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Mark Gray and Rachel Counts
United States Copyright Office

Via email to mgray@copyright.gov, rcounts@copyright.gov

Re: Docket No. 2020-11 – *ex parte* meeting
Class 1 (AV Works – Comment & Criticism)
Class 3 (AV Works – Accessibility)
Class 7a (Motion Pictures – Text and Data Mining)

Dear Mr. Gray and Ms. Counts:

On July 30, 2021, the undersigned, legal counsel to Advanced Access Content System Licensing Administrator, LLC (AACCS LA) and DVD Copy Control Association (DVD CCA), met with Kevin Amer, Mr. Gray, Jordana Rubel, and David Welkowitz to discuss the proposed exemptions in Classes 1, 3, and 7a in the above noted proceeding. This letter provides a summary of that discussion and the arguments made by AACCS LA and DVD CCA.

As an initial matter, it was noted that all comments made and objections raised by AACCS LA and DVD CCA elsewhere in the record remain applicable, and nothing herein represents a change of position in that regard. To the extent approaches to possible exemptions are offered, it is in the context of recommending reasonable limits and boundaries to exemptions (or expansions thereof) which the Office may be inclined to grant, notwithstanding the objections offered by AACCS LA, DVD CCA, or other parties in the proceeding.

Class 1 (AV Works – Criticism and Comment)

Limitation to Pandemic. While the Office requested proposed regulatory language to enable an expanded Class 1 exemption in response to the current COVID-19 pandemic, AACCS LA and DVD CCA noted that none of the proposals submitted actually limit their applicability to the pandemic. In fact, proponents argued an “all or nothing” approach which requires application of the proposed expansion for the entire three-year period until the next Triennial Proceeding, even if in-person education were to return in full force the day after such an expanded exemption were published.

AACCS LA and DVD CCA indicated to the Office staff that the very nature of this proceeding is to craft exemptions that are carefully and narrowly tailored as to use and user – in short, they are conditional by intention and nature. For every exemption granted, if the conditions of use and user are not met, the exemption will not apply. In this case, the record deals only with the current COVID-19 pandemic, and does not apply outside of its direct impact. There is nothing in the rules

or precedent of these proceedings to prevent the Office from promulgating an exemption linked explicitly and directly to a federally-mandated prohibition on in-person education (to avoid a patchwork approach on a state-by-state, or community-by-community basis) in response to a public health emergency recognized by the White House, Center for Disease Control (CDC), or other applicable federal body. If the Office is inclined to recommend granting proponents' requested expansion, it should be limited to the stated purpose – dealing with the restrictions on in-person education directly attributable to the COVID-19 pandemic.

Gap-Filling. While proponents referred to a need to “fill gaps” in the market for streamed content for use by educational institutions, it was widely acknowledged that these gaps already existed – prior to the COVID-19 pandemic. Online streaming of motion picture content has been, and continues to be, an evolving market. Even in the consumer retail segment of the market, not every title desired by viewers is available on demand. The pandemic has highlighted these gaps, but did not cause them. And, as exemplified by Swank Motion Pictures, streaming providers have stepped up their activities to greatly increase the number of motion picture offerings available to their educational institution customers.

Congress did not intend that exemptions to the general prohibition of circumvention of technical measures serve as a substitute for the judgment of creators regarding how rapidly to adopt the digital platforms enabled by the DMCA. The market for streaming offerings is expanding, has grown more rapidly in light of the COVID-19 pandemic, and shows every sign of continuing its robust growth going forward. Care should be taken to not stifle the very market activity the DMCA was intended to encourage by enabling users to stockpile space-shifted copies – via what would arguably be a compulsory license obligation levied on content creators – that would potentially obviate the need for legitimately-offered streaming offerings that happen to come later than the users may have preferred.

Class 3 (AV Works – Accessibility)

AACS LA and DVD CCA expressed their appreciation for both the opportunity to work directly with proponents on compromise language and acknowledgement of the sincere effort of the parties to find a middle ground. Notwithstanding, the parties fell just short of mutually agreeable language, despite having found high-level agreement in principle on multiple points during the time allotted for compromise discussions.

The following points were offered by AACS LA and DVD CCA as framing their recommendations for any expansion of the current exemption:

- Remediation should be undertaken by (or at the direction of and under the supervision of) the office or staff member(s) actually charged with addressing the needs of students with disabilities at the educational institution, and not merely any faculty or staff member.
- The educational use for which the circumvention is undertaken should be reasonably foreseeable, such as inclusion of the work in a syllabus for a scheduled class or a recurring class that is reasonably expected to use that work in each recurrence. Other criteria are certainly possible to show reasonably foreseeable use. Proactive remediation, without an identified and specific educational need, however, should not be permitted.
- To the extent “sufficient quality” of the remediation is not able to be judged against suitable objective criteria (for instance, because suitable objective criteria do not exist), it should at

least be subject to the reasonable professional judgment of the office or staff member(s) actually charged with addressing the needs of students with disabilities.

- Recognizing works may need to be re-used and/or remediated multiple times in order to address disability needs of different types over time, AACCS LA and DVD CCA do not object in principle to retaining circumvented and remediated (as applicable) works for future use (subject to the continuing existence of a reasonably foreseeable educational need), as long as suitable and clearly stated security standards/measures are used to protect against further, unauthorized use or distribution of circumvented/remediated motion pictures.

In response to a question raised by the Office, AACCS LA and DVD CCA do not agree that the word “educational” should not be required to describe the use covered by the proposed exemption expansion. While a potentially wide variety of non-classroom activities would arguably still qualify as educational uses, an outright rejection of the word would render the exemption essentially open-ended, which is not in keeping with the purpose of this proceeding to promulgate narrowly crafted exemptions.

Class 7a (Motion Pictures – Text and Data Mining)

Security Standards. AACCS LA and DVD CCA expressed concern with proponents’ argument that, despite the concept of an exemption for text and data mining originating in the European Union (EU), the Office should nonetheless ignore the provisions of the EU standard which call for involvement of rights holders in the development of appropriate security standards for the circumvented works contained in a corpus subjected to text and data mining.

In response to an Office question regarding the potential benefit of adopting the general frameworks of NIST or ISO to allow researchers to determine appropriate security measures, AACCS LA and DVD CCA noted that, while there are a number of potentially useful starting points for the discussion of appropriate security standards, we do not need to, nor should we, leave it to an institution-by-institution, or, likely to be even less consistent, a researcher-by-researcher, determination. We already know (i) what is to be secured – circumvented titles ripped from commercially-released prerecorded media, and (ii) the threat to be defended against – further, unauthorized distribution or use beyond that required for the specific research project for which the corpus was assembled. Given this relatively narrow and ubiquitous set of circumstances, a generally applicable set of security standards should be developed before allowing an exemption for text and data mining to be exercised.

In a discussion about how this might be accomplished, AACCS LA and DVD CCA pointed out that our earlier comments had offered the suggestion of a Copyright Office-sponsored working group. It was pointed out that AACCS LA and DVD CCA themselves are both the product of cross/multi-industry negotiation and compromise, so we know how to constructively engage in these activities. It was discussed that the Office might observe, participate in, or even mediate/facilitate such a working group. The setting of a firm deadline, after which the Office would finalize the operative security standards should the working group be unable to reach a consensus, was discussed as a possible approach. It was noted that a working group should not be expected to be a short or easy process, but it offers one possible path to success.

Access to Circumvented Works. In response to proponents' suggestion - despite direct testimony in the hearings that the result of text and data mining procedures is "a number" and further access to the circumvented motion pictures would no longer be needed - that researchers may nonetheless want access to the circumvented works in order to verify results of the process, AACCS LA and DVD CCA understand the desire or need to verify results, but see no reason why this cannot be achieved by reviewing the original movie disc - which the researcher should be required to have legally acquired in the first place. DVD and Blu-ray players all enable fast-forward and rewind functionality, and nearly all movies on DVD and Blu-ray are authored with chapter/scene markings, allowing a viewer to easily go to a specific point in the movie, without having to resort to circumventing the TPMs protecting those movies.

Please feel free to contact the undersigned if there are any questions.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Michael B. Ayers", with a long horizontal flourish extending to the right.

Michael B. Ayers