithm, the digital sound and graphics files on a DVD that together constitute a motion picture and ancillary audiovisual works. A CSS-

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<sup>2</sup> The authors of this comment do not agree that the passage of the WIPO treaties required the adoption of the DMCA. Moreover, they believe the DMCA went far beyond the text of the treaty in imposing restrictions on circumvention devices.

<sup>3</sup> H.R. REP. 105-551, pt. 1, at 18 (1998).

<sup>4</sup> S. REP. NO. 105-190, at 12 (1998).

<sup>5</sup> DVDs can store any digital information. There are several standards for this including DVD-Audio and DVD-ROM. Video DVD is the sole technology at issue in this comment.

protected DVD can be decrypted by an appropriate decryption algorithm that employs a series of keys stored on the DVD and the DVD player. In consequence, only players and drives containing the appropriate keys are able to decrypt DVD files and play movies and ancillary material stored on DVDs.

As the motion picture companies did not themselves develop CSS and, in any case, are not in the business of making DVD players and drives, the technology for making compliant devices, i.e., devices with CSS keys, had to be licensed to consumer electronics manufacturers. In order to ensure that the decryption technology did not become generally available and that compliant devices could not be used to copy as well as merely to play CSS-protected movies and ancillary materials, the technology is licensed subject to strict security requirements. Moreover, manufacturers may not, consistent with their licenses, make equipment that would supply digital output that could be used in copying protected DVDs.

**i. The 2nd Circuit Court of Appeals has held CSS to be an access control device**

In the only case to consider CSS in the context of the DMCA, *Universal City Studios, Inc. v. Reimerdes*,<sup>6</sup> the Southern District of New York (affirmed by the 2nd Circuit Court of Appeals) granted injunctive and declaratory relief for Universal Studios and other motion picture plaintiffs against Reimerdes under § 1201(a)(2) of the DMCA for posting and making DeCSS technology, an unlicensed version of CSS, available on a website.

Although Reimerdes was not charged with violation of § 1201(a)(1) for *use* of a circumvention device,<sup>7</sup> he was found liable for trafficking in circumvention devices under § 1201(a)(2). A necessary element of the holding of the case, therefore, is that CSS is a technological measure that effectively controls access to a copyrighted work within the meaning of §1201(a)(2)

**B. The Content Scrambling System (CSS) prevents quotation of ancillary audiovisual works distributed on Digital Versatile Discs (DVDs) for purposes of commentary and criticism**

The terms of the CSS technology licensing agreement “permits licensed devices to decrypt and play – but not to copy – the films” and ancillary materials on DVDs.<sup>8</sup> Consequently, one cannot access for purposes of copying or quotation, a brief passage or excerpt from the ancillary materials on a DVD for purposes of commentary, criticism and review.

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<sup>6</sup> *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp.2d 294 (S.D.N.Y. 2000), *aff'd*, *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2nd. Cir. 2001).

<sup>7</sup> Section 1201(a)(1) did not come into effect until October 28, 2000, after the case had commenced.

<sup>8</sup> Final Rule: Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 Fed. Reg. 64555, 64574 at 64568 (2000) (to be codified at 37 C.F.R. pt. 201) [hereinafter *Initial Exemption to Prohibition on Circumvention*].

**C. Quotation for purposes of commentary and criticism of ancillary audiovisual works distributed on Digital Versatile Discs (DVDs) is a noninfringing use under current law**

Copying or quotation of a work is one of the exclusive rights of the copyright holder as defined in 17 U.S.C. § 106. Violation of one of the exclusive rights of the copyright holder is an infringement of copyright.<sup>9</sup> However, copyright law provides for an affirmative defense, known as “fair use,” which limits the exclusive rights of the copyright holder.

Fair use was originally judicially established doctrine. It was statutorily codified as 17 U.S.C. § 107, which was intended “to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.”<sup>10</sup> In the judicial decision that introduced the concept of fair use into American law, *Folsom v. Marsh*, 9 F. Cas. 342 (CCD Mass. 1841), Justice Story claimed “no one can doubt that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism.” Furthermore, in the House Report on the 1976 Copyright Act, page 24 of the Register’s 1961 Report is quoted approvingly, noting that one activity that may be considered fair use is the “quotation of excerpts in a review or criticism for purposes of illustration or comment”.<sup>11</sup> Finally, 17 U.S.C. § 107 itself states “reproduction in copies ... for purposes such as criticism [and] comment ... is not an infringement of copyright.”

Clearly, quotation for purposes of commentary and criticism of ancillary audiovisual works distributed on Digital Versatile Discs (DVDs) is a noninfringing use under current law.

**D. Consideration of the factors enumerated in § 1201(a)(1)(C) supports the conclusion that an exemption is warranted for this proposed class of works**

Section 1201(a)(1)(C) of the DMCA designates four factors which the Librarian of Congress must take into account in determining whether to provide an exemption to § 1201(a)(1) for a class of works. Examination of these factors clearly demonstrates the need for an exemption for ancillary audiovisual works distributed on Digital Versatile Discs (DVDs) using the Content Scrambling System (CSS) of access control.

**i. Effect on the availability for use of copyrighted works**

**1. The vast number of ancillary audiovisual works are not available in unprotected formats**

One of the elements the Register must consider is “whether works protected by technological measures that control access are also available in the marketplace in formats that are unprotected.”<sup>12</sup> For purposes of the present comment we note that the majority of ancillary

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<sup>9</sup> 17 U.S.C. § 501

<sup>10</sup> H.R. REP. NO. 94-1476, p.66 (1976)

<sup>11</sup> *Id.*

<sup>12</sup> Notice of Inquiry: Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 67 Fed. Reg. 63578, 63582 at 63580 (2002) (to be codified at 37 C.F.R. pt. 201) [hereinafter *Notice of Inquiry for Second Exemption Rulemaking*].

audiovisual works distributed on DVDs (such as outtakes, interviews with actors and directors, behind-the-scenes making of documentaries, etc.) are unavailable in VHS videotape or other, unprotected formats. This fact was noted in the initial rulemaking<sup>13</sup> and the disparity has and will only increase.<sup>14</sup> Appendix A has a representative list of the ancillary audiovisual materials available on a number of recent, popular DVDs but not on the equivalent VHS videotape.

## **2. CSS access control on DVDs does not support a model beneficial to the public**

“Another consideration relating to the availability for use of copyrighted works is whether the measure supports a model that is likely to benefit the public.”<sup>15</sup> In order to properly interpret this factor however, we must first consider the scope of the rulemaking:

The statutory focus of this rulemaking is limited to one subsection of section 1201: The prohibition on the conduct of circumvention of technological measures that control access to copyrighted works. 17 U.S.C. 1201(a)(1)(C). The Librarian has no authority to limit either of the anti-trafficking provisions contained in subsections 1201(a)(2) or 1201(b).<sup>16</sup>

Indeed, the Librarian must disregard any adverse effects that are caused by factors other than the prohibition against circumvention:

The focus of the rulemaking proceeding must remain on whether the prohibition on circumvention of technological protection measures (such as encryption or scrambling) has caused any substantial adverse impact on the ability of users to make non-infringing uses. Adverse impacts that flow from other sources ... or that are not clearly attributable to such a prohibition, are outside the scope of the rulemaking.<sup>17</sup>

Where adverse impacts that flow from other sources are not to be considered, it would be nonsensical to consider beneficial impacts that flow from other sources. Therefore, the question before the Librarian in this rulemaking is *not* whether the *anti-trafficking* provisions support a model beneficial to the public, but the much narrower question of whether the prohibition on the *use* of circumvention technology in this particular case supports a model beneficial to the public. This comment contends that the prohibition on circumvention in the case of CSS does not support a model beneficial to the public.

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<sup>13</sup> Initial Exemption to Prohibition on Circumvention, nn. 13

<sup>14</sup> Rick Lyman, *Revolt in the Den: DVD Sends the VCR Packing to the Attic*, N.Y. TIMES, Aug. 26, 2002 <<http://www.nytimes.com/2002/08/26/technology/26DVD.html>> (“Directors have embraced the format so enthusiastically, much more than they ever did with VHS,” Mr. Feingold [president of Columbia Tri-Star Motion Picture Group] said. “As a result, they’re getting involved right from the beginning in the making of the extra DVD material and taking a much more hands-on approach to the DVD release. It can’t help but have an impact.”). See also, Richard Natale, *Press Play to Access the Future*, L.A. TIMES Calendar Live, Apr. 7, 2002 <<http://events.calendarlive.com/top/1,1419,L-LATimes-Movies-X!ArticleDetail-55354,00.html>> (“The level of interactive material has grown incredibly. It’s happened so fast that it’s a little frightening.”)

<sup>15</sup> Notice of Inquiry for Second Exemption Rulemaking at 63580

<sup>16</sup> *Id.* at 63579

<sup>17</sup> Initial Exemption to Prohibition on Circumvention, at 64559

In the initial rulemaking, the Librarian determined that:

[B]ecause motion picture producers are generally unwilling to release their works in DVD format unless they are protected by access control measures, it cannot be said that enforcing section 1201(a)(1) would, in the words of the Commerce Committee, result “in less access, rather than more ...”<sup>18</sup>

However, the proper inquiry would be whether motion picture producers are generally unwilling to release their works in DVD format unless the *prohibition on the use of circumvention technology were enforced*. It is difficult to see why motion picture producers would be concerned by the mere circumvention of CSS.

Let this comment assume, for the sake of argument, that trafficking in circumvention devices harms motion picture producers by making circumvention devices more widespread and thus easier for copyright pirates to acquire. This would be a beneficial impact that did not flow from the prohibition on the use of circumvention devices and, consequently, would lie outside the scope of the present rulemaking. Moreover, in the case of DVDs, there is no logical connection between circumventing CSS and trafficking in anti-CSS devices.

When a consumer has lawfully acquired<sup>19</sup> a DVD, what does the prohibition on the use of circumvention technology gain for the motion picture producers? If the consumer circumvents CSS in making a noninfringing use of the work, how is the motion picture producer harmed?

If the consumer circumvents CSS in order to infringe copyright, there is no harm from the circumvention of CSS itself but, rather, the harm stems from the infringement directly, which is prohibited under the Copyright Act:

Thus, for example, where a copy control technology is employed to prevent the unauthorized reproduction of a work, the circumvention of that technology would not itself be actionable under Section 1201, but any reproduction of the work that is thereby facilitated would remain subject to the protections embodied in title 17.

S. REP. 105-190, at 27 (1998).

Contrast the case of CSS with that of a password-protected proprietary online database. In the case of a password-protected proprietary online database, circumvention of an access control device means that the circumventor gains access to a database without providing good consideration. This can properly be seen as harm to the owner of the database. In the case of CSS, before one circumvents it, one must lawfully acquire a DVD. In such case the content provider has already received good consideration for use of the work when the DVD was legitimately acquired. “Access” to the work has not been stolen from the content provider. How then, does mere circumvention create any adverse effects for the motion picture producer?

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<sup>18</sup> Initial Exemption to Prohibition on Circumvention, nn. 13

<sup>19</sup> If a DVD has been illicitly acquired laws against theft of physical goods generally apply.

It might be argued that if circumvention of CSS is prohibited, then motion picture producers could benefit by creating a market in which citizens pay fees for permission to circumvent for purposes of fair use, such as comment and criticism. This argument is, conveniently, circular. Furthermore, it has been dismissed by the Supreme Court, which has held that "If the use is otherwise fair, then no permission need be sought or granted."<sup>20</sup> Indeed,

*there is no protectible derivative market for criticism.* The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop. Yet the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market. "People ask . . . for criticism, but they only want praise." S. Maugham, *Of Human Bondage* 241 (Penguin ed. 1992). [emphasis added]<sup>21</sup>

In other words, it would be illegitimate in this rulemaking for the motion picture studios to make a claim that a prohibition on circumvention is beneficial to them because they can create a market from it. This does not prohibit the motion picture studios from licensing circumvention for purposes that are not fair use.

### **3. Availability of ancillary works on DVDs is driven by consumer demand and filmmaker enthusiasm**

Even if, somehow, the prohibition on circumvention of CSS creates a marginal incentive for movie studios to make ancillary works available, that incentive is miniscule compared to the incentive for the production of ancillary materials created by high demand from both consumers and filmmakers. In the initial exemption rulemaking, the Librarian determined that:

[A]ncillary material traditionally has not been available in copies for distribution to the general public, and it appears that it is only with the advent of the DVD format that motion picture producers have been willing or able to include such material along with copies of the motion pictures themselves.<sup>22</sup>

Three years ago, enthusiasm for and recognition of the importance of ancillary material may have been lacking in the general public. Today, however, ancillary materials are a major driving force in the DVD market:

A case in point is the sequential release on DVD and VHS cassette of three versions of "The Lord of the Rings: The Fellowship of the Ring." A release earlier this month will be followed in November by an expanded version, with 30 minutes of extra scenes woven in and interviews with the filmmakers, and then by a deluxe four-disc set with more features. New Line Cinema, which released film, is counting on some DVD aficionados

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<sup>20</sup> *Campbell v. Acuff-Rose Music*, 510 U.S. 569 at 585n18 (1994)

<sup>21</sup> *Id.* at 592

<sup>22</sup> Initial Exemption to Prohibition on Circumvention, nn. 13

to buy two and perhaps all three versions, leaving it to future scholars to ponder which is the definitive version of the movie.<sup>23</sup>

The above, perhaps, is the clearest indication of the strong market for ancillary materials. Why else would consumers purchase three different copies of the same motion picture except to gain access to the ancillary materials? Indeed, as DVDs have become more popular, ancillary materials have become a key selling point:

As audiences have become accustomed to interacting with DVDs, they also have become more demanding. When the discs first came out, says Chris Carey, senior vice president of DVD publicity and promotion at Disney, consumer surveys listed improved picture and sound quality as the two most important features.

"The interactive features were way down on the list," he says. "But six months later, in our follow-up survey, interactivity was right behind sound and audio."<sup>24</sup>

When it comes to the availability of ancillary audiovisual works on DVD, consumer demand is clearly a very important factor, even for less well-known films:

Steve Deeks, president of Artisan Home Entertainment, adds that such features as deleted scenes and alternate endings are high in the company's recent consumer canvassing and have spurred the sales not only of major titles like "Terminator 2," but smaller films such as "Suicide Kings," which offered three endings.<sup>25</sup>

Furthermore, the push for increased availability of ancillary materials on DVDs comes not only from the demand side, but the supply side as well. Filmmakers themselves are passionate supporters of increased availability of ancillary material:

"Directors have embraced the format so enthusiastically, much more than they ever did with VHS," Mr. Feingold [president of Columbia Tri-Star Motion Picture Group] said. "As a result, they're getting involved right from the beginning in the making of the extra DVD material and taking a much more hands-on approach to the DVD release. It can't help but have an impact."<sup>26</sup>

Indeed,

Filmmakers, who used to be reluctant to participate in a movie's afterlife, now also insist on helping plan the DVD. For instance: M. Night Shyamalan has been working on a third film for Disney, "Signs." Plans for the DVD were underway shortly after the film was

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<sup>23</sup> Rick Lyman, *Revolt in the Den: DVD Sends the VCR Packing to the Attic*, N.Y. TIMES, Aug. 26, 2002 <<http://www.nytimes.com/2002/08/26/technology/26DVD.html>>

<sup>24</sup> Richard Natale, *Press Play to Access the Future*, L.A. TIMES Calendar Live, Apr. 7, 2002 <<http://events.calendarlive.com/top/1,1419,L-LATimes-Movies-X!ArticleDetail-55354,00.html>>

<sup>25</sup> *Id.*

<sup>26</sup> Rick Lyman, *Revolt in the Den: DVD Sends the VCR Packing to the Attic*, N.Y. TIMES, Aug. 26, 2002 <<http://www.nytimes.com/2002/08/26/technology/26DVD.html>>



greenlighted, so that the film's creator could supervise as it followed the movie through the script development process, storyboarding and other facets of production.<sup>27</sup>

For many filmmakers, ancillary materials are their chance to discuss the deeper meanings of their work with a large audience, as well as provide material that had to be left on the cutting room floor for a variety of reasons:

Now the average consumer can pick up the DVD marketed as a "bootleg" cut of Cameron Crowe's "Almost Famous," which includes a half-hour of additional footage, some of which requires interactivity. An outtake scene without a soundtrack instructs the viewer to cue a CD of Led Zeppelin's "Stairway to Heaven" to the picture. This was Crowe's way around the fact that he ultimately couldn't get the rights to the song and had to remove the scene.<sup>28</sup>

Additionally, ancillary materials are essentially an advertisement for the individuals behind the films, whose names you used to occasionally hear, but with few exceptions were never seen or heard directly. Director "Ridley Scott thinks the added supplementary materials on many discs are a wonderful opportunity for filmmakers. 'It's all about promoting what we do,' he said."<sup>29</sup>

**ii. Effect on the availability for use of copyrighted works for nonprofit archival, preservation, and educational purposes**

The use of CSS on DVDs significantly reduces the availability of ancillary audiovisual works for nonprofit, archival, preservation, and educational purposes. Because the CSS system is dependent upon a proprietary closed technology, the ability to make and use nonprofit archives is effectively prevented by the DVD/CSS technological system. Because "authorized" DVD hardware prevents people from making a back-up copy of their lawfully purchased DVD, they are denied their legitimate rights under fair use to protect themselves against eventual media failure. Similarly, the CSS system reduces the availability of DVDs for nonprofit educational purposes. Because the only readily available hardware for playing DVDs are the "authorized" DVD players which prevent archiving and copying for educational purposes. It is necessary to exempt the ancillary audiovisual works distributed on DVDs to ensure people have the ability to exercise their lawful rights to create nonprofit archives and manipulate DVD media for educational purposes.

**iii. Impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research**

The explicit purpose of this comment is to defend quotation, for purposes of commentary and criticism, of ancillary audiovisual works distributed on Digital Versatile Discs (DVDs). The

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<sup>27</sup> Richard Natale, *Press Play to Access the Future*, L.A. TIMES Calendar Live, Apr. 7, 2002  
<<http://events.calendarlive.com/top/1,1419,L-LATimes-Movies-X!ArticleDetail-55354,00.html>>

<sup>28</sup> *Id.*

<sup>29</sup> Ted Elrick, *DVD Special Editions: How to do an Audio Commentary (Part I)*, DGA MAGAZINE, Jul. 2002  
<[http://www.dga.org/news/v27\\_2/feat\\_dvd-howto.php3](http://www.dga.org/news/v27_2/feat_dvd-howto.php3)>

impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism and comment has been devastating.

**1. Fair use criticism and comment are a core concern of the First Amendment and must be granted special solicitude in this rulemaking**

Criticism and comment are the core concerns of the First Amendment.<sup>30</sup> Indeed, criticism and comment are the paradigmatic examples of fair use and have been recognized as such since the very introduction of the concept into American jurisprudence.<sup>31</sup>

Fair use itself is a First Amendment protection limiting copyright. In *Harper & Row*, the Supreme Court referred to fair use and the idea/expression dichotomy as “First Amendment protections . . . embodied in the Copyright Act[.]”<sup>32</sup> To hold that the idea/expression dichotomy and the fair use doctrine are constitutional protections is to concede the necessity of heightened First Amendment review to determine if a statute that alters traditional fair use has adequately met constitutional standards. Fair use could not function as a “First Amendment protection” unless changes to fair use were subject to First Amendment considerations.

Furthermore, the Digital Millennium Copyright Act itself regulates speech directly. It is not a law aimed at general conduct that has incidental effects on expression—like a trespass statute or an anti-littering ordinance. To the extent that § 1201(a)(1) prohibits circumvention of CSS to make fair use of the work on a DVD lawfully acquired, it is law aimed *solely* at expression. It is not a time, place, and manner regulation intended to effectuate non-speech related purposes.<sup>33</sup> Moreover, even laws that are content-neutral regulations of speech are subject to heightened scrutiny and not minimum rationality review. If, in the courts, such laws are subject to heightened scrutiny, similarly the Librarian should give special solicitude for the guarantees of the First Amendment. Indeed, to the extent that § 1201(a)(1)(C) compels the Librarian to consider and examine traditional fair use concerns, such as those in § 1201(a)(1)(C)(iii), review under First Amendment standards is proper.

It may be argued that the section of the DMCA in question does not punish expression itself, but merely the “non-speech” act of circumvention. However, this is a distinction without a difference. The act of quotation or copying is itself an expressive act. Additionally, to hold otherwise would be to permit government to regulate speech as long as it was couched in terms

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<sup>30</sup> *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (“It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market ....”)

<sup>31</sup> *Folsom v. Marsh*, 9 F. Cas. 342 (CCD Mass. 1841)

<sup>32</sup> *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 at 560 (1985).

<sup>33</sup> “[I]n the context of intellectual property, [the] ‘no adequate alternative avenues’ test does not sufficiently accommodate the public’s interest in free expression. Intellectual property, unlike real estate, includes the words, images, and sounds that we use to communicate. . . . Restrictions on the words or images that may be used by a speaker, therefore, are quite different than restrictions on the time, place, or manner of speech.” *Cardtoons, L.C. v. Major League Baseball Players Ass’n.*, 95 F.3d 959, 971 (10th Cir. 1996) (citations omitted).

of regulating conduct. After all, a ban on handbills as part of a littering ordinance ostensibly regulates conduct and not speech, but the Supreme Court does not accept that sophistry.<sup>34</sup>

## **2. The DMCA is a criminal statute and effects on free speech concerns must be scrutinized with particular care**

The Supreme Court has long held that the chilling effects upon the exercise of free speech from criminal statutes that reach protected speech must be analyzed scrupulously:

Criminal statutes must be scrutinized with particular care, those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application. [citation omitted]<sup>35</sup>

The Supreme Court has held that even misdemeanor offenses subject to fines can chill protected speech, see *Wooley v. Maynard*, 430 U.S. 705 (1977). However, first time violations of § 1201(a)(1) are punishable by fines as large as \$500,000 and jail time up to 5 years.<sup>36</sup> Subsequent violations are punishable by fines as large as \$1,000,000 and jail time up to 10 years.<sup>37</sup> While criminal penalties are reserved for those who willfully violate the statute “for purposes of commercial advantage or private financial gain,” this still reaches substantial amounts of protected speech.

For example, Eric Olsen’s BlogCritics website ([www.blogcritics.org](http://www.blogcritics.org)) is a forum for independent reviewers to provide reviews of books, CDs and DVDs. The site is financed through ad revenues and associate’s programs.<sup>38</sup> If Eric Olsen were to circumvent CSS in order to add short clips to his reviews of ancillary materials on DVDs, his actions would make the website more attractive, increasing traffic (and therefore ad revenues) as well as likely increasing the number of sales through the site’s associate programs. Such actions would therefore subject Mr. Olsen to potential criminal liability.

Furthermore, the civil penalties are extraordinarily severe as well. Under 17 U.S.C. § 1204, violating the prohibition on circumvention of CSS results in a minimum fine of \$200. That is for doing nothing more than excerpting a clip from a lawfully acquired DVD for purposes of comment and criticism. Fifteen seconds of fair use can cost a minimum of \$200. For many, such an amount is significant enough to dissuade them from exercising their First Amendment rights.

Therefore, in this rulemaking, the Librarian’s determination of the need for an exemption should take into account the chilling effects of the DMCA’s severe criminal and civil penalties. “The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment’s vast and privileged sphere.”<sup>39</sup>

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<sup>34</sup> *Schneider v. State (Town of Irvington)*, 308 U.S. 147 (1939).

<sup>35</sup> *Houston v. Hill*, 482 U.S. 451, 459 (1987).

<sup>36</sup> 17 U.S.C. § 1204

<sup>37</sup> 17 U.S.C. § 1204

<sup>38</sup> Associate programs provide revenue to websites that permit visitors to purchase items online from major retailers through the “associate” website.

<sup>39</sup> *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002)

### **3. Ancillary materials are particularly important elements to quote for purposes of comment and criticism**

The importance of these ancillary materials for comment and criticism cannot be overestimated. Ancillary materials create “a vast new pool of information about how movies are made that, many hope, will have a positive effect on dwindling film literacy.”<sup>40</sup> Film literacy, of course, is one of the main purposes of quotation of ancillary materials for commentary and criticism. These ancillary materials provide deeper insight for commentary and criticism: “For the viewer, he [director Oliver Stone] adds, the opportunity to see outtakes and alternate takes not only shows ‘why I’m proud of that particular scene, but sometimes why it wasn’t necessary in the finished film.’”<sup>41</sup> Director Baz Luhrmann has said, “I used to hate the video experience because nothing replaces seeing a movie in the theater. But with DVDs, you have the possibility of going deeper into the making of the film.”<sup>42</sup>

Observes Peter Staddon, senior vice president of marketing for 20th Century Fox Home Entertainment: “Say there are 25 million DVD buyers out there right now. All of them have become film critics. They’re looking and listening at films far more critically. At one time, people would rent a movie and think nothing more of it. Now they look at deleted scenes, making-of documentaries and other features. They’ve become far more involved in the process.”<sup>43</sup>

Commenting on these ancillary audiovisual materials is widespread: “Information about these special features is widely discussed and critiqued on special Internet chat sites about DVDs,” he [Steve Deeks, president of Artisan Home Entertainment] says.”<sup>44</sup> Unfortunately, such commentary is currently restricted to text only, as the means of quotation are not legally permitted.

### **4. Mere possibility of copying without violating § 1201(a)(1) is not sufficient to protect strong First Amendment rights**

In the initial rulemaking the Librarian noted that “[t]here was no showing that copy or use controls could not be circumvented without violating Section 1201(a)(1).”<sup>45</sup> For example, one can copy the analog output from some DVD players by circumvent the Macrovision copy control, which would not violate § 1201(a)(1). This remains the case. However, this fact does not end the inquiry.

Once again, the Supreme Court’s First Amendment jurisprudence provides the proper guidance. The Court has long held that the Constitution mandates that “one is not to have the exercise of

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<sup>40</sup> Rick Lyman, *Revolt in the Den: DVD Sends the VCR Packing to the Attic*, N.Y. TIMES, Aug. 26, 2002 <<http://www.nytimes.com/2002/08/26/technology/26DVD.html>>

<sup>41</sup> Richard Natale, *Press Play to Access the Future*, L.A. TIMES Calendar Live, Apr. 7, 2002 <<http://events.calendarlive.com/top/1,1419,L-LATimes-Movies-X!ArticleDetail-55354,00.html>>

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Initial Exemption to Prohibition on Circumvention at 64568

his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.”<sup>46</sup> By analogy, one is not to have his right to make fair use of a legitimately acquired DVD by circumventing CSS abridged by the plea that there exist other means to quote the work.

Within the context of the present comment this is particularly applicable. The quotations from ancillary audiovisual works are to be published on the Internet as elements of comment and criticism. For the first time, the average citizen is able to publish multimedia to the world.

[The Internet] provides relatively unlimited, low-cost capacity for communications of all kinds. The Government estimates that “as many as 40 million people use the Internet today, and that figure is expected to grow to 200 million by 1999.” This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, **video**, and still images as well as interactive, real-time dialogue. Through the use of chat rooms, **any person with a phone line can become a town crier with a voice that resonates farther than it could from a soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.** [emphasis added]<sup>47</sup>

It must be emphasized that it is only through the Internet that citizens are able to communicate easily through the use of video media. Where before only professional television critics such as Roger Ebert could illustrate their reviews with video from the work, now everyone can.

In order to publish such multimedia reviews on the Internet, all that is required is a computer with a DVD drive and an Internet connection, much like this author’s laptop. However, a determination that alternate means to quote the work exist would create additional barriers. For example, rather than simply use the laptop, the author of this comment would have to invest in an external DVD player and external television tuner that could convert that analog television signal into an appropriate format that the laptop could understand. Possible, yes, but expensive and a barrier to the author’s free exercise of First Amendment rights.

Far from being a mere inconvenience, the requirement to obtain additional, expensive equipment to exercise rights is anathema to the First Amendment. The purpose of quotation of ancillary audiovisual works, of course, is to distribute one’s resulting comments and criticisms to the world. In this context the Supreme Court has stated that door-to-door:

distribution of circulars is **essential to the poorly financed causes of little people.** Freedom to distribute information to every citizen whenever he desires to receive it is clearly vital to the preservation of a free society that ... it must be fully preserved. [emphasis added]<sup>48</sup>

In *Reno v. ACLU*, the Supreme Court noted that “[u]sing credit card possession as a surrogate for proof of age would impose costs on non commercial Web sites that would require many of them

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<sup>46</sup> *Schneider v. State (Town of Irvington)*, 308 U.S. 147 (1939).

<sup>47</sup> *Reno v. ACLU*, 521 U.S. 844, 896-7 (1997)

<sup>48</sup> *Martin v. Struthers*, 319 U.S. 141 (1943)

to shut down.... Moreover, the imposition of such a requirement would completely bar adults who do not have a credit card and lack the resources to obtain one from accessing any blocked material." [quotations omitted]<sup>49</sup> Similarly, requiring would be commentators to purchase additional equipment can be an insurmountable barrier.

It may be argued that courts have found no First Amendment rights where there are adequate alternative channels of communication. In *Lloyd Corp. v. Tanner*, the Supreme Court held that there was no First Amendment right to distribute handbills in a privately owned shopping center.<sup>50</sup> However, this and similar cases are easily distinguishable from the present comment as there is no effect on the copyright holder's property interests. By definition, noninfringing quotation does not violate the intellectual property rights of the copyright holder. Where there is no property rights violation, *Lloyd* is not applicable. Moreover, noncommercial use of intellectual property, which in this case means use for editorial purposes such as comment or criticism, is particularly well protected in this context.<sup>51</sup>

## 5. The case of Blogcritics

As noted above, Blogcritics is a website where independent reviewers can submit reviews on books, music and movies. The website has capitalized on the weblog or "blog" phenomena which has done much to realize the potential for independent self-publication the Internet promises and the Supreme Court recognized in *Reno v. ACLU*. Through blogs, individuals with nothing more than access to the Internet can effortlessly publish daily journals of their thoughts, comments and links to materials they find interesting. The simplicity and ease of publication through blogs has created a rising tide of free expression that even the major media recognizes and responds to.<sup>52</sup>

Many of those who use blogs ("bloggers"), frequently comment and criticize the media. These comments are often valuable reviews of works. The insight of Blogcritics was that these valuable works of criticism and commentary could be hosted on a single site so that visitors could easily find and read them. The site has been very successful, attracting over one hundred contributors and tens of thousands of visitors.

Eric Olsen, the founder and administrator of Blogcritics, believes the addition of quotations from ancillary materials on DVD would make the site even more attractive and useful to visitors. Already quotations from books and links to samples of music are available on Blogcritics. Quotations from DVDs would be an obvious addition, but Mr. Olsen would be exposing himself to criminal liability for circumventing CSS in order to create the noninfringing quotations.

Furthermore, many of the individual contributors to Blogcritics find that their commentary on DVDs is inhibited by § 1201(a)(1), and the value of their criticism is hampered as a result:

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<sup>49</sup> *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997)

<sup>50</sup> *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972)

<sup>51</sup> *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26 (1st Cir. 1987)

<sup>52</sup> John Podhoretz, *The Internet's First Scalp*, NY POST (Dec. 13, 2002)  
<<http://www.nypost.com/postopinion/opedcolumnists/51499.htm>>

Phillip Winn, who has posted many reviews, including one regarding the recent Disney DVD release of *Tarzan & Jane*,<sup>53</sup> complains that,

Since the quality of DVD extras vary so much from release to release, DVD viewers have grown increasingly skeptical of the value of promised DVD extras. Being able to show short clips from some releases helps to demonstrate the value of some excellent release. Some recent examples include 'O Brother Where Art Thou' and 'Fight Club,' both of which had excellent behind-the-scenes documentaries, snippets of which would have greatly enhanced reviews of the discs.

However, given the DMCA, even short clips that I would previously considered "fair use" are now off-limits. I cannot use them, and readers will not know about them. I can describe them, of course, but much like describing color to a blind person, it's difficult to express in print how good some of these interviews and documentaries are.<sup>54</sup>

Ed Driscoll, a writer whose work has appeared in such magazines as *Audio/Video Interiors*, *Electronic House*, *Home Automation*, and *Smart TV and Sound*, has published a number of reviews on Blogcritics. He has noted<sup>55</sup> some of his reviews that would have been improved had he been legally permitted to circumvent CSS in order to quote from the works. Below are quotations from two of his reviews that show where passages that would be enhanced by a quotation from the DVD:

*Law & Order Arrives on DVD:*

"Everybody's Favorite Bagman", Law & Order's pilot episode (and included on this DVD), was shot on 16mm, for a deliberately crude, grainy and streetwise look. As Wolf explains on the DVD's documentary, when it came time to run the pilot on national TV, executives at NBC thought its image quality was below their standards, and it took a direct OK from Brandon Tartikoff for it to air.<sup>56</sup>

*The Message is the Medium: Koyaanisqatsi and Powaqatsi come to DVD:*

The *Koyaanisqatsi* DVD comes with a fairly comprehensive video interview of Reggio and his soundtrack composer, Philip Glass. At one point, Reggio refers to technology as "the beast", and an oppressive one at that. And yet, Reggio, his cinematographer, the brilliant Ron Fricke and Glass each push technology to the limit while simultaneously attacking it. At one point in *Koyaanisqatsi*, during a rapidly speeded-up night cityscape,

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<sup>53</sup> Philip Winn, *Tarzan & Jane - Disney (DVD)*, BLOGCRITICS (Sep. 10, 2002) <<http://blogcritics.org/archives/2002/09/10/103031.php#20020910103031>>

<sup>54</sup> Email from Phillip Winn, *W6 Daily* <<http://w6daily.winn.com/>>, to Eric Olsen, Administrator, *Blogcritics*, (Dec. 16, 2002).

<sup>55</sup> Email from Ed Driscoll, *EdDriscoll.com* <<http://www.eddriscoll.com/>>, to Eric Olsen, Administrator, *Blogcritics*, (Dec. 16, 2002).

<sup>56</sup> Ed Driscoll, *Law & Order Arrives on DVD*, BLOGCRITICS (Nov. 4, 2002) <<http://blogcritics.org/archives/2002/11/04/004441.php#20021104004441>>

the camera pans, in a perfectly fluid motion past a huge Miesian office building and thousands of cars whirring past underneath. Think of the technology involved in that camera movement: Selecting a camera designed to shoot a frame or two a second to get that speeded-up look. And loading it with the right film stock to shoot at night, the right filter on the lens to shoot in nothing but city lights, the right motorized head to allow the camera to pan at an ultra-low speed, etc. And then have the lab properly develop the film and time the prints, etc. And then add Glass's music, largely performed on synthesizers in a recording studio.<sup>57</sup>

Lester Norton, who writes under the pseudonym Solonor Rasreth on Blogcritics, wanted to excerpt quotations from the interviews with the soldiers who fought in WWII in the HBO DVD release *Band of Brothers*:

The interview segments with the soldiers from the 'Band of Brothers' DVD are essential to putting into context the struggles depicted in the film series from HBO. It is a shame that the law prevents us from legally giving our readers an example of these interviews, which are only available on the DVD.<sup>58</sup>

Michael Croft, another Blogcritics contributor, finds that literature and professional film reviewers are privileged in their ability to be able to quote from audiovisual works in their reviews:

The DVD special edition of the film *Mansfield Park* contains interviews with the stars and the director that provide information about how they blended elements from Jane Austen's life into her controversial book. Some of those anecdotes, which could be used to show how key themes were emphasized in the film, are only available on the DVD. That we cannot legally provide a multi-media sample of this material hurts our ability to provide the most clear and insightful reviews. It's as if Siskel and Ebert weren't allowed to show clips or the New York Times Review of Books were not allowed to directly quote from reviewed material.<sup>59</sup>

Jay Caruso, who contributed to the design of the Blogcritics website, believes that his ability to provide a full review of DVDs has been compromised, such as in his recent review of *The Sum of All Fears* DVD<sup>60</sup>:

I recently reviewed 'The Sum Of All Fears' DVD release and touched upon some of the special features available on the disc. One of these features was the breakdown of the special effects created for the scene where the nuclear bomb was detonated. Allow[ing]

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<sup>57</sup> Ed Driscoll, *The Message is the Medium: Koyaanisqatsi and Powaqatsi come to DVD*, BLOGCRITICS (Oct. 5, 2002) <<http://blogcritics.org/archives/2002/10/05/165705.php#20021005165705>>

<sup>58</sup> Email from Lester Norton, *Solonor's Ink Well* <<http://solonor.com/blogger.html>>, to Eric Olsen, Administrator, *Blogcritics*, (Dec. 17, 2002).

<sup>59</sup> Email from Michael Croft, *Ones and Zeros* <<http://www.whiterose.org/michael/blog/index.html>>, to Eric Olsen, Administrator, *Blogcritics*, (Dec. 17, 2002).

<sup>60</sup> Jay Caruso, *The Sum of All Fears*, BLOGCRITICS (Dec. 8, 2002) <<http://blogcritics.org/archives/2002/12/08/114117.php#20021208114117>>



viewers to see a segment of that special feature would allow them to experience part of it before they decided to make a purchase.

Unfortunately, as the law currently stands, our readers are being denied that opportunity ... [t]hese extra features are only available on DVD and allowing them to see a portion could be the final nudge to get somebody to purchase it.<sup>61</sup>

Blogcritics contributor Travis Lee agrees with Mr. Caruso that consumers also suffer when reviewers cannot include quotations of ancillary material on DVDs:

The specials and knick-knacks lurking around every [corner] of these [*Lord of the Rings Special Edition* DVDs] is enough to go out and buy yet ANOTHER version of this movie. It doesn't stop. Putting samples of commentary as well as effects and other non-sense on this your lovely BlogCritics wouldn't do the movie justice, but it'd sell about another million copies. However, I'm sparing Eric Olsen's future as well as mine and abiding by the law.<sup>62</sup>

#### **iv. Effect of circumvention of technological measures on the market for or value of copyrighted works**

As two of Blogcritics' contributors pointed out, rather than harm the market or value of copyrighted works, an exemption for the prohibition on circumvention of CSS for ancillary works would likely increase the value of the underlying copyrighted works.

For the first time since the advent of movies, citizen-reviewers have the opportunity to engage at a deep level not only with film, but also the many ancillary elements previously unavailable. More important, they can share their insights and experience with others via the Internet. Consequently, film literacy is increasing and that too, can only be beneficial to the value of the underlying works. Rather than dismissing these elements because ancillary materials have not traditionally been available to the general public, we should be celebrating the fact that the volunteer commentators of Blogcritics have taken on this important task of increasing film literacy.

In any case, contrary to the initial determination, there is no harmful effect on the market for or value of copyrighted works. In support of this argument, this comment returns to consider the scope of this rulemaking:

The statutory focus of this rulemaking is limited to one subsection of section 1201: The prohibition on the conduct of circumvention of technological measures that control access to copyrighted works. 17 U.S.C. 1201(a)(1)(C). The Librarian has no authority to

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<sup>61</sup> Email from Jay Caruso, *The Daily Rant* <<http://www.jaycaruso.com/>>, to Eric Olsen, Administrator, *Blogcritics*, (Dec. 17, 2002).

<sup>62</sup> Email from Travis Lee, *One Golden Spoon* <<http://onegoldenspoon.com/>>, to Eric Olsen, Administrator, *Blogcritics*, (Dec. 17, 2002).

limit either of the anti-trafficking provisions contained in subsections 1201(a)(2) or 1201(b).<sup>63</sup>

Indeed, the Librarian must disregard any adverse effects that are caused by factors other than the prohibition against circumvention:

The focus of the rulemaking proceeding must remain on whether the prohibition on circumvention of technological protection measures (such as encryption or scrambling) has caused any substantial adverse impact on the ability of users to make non-infringing uses. Adverse impacts that flow from other sources ... or that are not clearly attributable to such a prohibition, are outside the scope of the rulemaking.<sup>64</sup>

Therefore, the question before the Librarian in this rulemaking is *not* whether an exemption to the *anti-trafficking* provisions has harmful effects on the market for or value of copyrighted works, but the much narrower question of whether an exemption on the noninfringing *use* of circumvention devices has harmful effects on the market for or value of copyrighted works. This comment contends that the prohibition on circumvention in the case of CSS has no harmful effect on the market for or value of copyrighted works.

For example, in the initial determination of exemptions, the Librarian concluded that:

The music industry's reluctance to distribute works on DVDs as a consequence of circumvention of CSS is a specific example of the potential effect on availability: "In fact, it was the very hack of CSS that caused a delay in introduction of DVD audio into the marketplace."<sup>65</sup>

However, the above evidence of adverse consequence does not flow from the *act* of circumventing access controls for noninfringing uses. As such, this evidence of adverse impact was improperly considered in the initial exemption rulemaking. Any reluctance on the part of the music industry to distribute works on DVDs came not from noninfringing circumvention of CSS, but rather from the existence of and trafficking in of circumvention tools such as DeCSS.

The music industry was concerned by the mere fact that a hack existed, that the technological protection measures upon which they intended to rely were already compromised. However, the mere existence of circumvention tools, such as DeCSS, lies outside the scope of this rulemaking. DeCSS existed before the initial rulemaking took place, and any rulemaking by the Librarian could not change this fact. The Librarian, for example, could not commission the creation of a circumvention device, nor could the Librarian ban the existence of such devices. Therefore, any harms that flow from the existence of circumvention devices cannot be considered.

Furthermore, the music industry was particularly concerned that the circumvention device was widely available, i.e., had been trafficked in. The Librarian cannot create an exemption to the anti-trafficking provisions, nor increase the penalties for violating them. Thus, any harms that

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<sup>63</sup> Notice of Inquiry for Second Exemption Rulemaking at 63579

<sup>64</sup> Initial Exemption to Prohibition on Circumvention, at 64559

<sup>65</sup> Initial Exemption to Prohibition on Circumvention, at 64570

flow from the trafficking in of circumvention devices is properly not to be considered within the scope of this rulemaking.

Perhaps the music industry was concerned that some were making *infringing* copies of motion pictures protected by CSS. Needless to say, the Librarian cannot alter or provide exemptions to 17 U.S.C. § 106 within in the scope of this rulemaking. Thus, any harms that flow from copyright infringement itself are improperly considered.

The claim from the initial rulemaking then, must be that individuals who circumvent CSS on lawfully acquired DVDs for noninfringing purposes harm the value of or market for audiovisual works on DVDs. However, when the motion picture studios have sold, not licensed, but sold a copy of an audiovisual work on a DVD to a consumer, it is difficult to imagine what harm occurs when the consumer makes a noninfringing use of the audiovisual work on the lawfully acquired DVD, even if the noninfringing use requires circumvention.

If the Librarian grants an exemption to § 1201(a)(1)(A) for ancillary audiovisual works distributed on Digital Versatile Discs (DVDs) using the Content Scrambling System (CSS) of access control, how will any harm to the motion picture studios ensue? The exemption will only apply to noninfringing uses of the ancillary materials on lawfully acquired DVDs. If an individual infringes on the copyright of the ancillary materials, the exemption does not apply. If the individual trafficks in a circumvention device, the exemption will not apply to that act. For the motion picture studios to prevail in this rulemaking, they will have to make a showing as to why the act of circumventing access control devices for noninfringing uses of physical media, lawfully acquired, is harmful to the value of or market for their works. This they cannot do.

**E. In the alternative, the Librarian of Congress may determine that CSS is not an access control device**

In the alternative, the Librarian of Congress should issue a determination that CSS is not an access control device within the meaning of 17 U.S.C. §1201(a)(2), and therefore, not subject to exemption under 17 U.S.C. §1201(a)(1)(C). The fact that in the initial rulemaking the Librarian of Congress implicitly adopted the position that CSS is an access control device<sup>66</sup> does not prevent a different determination this rulemaking. Exemptions are reviewed de novo.<sup>67</sup>

It is undisputed that CSS incorporates an encryption scheme. However, this fact alone does not place CSS in the category of devices which § 1201(a)(2) protects. Indeed, many different sorts of technological protection measures (including those incorporating encryption) may not be protected by the DMCA at all. Thus, the fact that CSS incorporates an encryption scheme is not enough to demonstrate a *prima facie* case that CSS is an “access control device” as defined by the DMCA. The fact that CSS incorporates an encryption scheme is merely a prerequisite, but not dispositive condition for a claim under § 1201(a). Under the DMCA’s statutory scheme, not only must CSS incorporate an encryption scheme, such an encryption scheme must “effectively

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<sup>66</sup> Initial Exemption to Prohibition on Circumvention at 64567-64570

<sup>67</sup> Notice of Inquiry for Second Exemption Rulemaking at 63580

controls *access* to a work”. 17 U.S.C. § 1201(a)(3)(B)(emphasis added). In the case of CSS, this cannot be done.

Furthermore, the courts have not yet considered this analysis and interpretation of the DMCA, which focuses on the meaning of “access” and is based on standard structural and intent doctrines of statutory construction.

- i. **The Librarian of Congress cannot make a determination regarding a class of works distributed on Digital Versatile Discs (DVDs) using the Content Scrambling System (CSS) because CSS is not a technological protection measure that “effectively controls access to a work”**

Section 1201(a)(3)(B) of the DMCA provides in relevant part:

a technological measure “effectively controls access to a work” if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.

Section 1201(a) therefore does not refer simply to “access” but refers specifically to “access to a work”. Congress therefore distinguished between the entity that is the “work” and a subsequent “copy”.<sup>68</sup> A copy is the object (in this case, a DVD) within which the work is “fixed.”<sup>69</sup> When Congress drafted § 1201(a), it used the term “work” to deliberately describe and target the acts that Congress was seeking to prevent. Congress intended § 1201(a) to address unlawful access to the “work” and not to govern the subsequent use of lawfully acquired “copies” where that work was fixed. H.R. REP. pt. 2, (1998) (“[Section 1201(a)] covers protections against unauthorized initial access to a copyrighted work.”). Lawful access to the entity that is the “work”, the prerequisite to fair use, is granted to the consumer upon lawful receipt of a DVD, for example by purchase from a retailer, and always has been.

“[Copyright] has never accorded the copyright owner complete control over all possible *uses* of his work.” *Sony Corp. of America v. Universal City Studios Inc.*, 464 U.S. 417, 432, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984) (emphasis added). The Supreme Court has also held that a copyright owner may not place a “restriction upon the subsequent alienation of the subject-matter of copyright after the owner had parted with the title to one who had acquired full dominion over it and had given a satisfactory price for it”. *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 350, 28 S.Ct. 722, 52 L.Ed 1086 (1908).

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<sup>68</sup> “Copies” are material objects, other than phono records, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term “copies” includes the material object, other than a phono record, in which the work is first fixed. 17 U.S.C § 101.

<sup>69</sup> A work is “fixed” in a tangible medium of expression when its embodiment in a copy or phono record, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is “fixed” for purposes of this title if a fixation of the work is being made simultaneously with its transmission. *Id.*

If a copyright owner cannot prevent subsequent sale of a lawfully acquired work, the copyright owner cannot deny the right to use or perceive the work to a consumer who has lawfully purchased the work. *Universal Film Mfg. Co. v. Copperman*, 218 F. 577, 579 (2nd Cir. 1914) (“The attempt ... to annex a condition as to the use of the film after it was absolutely sold was vain.”), *cert. denied, Universal Film Mfg. Co. v. Copperman*, 235 U.S. 704, 35 S.Ct. 209, 59 L.Ed. 433 (1914). Neither the Copyright Act itself nor the DMCA grants copyright owners the power to prevent non-infringing *uses* of lawfully acquired works.

Currently, motion picture studios that claim CSS is an access control device are essentially taking the position that the purchase of a DVD is a meaningless transaction – since merely playing a lawfully acquired DVD on any non-licensed DVD player is unlawful. To follow once again the motion picture studios’ interpretation of 17 U.S.C. §1201(a)(2) *ad absurdum* is to find that a consumer who does not have a licensed player is receiving little or no consideration for the purchase price of the DVD. The studios are, in essence, engaging in fraudulent misrepresentation in the marketing and promotion of DVDs, as they have misled the consumer with regard to the bargain he is receiving with the purchase of the DVD (the free and unfettered right to watch the DVD the consumer has purchased). The motion picture studios are now claiming that the consumer without a licensed DVD player has no right to make noninfringing use of the DVD he or she purchased. This is absurd.

The motion picture studios’ proposed application of 17 U.S.C. §1201(a)(2) to CSS is an overly broad interpretation of the DMCA. Congress intended to recognize the right of consumers to “access”, that is “to make use of”, a work released on DVD media. Congress specifically addressed the potential of the DMCA to be invoked to interfere with reasonable access to a legitimately acquired copy of a work. 144 Cong. Rec. H. 7074 (August 4, 1998, Coble). In fact, Congress was very much concerned, when creating the new paracopyright scheme with not interfering “with fair use and other rights now enjoyed by information users under current law.” *Id.* A finding that CSS is an access control device advocates an impermissibly overbroad and inaccurate interpretation of the application of the DMCA.

**ii. Congressional Intent supports a determination that CSS is not an access control device**

Congress analogized the purpose of § 1201(a) as “the electronic equivalent of breaking into a locked room in order to obtain a copy of a book.” H.R. Rep. 105-551, pt. 1, at 17 (1998). Nimmer characterizes § 1201(a) similarly. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §12A.03[D][1] (1999). Yet here so-called “circumvention of an access control device” can only occur with lawfully acquired DVDs. If you own the book (DVD), then you have not broken into a room or stolen anything by merely circumventing the encryption on that DVD.

The DMCA contains no prohibitions on acts of circumvention for purposes other than gaining unauthorized access to protected works. One who is authorized to access (make use of) a work is free to do so by means of circumvention, since any possible illegal acts once access is authorized are covered by the Copyright Act proper. The Senate discussed this distinction:

Thus, for example, where a copy control technology is employed to prevent the unauthorized reproduction of a work, the circumvention of that technology would not itself be actionable under Section 1201, but any reproduction of the work that is thereby facilitated would remain subject to the protections embodied in title 17.

S. REP. 105-190, at 27 (1998).

Other elements of legislative history make clear that this is the appropriate interpretation. For example, § 1201(a)(1):

[D]oes not apply to the subsequent actions of a person once he or she has obtained authorized access to a copy of a work . . . , even if such actions involve circumvention of additional forms of technological protection measures. In a fact situation where the access is authorized, the traditional defenses to copyright infringement, including fair use, would be fully applicable. *So an individual would not be able to circumvent in order to gain access to a work, but would be able to do so in order to make fair use of a work which he or she has acquired lawfully.*

H.R. REP. 105-551, pt. 1, at 18(1998) (emphasis added); *accord* S. REP. 105-190, at 26 (1998) (“This paragraph does not apply to the subsequent actions of a person once he or she has obtained authorized access . . . even if such actions involve circumvention . . .”).

The foregoing distinction is obliterated by any interpretation of the DMCA that holds that merely circumventing CSS on a legitimately acquired DVD for noninfringing purposes is unlawful. Because the movie studios allege CSS is an access control device, the *act* of circumventing CSS is illegal under § 1201(a)(1). This is the proper interpretation of the statute. The ban on the *act* of circumventing and the ban on trafficking in access control circumvention devices appear together in the same paragraph of the statute. This strongly suggests that the two provisions should be treated as different elements of the same basic wrong. The *act* of circumvention is wrong and, therefore, trafficking in circumvention tools is similarly wrong. The logic of the statute is not that trafficking in circumvention tools is wrong and, therefore, the *act* of circumvention is also wrong. This is the interpretation of Congress. “For example, if unauthorized access to a copyrighted work is effectively prevented through use of a password, it would be a violation of this section [1201(a)] to defeat or bypass the password *and to make the means to do so . . .* . This is roughly analogous to making it illegal to break into a house using a tool, the primary purpose of which is to break into houses.” S. REP. 105-190, at 11 (1998)(emphasis added); *see also* H.R. REP. 105-551, pt. 1, at 18 (1998)(“[Section 1201(a)(2)] *supplements* the prohibition against the act of circumvention in paragraph [1201](a)(1).”)(emphasis added). The ban on the act of circumvention does not supplement the prohibition on trafficking.

If the Librarian of Congress were to find that CSS is an access control device, then the circumvention of CSS would be deemed illegal under § 1201(a)(1). Congress certainly did not intend for individuals who lawfully acquired DVDs to be guilty of a crime for the lawful use of the material on the DVDs, regardless of how they accessed them. To hold that CSS is an access control device would be to hold that a consumer who has lawfully purchased a DVD and merely copies a small portion of the ancillary files onto his or her hard drive, is to be considered theft

(the act of circumventing an access control device is the equivalent of breaking into a locked room to steal a book), regardless of whether the copying was noninfringing.

Fair use is not a defense to a charge of violation of § 1201 (a)(1). Clearly, Congress did not intend to abrogate fair use by passing the DMCA. *See* 17 U.S.C. § 1201(c)(1) (“Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use”). *see also*, H.R. REP. 105-551, pt. 1 (1998) (“In a fact situation where access is authorized, the traditional defenses to copyright, infringement, including fair use, would be fully applicable.”) However, a fair use defense would not prevent copyright holders from suing under § 1201(a)(1) over non-infringing uses of legitimately acquired DVDs.

A determination that CSS is an access control device will mean that circumventing CSS for noninfringing uses of a DVD purchased legitimately is a criminal act. Nowhere does Congress demonstrate intent to make noninfringing use of lawfully acquired media a criminal act.

**iii. At best, CSS is a copy protection device under § 1201(b)**

The Librarian of Congress should find that CSS is not an access control device within § 1201(a)(2), and that, as a result, a rulemaking for an exemption to § 1201(a)(1)(A) is unnecessary. Such a finding by the Librarian is wholly consistent with the legislative intent. Section 1201(a)(2) was enacted to prohibit devices that would enable access to a copyrighted work without first paying for the right for such access, in contrast with the purpose of § 1201(b), which protects unauthorized copying of the work.<sup>70</sup> Analogies to cable-stealing “black boxes” that permit illegal access to cable broadcasts are clearly distinguishable from the technological measure at issue here, where only those who have lawfully acquired DVDs would have access to the work.<sup>71</sup> In the case of cable theft, the thieves have not lawfully acquired the right to make use of the cable broadcast, whereas, in the case of DVDs, the legitimate purchaser has a lawfully acquired right to make use of the work.

To analyze whether or not CSS actually constitutes *access* protection (as opposed to copy protection), suppose for a moment that an individual purchases a DVD and then circumvents CSS for non-infringing purposes, such as to quote 15 seconds of ancillary material for a review. Does the content provider have any need or cause to object under § 1201(a)? Of course not. The content provider has received good consideration for use of the work when the DVD was legitimately purchased. “Access” to the work has not been stolen from the content provider. Within the intent of § 1201(a), as long as the content provider has been paid for the DVD, they have no legitimate reason to care whether the technological protection devices is circumvented for non-infringing uses of the work.

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<sup>70</sup> H.R. REP. 105-551, pt. 1, (1998) (“[1201(b)] applies when a person has obtained authorized access to a copy or a phonorecord of a work, but the copyright owner has put in place technological measures that effectively protect his or her right under Title 17 to control or limit further use of the copyrighted work”).

<sup>71</sup> “The Committee believes it is very important to emphasize that Section [1201(a)(2)] is aimed fundamentally at outlawing so-called ‘black boxes’ that are expressly intended to facilitate circumvention of technological protection measures for purposes of gaining access to a work.” H.R. REP. 105-551, pt. 2 at 40 (1998).

Our courts have long held that “format-shifting” of copyrighted content for private-in-home use by consumers is authorized.<sup>72</sup> See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 104 S. Ct. 774 (1984)(Time-shifting of television broadcasts is permissible). It should be noted that the Supreme Court in *Sony v. Universal*, by permitting time-shifting, was also implicitly permitting format shifting as well, since television broadcasts and video recordings are different formats. When a user has authorized access to content in one file format, it is fair use to translate that format into a different format that can be used by a different type of hardware or software application. 17 U.S.C. § 117; *Aymes v. Bonelli*, 47 F.3d 23, 26 (2d Cir. 1995)(No infringement where lawfully in possession of software copy.). It is abundantly clear that Congress did not intend to terminate this right when it enacted the DMCA.<sup>73</sup> Thus, even those copyright holders who might object to having their content copied onto a hard drive have no right to do so, because such copying for format shifting is fair use.

Congress certainly saw clearly that access control and other forms of protection were sufficiently different that it would be unusual that the two types of protection would be inseparable:

Although sections 1201(a)(2) and 1201(b) of the bill are worded similarly and employ similar tests, they are designed to protect two distinct rights and to target two distinct classes of devices. Subsection 1201(a)(2) is designed to protect access to a copyrighted work. Section 1201(b) is designed to protect the traditional copyright rights of the copyright owner. As a consequence, subsection 1201(a)(2) prohibits devices primarily designed to circumvent effective technological protection measures that limit access to a work. Subsection 1201(b), on the other hand, prohibits devices primarily designed to circumvent effective technological protection measures that limit the ability of the copyrighted work to be copied, or otherwise protect the copyright rights of the owner of the copyrighted work. *The two sections are not interchangeable, and many devices will be subject to challenge only under one of the subsections.*

S. REP. 105-190, at 12 (1998). As the Librarian of Congress has stated:

CSS was already in development in 1998 when the DMCA was enacted. It cannot be presumed that the drafters of section 1201(a) were unaware of CSS.<sup>74</sup>

If this is indeed the case, then it would be unlikely that Congress would claim that “many devices will be subject to challenge only under one of the subsections”, when one of the most prominent technological devices would, as the movie studios claim, be subject to challenge under both subsections. It must also be considered that the basic structure of the CSS encryption system for physical media was and is a very common one. Certainly Congress knew this when they debated the DMCA.

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<sup>72</sup> Format shifting is the non-commercial copying, by a consumer, of an acquired work from one medium onto another for purposes of playing that work for individual use.

<sup>73</sup> [A]n individual ... [is permitted to circumvent] in order to make fair use of a work which he or she has acquired lawfully.” H.R. REP. 105-551, pt. 1 at 18 (1998).

<sup>74</sup> Initial Exemption to Prohibition on Circumvention, nn. 14.



The distinction between “access” controls and “copy” controls is subtle but important. An access control device effectively controls access to a work by determining *when one has the right to make use of a work, not how one may use the work*. The operation of these measures with regard to physical media need not be a simple binary matter (access/no access). Access control technologies are used, for example, to permit access to a work for a limited period (such as a free demonstration or “test drive” period, or for the duration of a license agreement) while closing it thereafter. Similar techniques are also employed to allow access to part of a work while denying it to another part; to enable access by a specified category of users but not by another category; or to enable access by a specified number of simultaneous users in a network environment but no more. However, access control in this sense is not applicable to DVDs. With DVDs, access *is* a simple binary matter, and it is not technologically determined: either one has lawful possession of the DVD (and therefore, the right to make use of the work), or one does not.<sup>75</sup> Once a DVD is purchased, there are no time limits, no restrictions on enjoying only part of the DVD while being denied access to another part, nor any restriction on the number of users.<sup>76</sup>

It is possible for physical media to incorporate both copy and access control. A similar and now defunct technology (DiVX, for example) incorporated a system in which the video disks (similar to DVDs) could only be played for a limited 48-hour period after purchase. Subsequent viewings required further payments. Many software games are distributed on CDs so that demo versions are available but passwords (which are purchased) are required to “unlock” the full version of the game. Despite the numerous possibilities for implementing forms of access control on physical media, DVDs do not implement any. Lawful acquisition of a DVD gives the owner an unfettered right to access (make use of) the work embodied on the DVD. To claim that access to a lawfully acquired DVD is anything other than completely unfettered<sup>77</sup> is to wholly disembowel the consumer’s right to private home viewing once a lawful purchase is made.

Furthermore, the interpretation of the DMCA proposed in this comment does not, in effect, revive a version of section 1201(a)(1) focusing on persons who have gained initial lawful access that was initially enacted by the House of Representatives but ultimately rejected by Congress.<sup>78</sup>

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<sup>75</sup> Contrast this with a hypothetical situation in which a manufacturer provides consumers with an encrypted disk (say, through a mass mailing) that does not permit the right to make use of the work until the consumer pays for the password. With DVDs the right to make use of the work attaches at purchase.

<sup>76</sup> Restrictions on public performance are legal requirements, and not technically determined. CSS does not prevent one from playing a DVD on the Jumbotron in a baseball stadium.

<sup>77</sup> Except for violations of § 501(a) of the Copyright Act that are not at issue in this rulemaking.

<sup>78</sup> H.R. 2281, 105<sup>th</sup> Cong. § 1201(a)(1)(B)(i) (1998):

The prohibition contained in subparagraph (A) shall not apply to persons with respect to a copyrighted work which is in a particular class of works and to which such persons have gained *initial lawful access*, 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 under subparagraph (C) [emphasis added]

Compare, 17 U.S.C. 1201(a)(1)(B):

The prohibition contained in subparagraph (A) 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

This interpretation is not based on initial lawful access and does not create a perpetual right to break into web-sites, online databases and other sources of information not in full, lawful and ongoing possession of the user. For example, this interpretation of the DMCA would not justify ongoing access to an online database where initial access was lawful, but subsequent access (such as after the period of a subscription had run out) was no longer lawful. However, as stated above, once a consumer has legitimately acquired a DVD, access to the work fixed in the DVD copy is perpetual and unencumbered. A DVD is not a case of initial lawful access, but one in which lawful access is ongoing for as long as the DVD remains in the possession of the consumer.

In the final analysis, § 1201 must therefore be read as a whole, and interpretations that make elements of the statute nonsensical are not proper. For example, nonprofit libraries and similar institutions are granted an exemption from the act of circumventing access control devices under § 1201(a)(1):

- [1201](d) Exemption for Nonprofit Libraries, Archives, and Educational Institutions. –
- (1) A nonprofit library, archives, or educational institution which gains access to a commercially exploited copyrighted work solely in order to make a good faith determination of whether to acquire a copy of that work for the sole purpose of engaging in conduct permitted under this title shall not be in violation of subsection (a)(1)(A). A copy of a work to which access has been gained under this paragraph --
    - (A) may not be retained longer than necessary to make such good faith determination; and
    - (B) may not be used for any other purpose

The position that CSS is an access control device again becomes absurd: If CSS is construed to be an access control circumvention device, to be included in the prohibitions of § 1201(a), this exemption would become illogical. Libraries would not circumvent CSS in order to make a determination whether to purchase a copy of a work on DVD. Either the library has physical possession of a copy of the work on DVD that can be previewed by playing on a DVD player, or the library does not have physical possession of a copy of the work on DVD. If the library does have physical possession of a copy of a work on DVD, it is irrational that it should be permissible for the library to circumvent CSS in order to determine whether the library should purchase the DVD. Under a proposed application of the DMCA in which CSS is an access control device, circumvention of CSS by libraries would be legal prior to purchase of a DVD, but would become illegal after purchasing the DVD. Congressional intent for the libraries exemption would also be rendered nonsensical. 144 Cong. Rec. H. 7074 (August 4, 1998, Coble) (“We introduced a special ‘shopping privilege’ exemption that permits nonprofit libraries and archives to circumvent effective technological measures in order to decide whether they wish to acquire lawfully a copy of the work.”).

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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 under subparagraph (C).

#### **IV. Conclusion**

LawMeme therefore submits that in balancing the harms of inhibiting the core First Amendment values of comment and criticism by individuals in lawful possession of DVDs with the nonexistent harms to copyright holder motion picture studios, an exemption is justified in the case of ancillary audiovisual works distributed on Digital Versatile Discs (DVDs) using the Content Scrambling System (CSS) of access control.

Alternatively, LawMeme submits that CSS is not an access control device and thus not subject to this rulemaking.

Respectfully submitted,

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<sup>79</sup> LawMeme thanks the following individuals for their contributions and assistance in drafting this comment: Robert Glusko, James Grimmelmann, Gwen Hinze, Eric Olsen, Paul Syznol and Fred von Lohmann.

## Appendix A Comparisons of ancillary audiovisual materials distributed on DVD and VHS

The following table provides a comparison of the ancillary materials available on DVD with the ancillary material available on the equivalent VHS. Selections reflect recent major releases and popular titles. Ancillary material was noted on the packaging.

Lord of the Rings: The Fellowship of the Ring	
DVD	VHS
<ul style="list-style-type: none"> <li>• New version of <i>National Geographic Beyond the Movie: The Lord of the Rings: The Fellowship of the Ring</i> DVD, with additional featurettes</li> <li>• Unique version of the epic adventure with over 30 minutes of never-before-seen footage incorporated into the film and new music scored by Academy Award<sup>®</sup>-winning composer Howard Shore (approx. 208 minutes)</li> <li>• Commentary by Peter Jackson, Fran Walsh, and Philippa Boyens</li> <li>• Commentary by the design team, including production designer Grant Major, costume designer Ngila Dickson, Weta Workshop creative supervisor Richard Taylor, and conceptual designer Alan Lee</li> <li>• Commentary by the production/post-production team, including producer Barrie Osborne, executive producer Mark Ordesky, director of photography Andrew Lesnie, editor John Gilbert, and composer Howard Shore</li> <li>• Commentary by Elijah Wood, Ian McKellen, Liv Tyler, Sean Astin, John Rhys-Davies, Billy Boyd, Dominic Monaghan, Orlando Bloom, Christopher Lee, and Sean Bean</li> <li>• Easter egg: theatrical preview of <i>The Two Towers</i></li> <li>• Two discs with hours of original content including multiple documentaries and design/photo galleries with thousands of images to give viewers an in-depth behind-the-scenes look at <i>The Lord of the Rings: The Fellowship of the Ring</i>, including:             <ul style="list-style-type: none"> <li>• Adapting the book into a screenplay &amp; planning the film</li> <li>• Designing and building Middle-earth</li> <li>• Storyboards to pre-visualization</li> <li>• Weta Workshop visit: An up-close look at the weapons, armor, creatures, and miniatures from the film</li> <li>• An interactive map of Middle-earth tracing the journey of the Fellowship</li> <li>• An interactive map of New Zealand highlighting the location scouting process</li> <li>• Galleries of art and slideshows with commentaries by the artists</li> <li>• Guided tour of the wardrobe department</li> <li>• Footage from early meetings, moving storyboards, and pre-visualization reels</li> <li>• Bringing the characters to life</li> <li>• A day in the life of a hobbit</li> <li>• Principal photography: Stories from the set</li> <li>• Scale: Creating the illusion of size</li> <li>• Galleries of behind-the-scenes photographs and personal cast photos</li> <li>• Editorial and visual effects multi-angle progressions</li> <li>• Sound design demonstration</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• 30 minutes of additional footage</li> <li>• "A Day in the Life of a Hobbit" featurette</li> <li>• "The Two Towers" theatrical trailer</li> </ul>

<b>Monsters, Inc.</b>	
<b>DVD</b>	<b>VHS</b>
<ul style="list-style-type: none"> <li>• Commentary by filmmakers Pete Docter, Lee Unkrich, Andrew Stanton, John Lasseter</li> <li>• New Animated Short Film "Mike's New Car"</li> <li>• "For The Birds" - 2001 Oscar Winner For Best Animated Short Film</li> <li>• Hilarious Outtakes</li> <li>• The Monsters, Inc Company Play</li> <li>• Boo's Door Game - All New Set Top Game</li> <li>• Monsters Inc. Music Video</li> <li>• Finding Nemo - An Exclusive Sneak Peak</li> <li>• Two Worlds to Explore: The Monster World and The Human World</li> <li>• Pixar Tour</li> <li>• Discover how computer animation works</li> <li>• See how Monstropolis was created</li> <li>• Abandoned Concepts</li> <li>• Disney DVD Story time: Welcome to Monstropolis</li> <li>• Animation gags</li> <li>• Location flyarounds</li> <li>• Never-before-seen tests</li> <li>• Full-screen and widescreen anamorphic formats</li> </ul>	<ul style="list-style-type: none"> <li>• New Animated Short Film "Mike's New Car"</li> <li>• "For The Birds" - 2001 Oscar Winner For Best Animated Short Film</li> <li>• Hilarious Outtakes</li> <li>• The Monsters, Inc Company Play</li> <li>• Finding Nemo - An Exclusive Sneak Peak</li> </ul>
<b>Ice Age</b>	
<b>DVD</b>	<b>VHS</b>
<ul style="list-style-type: none"> <li>• Commentary by director Chris Wedge and co-director Carlos Saldanha</li> <li>• New animated short "Scrat's Missing Adventure"</li> <li>• "Behind the Scenes of <i>Ice Age</i>" HBO special</li> <li>• "The Making of <i>Ice Age</i>" documentary</li> <li>• Scene-specific commentary by actor John Leguizamo ("Sid")</li> <li>• Interactive animation explorations from composites to final picture</li> <li>• 6 deleted scenes in English, Spanish &amp; French</li> <li>• 6 production featurettes</li> <li>• 3 interactive animation studios</li> <li>• International clip</li> <li>• Scrat's promo slots</li> <li>• Blue Sky Studio's Oscar-winning animated film "Bunny"</li> <li>• Trailers, teasers and more</li> <li>• Full-screen and widescreen anamorphic formats</li> </ul>	<ul style="list-style-type: none"> <li>• None</li> </ul>

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Spider-Man	
DVD	VHS
<ul style="list-style-type: none"> <li>• Commentary by director Sam Raimi, Kirsten Dunst, producer Laura Ziskin, and co-producer Grant Curtis</li> <li>• Commentary by special effects designer John Dykstra and visual effects crew</li> <li>• "Weaving the Web": subtitled pop-on production notes and historical facts</li> <li>• Branching web-isodes</li> <li>• Music videos: Hero (Chad Kroeger featuring Josey Scott), What We're All About (Sum 41)</li> <li>• TV spots</li> <li>• Filmographies and character files</li> <li>• HBO Making of <i>Spider-Man</i></li> <li>• <i>Spider-Mania</i>, an E! Entertainment Special</li> <li>• Director profile: Sam Raimi</li> <li>• Composer profile: Danny Elfman</li> <li>• Screen tests for Tobey Maguire, J.K. Simmons, and CGI Spider-Man</li> <li>• Costume and makeup tests</li> <li>• Gag/outtake reel</li> <li>• Conceptual art and production design gallery</li> <li>• Comic book artist pin-up gallery</li> <li>• "Spider-Man: The Mythology of the 21st Century" historical documentary</li> <li>• The Spider-Man Comic Book Archives</li> <li>• Rogues Gallery</li> <li>• The Loves of Peter Parker</li> </ul>	<ul style="list-style-type: none"> <li>• None</li> </ul>
The Matrix	
DVD	VHS
<ul style="list-style-type: none"> <li>• Commentary by Carrie-Anne Moss, editor Zach Staenberg and visual effects supervisor John Gaeta</li> <li>• Isolated musical score with comentary by composer Don Davis (I)</li> <li>• Production notes</li> <li>• Theatrical trailer(s)</li> <li>• Behind-the-scenes documentary "HBO First Look: Making the Matrix"</li> <li>• Take the red pills to view two hidden special effects documentaries: "What is Bullet Time?" and "What is the Concept?"</li> <li>• Follow the white rabbit to nine behind-the-scenes featurettes</li> </ul>	<ul style="list-style-type: none"> <li>• None</li> </ul>

Comments of Ernest Miller on behalf of LawMeme

Star Wars Episode I	
DVD	VHS
<ul style="list-style-type: none"> <li>• Commentary by writer-director George Lucas, producer Rick McCallum, editor Ben Burt, animation director Rob Coleman, and visual effects supervisors John Knoll, Dennis Muren, and Scott Squires</li> <li>• Exclusive deleted-scenes documentary features seven new sequences completed just for this DVD release: Complete Podrace Grid Sequence, Extended Podrace Lap Two, The Waterfall Sequence, The Air Taxi Sequence, Dawn Before the Race, Anakin's Scuffle with Greedo, Farewell to Jira</li> <li>• "The Beginning: Making Episode I," an all-new hour-long documentary film culled from over 600 hours of footage, including an insider's look at Lucasfilm and ILM during the production</li> <li>• Multi-angle storyboard to animatic to film segment featuring the Submarine and Podrace Lap 1 sequences</li> <li>• Five featurettes explore the storyline, design, costumes, visual effects, and fight sequences</li> <li>• Award-winning twelve-part Web documentary series that chronicles the production</li> <li>• "Duel of the Fates" music video featuring John Williams</li> <li>• Never-before-seen production photo gallery with special caption feature</li> <li>• Theatrical posters and print campaign from around the world</li> <li>• Theatrical teaser and launch trailers, and seven TV spots</li> <li>• "Star Wars: Starfighter - The Making of a Game" featurette from LucasArts</li> </ul>	<ul style="list-style-type: none"> <li>• None</li> </ul>
Star Wars Episode II	
DVD	VHS
<ul style="list-style-type: none"> <li>• Commentary by writer-director George Lucas, producer Rick McCallum, picture editor and sound designer Ben Burt, ILM animation director Rob Coleman, and ILM visual effects supervisors Pablo Helman, John Knoll, and Ben Snow</li> <li>• Eight exclusive deleted scenes with introductions: Padme Addresses the Senate, Jedi Temple Analysis Room, Obi-Wan and Mace on Jedi Landing Platform, Extended Arrival on Naboo, Padme's Parents' House, Padme's Bedroom, Dooku Interrogates Padme, Anakin and Padme on Trial</li> <li>• "From Puppets to Pixels: Digital Characters in Episode II": all-new full-length documentary about the creation of digital characters in <i>Episode II</i></li> <li>• "State of the Art: The Previsualization of <i>Episode II</i>": witness the vital role of the animatics team</li> <li>• "Films Are Not Released: They Escape" sound documentary</li> <li>• Three featurettes examining the story line, action scenes, and love story through behind-the-scenes footage / interviews with cast and filmmakers</li> <li>• "Across the Stars" music video: an original composition by John Williams crafted exclusively for this DVD</li> <li>• Exclusive production photos / One-sheet posters / International outdoor campaign / 12-part Web documentary / Trailers and TV spots</li> <li>• "R2-D2: Beneath the Dome" mockumentary trailer</li> <li>• ILM visual effects breakdown montage</li> </ul>	<ul style="list-style-type: none"> <li>• None</li> </ul>

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Lilo and Stitch	
DVD	VHS
<ul style="list-style-type: none"> <li>• Deleted Scenes</li> <li>• "Burning Love": Behind the Scenes with Wynonna</li> <li>• A*Teens Music Video</li> <li>• "A Stitch in Time" short</li> <li>• How-To-Hula Lesson</li> <li>• "Inter-Stich-als"</li> <li>• DisneyPedia: Hawaii</li> <li>• Animating the Hula</li> <li>• "The Young Voices of Hawaii" featurette</li> <li>• On Location with the Directors</li> </ul>	<ul style="list-style-type: none"> <li>• None</li> </ul>
E.T. the Extraterrestrial	
DVD	VHS
<ul style="list-style-type: none"> <li>• Production notes</li> <li>• Feature film--2002 version</li> <li>• A special introduction by Steven Spielberg</li> <li>• Live performance of John Williams conducting at the 2002 premiere</li> <li>• An exciting space exploration</li> <li>• Feature film--1982 version</li> <li>• "Spotlight on Location" featurette</li> <li>• The Reunion: The cast and filmmakers discuss the impact of the film</li> <li>• The Evolution and Creation of <i>ET</i>: hundreds of production photographs, conceptual drawings and original advertising in an interactive environment</li> </ul>	<ul style="list-style-type: none"> <li>• None</li> </ul>
Harry Potter and the Sorcerer's Stone	
DVD	VHS
<ul style="list-style-type: none"> <li>• 360 Degree Self-guided tour of Hogwarts</li> <li>• New interviews with director Chris Columbus and producer David Heyman</li> <li>• Learn how to play Quidditch</li> <li>• Meet the ghosts of Hogwarts</li> <li>• Cast a spell over a scene in 8 languages</li> <li>• Mix potions, perform transfigurations, sneak past Fluffy, explore Diagon Alley, have a wand choose you, catch a snitch and much, much more</li> <li>• Theatrical trailers</li> </ul>	<ul style="list-style-type: none"> <li>• Over 5 minutes of Never Before Seen Footage</li> </ul>



Comments of Ernest Miller on behalf of LawMeme

Stuart Little 2	
<b>DVD</b>	<b>VHS</b>
<ul style="list-style-type: none"> <li>• Filmmakers' Commentary</li> <li>• Activate "Show and Tell" to jump behind the scenes to learn the filmmaking process</li> <li>• 2 Behind-the-Scenes featurettes</li> <li>• Stuart Little's Big Adventure's Read-Along</li> <li>• Interactive Game</li> <li>• Music Video: Celine Dion's "I'm Alive"</li> <li>• Stuart Little 2 Playstation game promo</li> <li>• Trailers</li> <li>• Full-screen and widescreen anamorphic formats</li> </ul>	<ul style="list-style-type: none"> <li>• None</li> </ul>
Spirit – Stallion of the Cimarron	
<b>DVD</b>	<b>VHS</b>
<ul style="list-style-type: none"> <li>• Commentary by directors Kelly Asbury &amp; Lorna Cook and producer Mirelle Soria</li> <li>• Production notes</li> <li>• Storyboards</li> <li>• The Animation of <i>Spirit</i></li> <li>• The Songs of <i>Spirit</i></li> <li>• Learn to draw Spirit with animator James Baxter</li> </ul>	<ul style="list-style-type: none"> <li>• None</li> </ul>
Reign of Fire	
<b>DVD</b>	<b>VHS</b>
<ul style="list-style-type: none"> <li>• Production notes</li> <li>• Theatrical trailer(s)</li> <li>• "Breathing Life Into The Terror" Making-of featurette</li> <li>• "If You Can't Stand the Heat" Pyrotechnics featurette</li> </ul>	<ul style="list-style-type: none"> <li>• None</li> </ul>
The Sum of All Fears	
<b>DVD</b>	<b>VHS</b>
<ul style="list-style-type: none"> <li>• Commentary by director Phil Alden Robinson and novelist Tom Clancy</li> <li>• Commentary by director Phil Alden Robinson and cinematographer John Lindley</li> <li>• Theatrical trailer(s)</li> <li>• The Making of <i>The Sum of All Fears</i></li> <li>• Creating Reality: The Visual Effects</li> </ul>	<ul style="list-style-type: none"> <li>• None</li> </ul>

Comments of Ernest Miller on behalf of LawMeme

Black Hawk Down	
<b>DVD</b>	<b>VHS</b>
<ul style="list-style-type: none"> <li>• Production notes</li> <li>• Theatrical trailer(s)</li> <li>• On the set featurette</li> </ul>	<ul style="list-style-type: none"> <li>• None</li> </ul>
Divine Secrets of the Ya-Ya Sisterhood	
<b>DVD</b>	<b>VHS</b>
<ul style="list-style-type: none"> <li>• Commentary by director/screenwriter Callie Khouri and actor Ashley Judd</li> <li>• Commentary by Khouri, producers Bonnie Bruckheimer and Hunt Lowry, executive producer Lisa Stewart, editor Andrew Marcus and composer T-Bone Burnett</li> <li>• Theatrical trailer(s)</li> <li>• Additional 8 scenes not seen in theatres</li> <li>• Unlocking the Secrets of the Ya-Ya Sisterhood chronicles the page-to-screen journey</li> <li>• Interactive Ya-Ya Sisterhood Scrapbook reveals tender portraits of the Ya-Ya ladies</li> <li>• Alison Krauss "Sitting in the Window of My Room" music video</li> </ul>	<ul style="list-style-type: none"> <li>• None</li> </ul>
A Beautiful Mind	
<b>DVD</b>	<b>VHS</b>
<ul style="list-style-type: none"> <li>• Commentary by director Ron Howard</li> <li>• Commentary by screenwriter Akiva Goldsman</li> <li>• Deleted scenes - with optional director's commentary</li> <li>• <i>A Beautiful Partnership</i>: Ron Howard and Brian Grazer</li> <li>• Development of the Screenplay</li> <li>• Meeting John Nash - The Nash Theory of Equilibrium</li> <li>• "Accepting the Nobel Prize in Economics"</li> <li>• "The Process of Age Progression"</li> <li>• Storyboards to final feature comparison</li> <li>• Creation of special effects</li> <li>• Scoring the film</li> <li>• Inside <i>A Beautiful Mind</i></li> <li>• <i>A Beautiful Mind</i> soundtrack</li> </ul>	<ul style="list-style-type: none"> <li>• None</li> </ul>

Moulin Rouge	
DVD	VHS
<ul style="list-style-type: none"> <li>• Theatrical trailer(s)</li> <li>• Production commentary by director Baz Luhrmann, production designer Catherine Martin, and cinematographer Don McAlpine</li> <li>• Writing commentary by writers Baz Luhrmann and Craig Pearce</li> <li>• 8 behind-the-scenes branches</li> <li>• Audio track for the visually impaired</li> <li>• "The Making of <i>Moulin Rouge</i>" HBO special</li> <li>• 5 "Star" featurettes: Nicole Kidman, Ewan McGregor, John Leguizamo, Jim Broadbent, Richard Roxburgh</li> <li>• The Story Is About...: interview with writers Baz Luhrmann and Craig Pearce; Craig Pearce reads early treatment; old storyline and script comparisons</li> <li>• The Cutting Room: interview with Baz Luhrmann and editor Jill Bilcock; unseen footage of abandoned edits (Come What May, Twice Across the Sky, Eidler's Rap, Outside It May Be Raining, Green Fairy Previsualisation); director's mock previsualisations</li> <li>• The Dance: A Word with Baz, Tango (extended &amp; multicam), Hindi (extended), Can Can (extended &amp; multicam), Coup d'Etat (extended &amp; multicam)</li> <li>• The Music: The Musical Journey, interview with Fatboy Slim, The Lady Marmalade Phenomenon, Come What May</li> <li>• The Design: Interview with production designer and co-costume designer Catherine Martin, set design, interview with co-costume designer Angus Strathe, costume design, graphic design, smoke and mirrors</li> <li>• Marketing: International sizzle reel, photo gallery, the little red book, poster gallery, trailers, music promo spot, extended scenes &amp; 4 re-cut dance sequences</li> </ul>	<ul style="list-style-type: none"> <li>• Live MTV performance of "Lady Marmalade"</li> <li>• Making-of featurette</li> <li>• 3 deleted scenes</li> <li>• Extended dance scene</li> </ul>