

UNITED STATES COPYRIGHT OFFICE

Exemption to Prohibition on Circumvention of
Copyright Protection Systems for Access Control Technologies

Docket No. RM 2008-8

COMMENTS

Of

NATIONAL ASSOCIATION OF BROADCASTERS

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I. Introduction and Summary

The National Association of Broadcasters (“NAB”) is a nonprofit trade association that advocates on behalf of more than 8,300 free, local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission, the Courts, the Copyright Office and other federal agencies.

NAB opposes the requested exemption designated Number 9A proposed by Matt Perkins (“Perkins Proposal”)¹ from the statutory prohibition on technological measures used to control access to copyrighted works, 17 USC § 1201(a)(1)(A). This proposal seeks to exempt all: “audiovisual works delivered by digital television (“DTV”) transmissions intended for free over-the-air reception that are marked with a ‘broadcast flag’ indicator that prevents, restricts, or inhibits the ability of recipients to access the work at a time of the recipient’s choosing and subsequent to the time of transmission, or using a machine owned by the recipient but which is not the same machine that originally acquired the transmission.”

The Perkins Proposal, like similar ones that the Office has rejected in previous proceedings, is fatally flawed for many reasons. The NAB initially notes that the proposal is premature because no broadcast flag regime has been adopted. The proposal also fails to make a “prima facie case” for any of the four “critical points” that must be established to obtain an exemption. Accordingly, the proposed broadcast flag exemption should be rejected.

¹ The Perkins Proposal is summarized in the Copyright Office’s Notice of Proposed Rulemaking (“NPRM”) in this proceeding. See 73 Fed. Reg. 79425, 79427 (Dec. 29, 2008)

II. Because There is No Broadcast Flag, the Proposal Must Be Rejected

The Perkins proposed exemption can and must be rejected for the same reason such exemption was rejected in 2006 -- namely that there currently exists no device to which it would apply. The Register's 2006 ruling rejecting the flag proposal exemption then, which is just as valid today, stated:

A number of comments assert that broadcast flags for television and radio broadcasts would interfere with time shifting, format-shifting, and recording for personal use. However, there is currently no broadcast flag mandate for either television or radio broadcasts and whether such a mandate will exist within the next three years is a matter of speculation. If it does exist, it will be due in whole or in part to Congressional action. Moreover, even if an audio or television broadcast flag were to be established, the precise substance of the requirement is unknown at this time. The Register cannot recommend an exemption based upon speculation about a legal regime that may or may not be imposed in the next three years.²

Perkins states, in support of his exemption, that "it must be expected that" following the DTV conversion broadcasters and copyright owners "will do more to experiment with these copy restrictions." This is pure speculation and cannot now be the basis of an exemption any more than it could in 2006 when the Register found a flag exemption premature.³ It clearly fails to meet Perkins' burden to: "provide evidence either that actual harm currently exists or that it is 'likely' to occur in the ensuing 3-year period."⁴ Accordingly, the Perkins Proposal should be rejected.

² Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 71 Fed. Reg. 68472, 68479 (Nov. 27, 2006).

³ The Register should note that Perkins refers to the flag as imposing "copy restrictions" which, if true, would also be grounds for rejecting his proposal.

⁴ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Notice of Inquiry ("NOI"), 73 Fed. Reg. 58073, 58075 (Oct. 6, 2008).

III. The Proposed Meets None of the Ground Rules for Obtaining an Exemption

Even if there were a broadcast flag to which an exemption would apply, which there is not, the Perkins Proposal fails to meet any of the ground rules to be applied in assessing the eligibility for such an exemption, as set forth in the NOI in this proceeding.⁵ At the outset, as with past proceedings, “the burden of proof is on the proponent of an exemption to come forward with evidence supporting an exemption for a particular class of works.” *Id.* at 58078.

To make a *prima facie* case for a proposed exemption, four “critical points should be established.” *Id.* The proponent must: 1) “explain how the technological measure effectively controls access to a copyrighted work;” 2) “specifically explain what noninfringing activity the prohibition on circumvention is preventing;” 3) “establish that the prevented activity is, in fact, a noninfringing use under current law;” and 4) “demonstrate why the access-protected copy of a work is needed for the noninfringing use and why alternative means of engaging in the noninfringing uses (including the use of available copies of the work in unprotected formats) if they exist, are insufficient substitute for accomplishing the noninfringing use.” *Id.* at 58077. As demonstrated below, the Perkins Proposal fails to make a *prima facie* case on any of these points.

⁵ NOI, 73 Fed. Reg. at 58077.

IV. The Perkins Proposal Fails to Meet its Burden Demonstrating The Broadcast Flag Controls Access to Copyrighted Works

The Perkins Proposal fails to explain how a broadcast flag controls access to copyrighted works. The Court of Appeals for the District of Columbia Circuit in *American Library Association v. FCC*, 406 F.3rd 689, 693 (C.A. D.C. 2005) stated:

“This technology, in combination with broadcasters’ use of the flag, would prevent redistribution of broadcast programming. The broadcast flag does not have any impact on a DTV transmission. The flag’s only effect is to limit the capacity of a receiver apparatus to redistribute broadcast content after a broadcast transmission is complete” (emphasis supplied).

Since the flag affects redistribution, it is not an access control technological protection measure for purposes of Section 1201(a) and no exemption is warranted.

V. The Proposal Does Not Explain What Noninfringing Activity the Prohibition on Circumvention of the Broadcast Flag is Preventing and Fails to Establish That the Activities the Flag Prevent Constitute Noninfringing Uses

The Perkins Proposal argues that the flag “prevents, restricts, or inhibits the ability of recipients to access the work at a time of the recipient’s choosing and subsequent to the time of transmission or using a machine owned by the recipient but which is not the same machine that originally acquired the transmission” (emphasis added). The Proposal is devoid of any explanation or justification as to what noninfringing activity the prohibition on circumvention of the broadcast flag is preventing or why or how these are non-infringing uses.

Presumably the Proposal ostensibly relies on the *Sony* case⁶ for the access Perkins seeks. But as the Register observed in 2003: “recording freely available, over-

⁶ *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417 (1984).

the-air broadcasts for purposes of time-shifting viewing (but not librarying) as a fair use in a pre-Internet age does not lead to the conclusion that all 'shifting' is noninfringing, particularly considering that these works may just as easily be shifted to a peer-to-peer network."⁷ With respect to the Perkins Proposal's claim that transferring an audiovisual work copied off the air by one machine to another is a noninfringing use, the Register correctly stated in 2000 and reiterated in 2003 that "there is no unqualified right to access works on any particular machine or device of the user's choosing."⁸ The Register's conclusion in the 2006 proceeding was even more definitive:

Many of the commenters claimed that their space-shifting of the works and their access of those works on an alternative device were noninfringing uses and that technological restrictions were impeding their ability to engage in a noninfringing use. Yet these commenters uniformly failed to cite legal precedent that establishes that such space-shifting is, in fact, a noninfringing use. The Register concludes that the reproduction of those works onto new devices is an infringement of the exclusive reproduction right unless some exemption or defense is applicable. In the absence of any persuasive legal authority for the proposition that making copies of a work onto any device of the user's choosing is a noninfringing use, there is no basis for recommending an exemption to the prohibition on circumvention.⁹

The Perkins Proposal is fatally flawed because it fails to demonstrate that non-infringing activities are being prevented in the absence of this proposed exemption.

⁷ The Recommendations of the Register of Copyrights in RM 2002-4 (Oct. 27, 2003) ("2003 Recommendation") at 139.

⁸ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies; Final Rule, 65 Fed. Reg. 64556, 64569 (Oct. 27, 2000); 2003 Recommendation at 143.

⁹ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Dkt. No. RM 2005-1, 71 Fed. Reg. 68472, 68478 (Nov. 27, 2006).

VI. Copies of Most Audiovisual Works Delivered By DTV Will Be Available for Non-Infringing Uses

The Perkins Petition makes no case at all, much less a prima facie case, demonstrating why the plethora of sources providing access to most of the audiovisual works that will be transmitted over DTV are “insufficient substitutes for accomplishing [his] noninfringing use.”¹⁰

The internet and mobile wireless devices are becoming increasingly popular modes of disseminating movies and television shows. As a result, viewers now have unprecedented freedom to choose where and how they watch programming. Consumers can view videos on subscription sites, through pay-per video downloads, and via commercial-supported, streaming video.

Netflix subscribers with a high-speed internet connection have the opportunity to view an extraordinary number of streaming videos from a selection of over 12,000 movie titles.¹¹ Likewise, StarzPlay offers unlimited video downloads to personal computers and mobile devices for a small subscription fee.¹² iTunes, Amazon.com, and Zune all offer popular television shows and movies that can be downloaded to computers and mobile devices and purchased on a per-video basis.¹³ Videos purchased

¹⁰ NOI, 73 Fed. Reg. at 58077.

¹¹ Sonny Bunch, *Streaming Past Blu Ray?: The Future is Now...almost*, The Washington Times, Jan. 23, 2009 available at <http://www.washingtontimes.com/news/2009/jan/23/streaming-past-blu-ray>.

¹² <http://www.starz.com/channels/starzplay>

¹³ See Amazon.com Video-on-demand at http://www.amazon.com/Video-On-Demand/b/ref=sv_d_7?ie=UTF8&node=16261631; iTunes: What's on iTunes at <http://www.apple.com/itunes/whatson/movies.html>; Zune: Videos at <http://social.zune.net/video/series.aspx?serid=e17799fc-1a2f-486b-9c0a-df2ccbfa6b0>.

from the Amazon.com and iTunes sites can be viewed on the customer's television via a compatible device.¹⁴

All of the major television networks provide free, commercial-supported, high definition streaming video of their current television programming online.¹⁵ The ease of streaming videos over the internet has created new venues for offering programming that is no longer on-the-air, and lead to the creation of new works specific to the new modes of dissemination. CBS offers a selection of "classic" programming such as *Star Trek* and *Twin Peaks*.¹⁶ Hulu, a website owned by NBC Universal, has partnered with over 50 cable and broadcast network program providers to offer an ever-expanding catalog of current television programming, cancelled television series, and movies.¹⁷ Fancast,¹⁸ Joost,¹⁹ and TV.com²⁰ also provide streaming video of select primetime shows, movies, and off-the-air programming. YouTube and Sling.com are developing similar services.²¹ New works are created specifically for the internet and mobile devices such as condensed episodes for "on-the-go" viewing and "behind the scenes" footage of popular programming.²² Even video of local events can be viewed online through local broadcaster websites.²³

¹⁴ John P. Falcone, *Amazon Video On Demand Coming to Roku Player*, CNET, Jan. 3, 2009, available at http://news.cnet.com/8301-1023_3-10131174-93.html.

¹⁵ See e.g. <http://abc.go.com/>; <http://www.nbc.com/Video/>; http://www.fox.com/fod/index.htm?src=menu_item_full_episodes.

¹⁶ <http://www.cbs.com/video/>

¹⁷ <http://www.hulu.com/about/partners>

¹⁸ <http://www.fancast.com>.

¹⁹ <http://www.joost.com>.

²⁰ http://www.tv.com/video/?tag=nav_top;videos.

²¹ Dan Frommer, *Sling.com Gets One Leg Up On Hulu – For Now*, Silicon Alley Insider, Jan. 22, 2009 available at <http://www.alleyinsider.com/2009/1/sling-hulu-viacom>.

²² For example, MTV fans who want more information about their favorite shows can visit <http://www.mtv.com> for full episodes, exclusive behind-the-scenes photos, bios and

In addition to downloading or streaming programs over the internet, consumers now have television shows and movies available on their mobile devices. MediaFlo offers 17 channels of network and cable programming that can be provided to cellular phones, laptops, and vehicle DTV screens for a subscription of \$15 per month.²⁴ Verizon's V Cast Mobile, video-on-demand service allows customers to access music videos, sporting events, and full episodes of television shows on their cellular phones and laptops.²⁵ A number of local broadcasters plan on providing commercial-supported digital mobile broadcasts in the near future.²⁶ Traditional television viewing has also become more flexible with the advent of video-on-demand. Current movies and TV shows are widely licensed for on-demand viewing over direct broadcast satellite services, cable, and new video subscription services offered by telecommunications companies.²⁷

video. Video blogs, cast bios, episode guides, photos and weekly polls are also be available on the MTV Mobile Internet site, <http://m.mtv.com>.

²³ See, e.g., WDTN-TV Dayton, <http://www.wdtn.com/subindex/video>; WPXI.com Pittsburgh <http://www.wpxi.com/video/index.html>; WTHR.com Indianapolis, http://www.wthr.com/Global/category.asp?C=136236&nav=menu188_9.

²⁴ Joyce Thorne, *Live Mobile TV Service Enhances Qualcomm's Image*, San Diego Business Journal, Jan. 19, 2009, available at http://www.sdbj.com/industry_article.asp?aID=56661689.2937106.1732055.9347061.6283579.134&aID2=133226.

²⁵ Chloe Albanesius, *CBS Brings Full Length Shows to Verizon's V Cast*, PCMAG.com, Jan. 12, 2009, available at <http://www.pcmag.com/article2/0,2817,2338753,00.asp>.

²⁶ Dianne See Morrison, *AT&T Wireless Open To Free Mobile TV; Will Mobile DTV Hurt MediaFlo?*, mocoNews.net, Jan. 13, 2009 available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/12/AR2009011202696.html>.

²⁷ See NBC Universal and DIRECTV Announce First Ever On Demand Deal for Primetime Network Programming; Top NBC Universal Content On Demand for \$0.99, Business Wire, Nov. 7, 2005, available at http://www.redorbit.com/news/technology/297715/nbc_universal_and_directv_announce_first_ever_on_demand_deal/; Geraldine Fabrikant, *Once Given Up for Dead, Comcast Defies Its Obits*, The New York Time, Jan. 21, 2007 available at

The NOI states that: “[T]his inquiry demands that the Register consider whether ‘works’ protected by technological measures that control access are also available in the marketplace in formats that are unprotected . . . because the unprotected formats might allow the public to make noninfringing uses of the work”²⁸ As previously demonstrated, works transmitted over DTV are not protected by access control technological protection measures. But, even if they were, the explosion in the fast and efficient availability of such works on DVDs, the Internet, and other digital networks eviscerates any claimed need for the exemption proposed here.

VII. Conclusion

The Register cannot recommend an exemption based upon pure speculation about whether a technology will be employed in the next three years. She also cannot recommend an exemption where the petitioner has failed to meet his burden of proof

<http://www.nytimes.com/2007/01/21/business/yourmoney/21comcast.html?n=Top/Reference/Times%20Topics/Subjects/C/Cable%20Television&pagewanted=all>; Verizon Press Release, *Disney-ABC Television Group and Verizon FiOS TV Expand ABC's Video-On-Demand Offering*, San Francisco Business Times, Oct. 28, 2008, available at http://www.bizjournals.com/eastbay/prnewswire/press_releases/California/2008/10/28/NY42127.

²⁸ NOI, 73 Fed. Reg. @ 58076.

with respect to any of the statutory criteria. The proposed broadcast flag exemption fails on all of these counts and must be denied.

Respectively submitted,

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A handwritten signature in black ink, appearing to read "Benjamin F.P. Ivins". The signature is written in a cursive style with a large initial "B" and a long, sweeping tail.

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