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August 13, 2021

Via email: mgray@copyright.gov; rcounts@copyright.gov

Mark Gray
Rachel Counts
U.S. Copyright Office
101 Independence Avenue SE
Washington, DC 20559-6000

Re: Docket No. 2020-11
Section 1201 Rulemaking, Proposed Class 7 (text and data mining of motion pictures and literary works)
Ex parte meeting

Dear Mr. Gray and Ms. Counts:

On August 11, 2021, Jacqueline Charlesworth of the firm Charlesworth Law, representing the Association of American Publishers ("AAP"), and Matthew Williams of the firm Mitchell, Silberberg & Knupp LLP, representing the Motion Picture Association, Inc. ("MPA"), participated in an *ex parte* meeting with the Copyright Office regarding Proposed Class 7 in the pending section 1201 rulemaking proceeding. Kevin Amer and Jordana Rubel attended on behalf of the Office. This letter provides a summary of that meeting and the positions advanced by AAP and MPA.[1]

Counsel for AAP opened the meeting by noting that due to significant changes in the proponents' proposal since it was first introduced, even at this late stage, opponents still lack critical information about the proposal—the who, what, when, where and how. By way of example, at the evidentiary hearing, which followed three rounds of written submissions, proponents represented that researchers were not seeking access to the works hosted in TDM databases. In a follow-up letter to the Office, however, proponents reversed themselves and indicated that they were in fact seeking such access. In the same post-hearing letter, proponents also for the first time suggested the use of "data capsules" to address the security issues presented by such access, a mechanism they did not explain and had complained about previously. These are but the latest examples demonstrating that the Class 7 proposal has been a continually moving target, depriving the opponents of a meaningful opportunity to respond, and defeating the purpose of a notice and comment proceeding. Further, proponents' latest assertions regarding the need to access the database and potential use of data capsules are speculative and

[1] In participating in the *ex parte* meeting and submitting this letter, counsel for AAP and MPA continue to rely upon, and do not intend to waive, any of their prior written or oral submissions regarding Class 7.


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not grounded in actual experience, as required under section 1201.[2] Proponents have failed even to define the TDM activities in which they seek to engage. Proponents' ever-changing proposal and representations have resulted in an inadequate evidentiary record. For these reasons alone, proponents have failed to meet their burden and the exemption should not be granted. Counsel for MPA concurred that the exemption should be denied on these grounds and the other grounds stated in prior comments, testimony, and post-hearing letters of the opponents.

In response to questions from the Office regarding the fair use implications of allowing researchers to access the works contained in TDM corpora, counsel for AAP pointed out that this would exceed judicial precedent. In both the *HathiTrust* and *Google Books* cases, it was essential to the fair use ruling that there was no ability to access entire works—including through Google's "snippet" views, which are governed by specific technology that prevents full access. Proponents' demand for full-text access is thus not supported by either precedent. Counsel for MPA elaborated that as both of these rulings emanated from the Second Circuit, they are not the law of the land, and the fair use status of TDM activities remains uncertain. Other cases such as *iParadigms* are not at all comparable as they did not involve valuable works such as those at issue here. Moreover, neither *HathiTrust* nor *Google Books*—or any other precedent—addressed TDM research activities in relation to motion pictures.

Counsel for MPA reminded the Office that proponents had agreed that they would only seek to circumvent access controls on copies of works owned by the beneficiary institutions. In the case of motion pictures, proponents also did not state a need to use Blu-ray discs. Motion pictures accessed through subscription services, including streaming services, should not be covered by an exemption. Nor should rentals or downloads from online retailers. Only where an institution owns a copy of a DVD should an exemption, if one is granted, apply.

On the issue of security, counsel for AAP emphasized that general language requiring only "reasonable" security measures was wholly inadequate in the context of the proposed exemption, which would allow for the creation and maintenance of databases consisting of hundreds or thousands of DRM-free works and thus represents an unprecedented risk for copyright owners. Adequate security was a critical consideration in the fair use analyses in both *HathiTrust* and *Google Books*, and no less important here. Counsel for MPA seconded these views.

[2] We note that following our August 11 meeting with the Office, we identified an August 9, 2021 letter from proponents summarizing an August 5, 2021 *ex parte* meeting at the Office. Although we regularly check the Office website for new *ex parte* letters, we had not seen this letter prior to our meeting. The letter indicates that proponents conducted a demonstration of TDM methods for the Office in an effort to support their changed position that researchers should have access to full-text works. Of course, opponents had no opportunity to assess or respond to this *ex parte* submission, which we trust will be excluded from the evidentiary record. This is yet another illustration of proponents' failure to submit a coherent proposal to which opponents can fairly respond, and more general failure to comply with the section 1201 rulemaking process.

Counsel for MPA suggested that the task of determining appropriate safeguards for works stored in TDM databases was a challenging one requiring IT expertise and time-consuming analysis. Accordingly, rather than being subjected to a hastily conceived, ill-defined standard, copyright owners should—if an exemption is granted—be able to define the security guidelines/best practices they believe would be effective in the TDM context. Exemption beneficiaries should then comply with these security standards. Counsel for AAP added that if the Office were forced to adopt a standard, the most likely candidate based on the record before it would be a NIST-based standard for highly sensitive/high-risk works, accompanied by specific safeguards, such as anti-downloading protections and deletion of the TDM database once the project was complete. Counsel for AAP and MPA strongly recommended that should the Office proceed to adopt a minimum security standard, the Office should require each sponsoring institution to publish the specific protocol and standards in use for copyright owners to review.

Counsel for both AAP and MPA emphasized that in light of the complex, sophisticated security measures required to host DRM-free copyrighted works, circumvention and hosting of such works should be undertaken only by institutions able to comply with such measures—not individual researchers. Both counsel also stressed the importance of limiting researchers to persons actually affiliated with the sponsoring institution and carefully defined collaborators.

The Office indicated that it was still weighing its approach to the TDM proposal. In this regard, Ms. Rubel inquired whether, if the exemption were denied, AAP and MPA would be willing to engage in future discussions with proponents in an effort to seek consensus around security and other issues. Counsel for AAP and MPA indicated that they would consult with their respective clients regarding this question. Counsel for MPA stated that, while he could not speak for each MPA member, he believed there was a good chance that productive discussions concerning motion pictures could take place. Counsel for AAP expressed similar views about this possibility.

Mr. Amer next inquired about the possibility of granting a limited exemption of some sort, and how that might be approached. Counsel for AAP emphasized that in the case of literary works, any such exemption should be limited to works of fiction, as there was no record to support the need to circumvent subscription products, databases, etc. Among AAP's written submissions, counsel for AAP referred the Office specifically to AAP's post-hearing letter, which—assuming the Office were inclined to grant an exemption—offered clarifying suggestions, including that there should be no access to the works in the TDM database, that the research be used solely for non-profit purposes, and other limitations. Counsel for MPA also referred to limitations suggested in prior filings, testimony and the post-hearing letter of the Joint Creators and Copyright Owners. Counsel for AAP and MPA both emphasized, however, that the better course would be for the Office to reject the proposal for all of the reasons discussed.

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Counsel for AAP and MPA appreciate the Office's time and thoughtful attention to the issues presented by Proposed Class 7.

Sincerely,

/s/ Jacqueline C. Charlesworth

Counsel for Association of American Publishers

/s/ J. Matthew Williams

Counsel for the Motion Picture Association, Inc.