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VIA EMAIL ONLY

Regan Smith
General Counsel and Associate Register of Copyrights
U.S. Copyright Office, Library of Congress
101 Independence Ave, SE
Washington, DC 20559-6000

Re: Response to Post-Hearing Letter on Proposed Class 17 – Docket No. 2020–11, Exemptions to Prohibition Against Circumvention of Technological Measures Protecting Copyrighted Works

Dear Ms. Smith:

On behalf of the Joint Creators and Copyright Owners (the "JCCO"),[1] I respectfully submit this response to your letter of May 6, 2021. This letter also responds to the June 4, 2021 letter submitted by proponents of Class 17. We appreciate the opportunity to continue to discuss the accessibility of copyrighted works, an important issue and one on which the JCCO associations and member companies continuously commit resources to improve the status quo.

The Notice of Inquiry and the Notice of Proposed Rulemaking set forth the standards for proposing classes of works for exemptions from Section 1201(a)(1)(A)'s prohibition on circumventing access controls. For example, "[t]o define an appropriate class of copyrighted works, the Office begins with the broad categories of works identified in 17 U.S.C. 102 and then refines them by other criteria, such as the technological protection measures ('TPMs') used, distribution platforms, and/or types of uses or users."[2] Proponents fail to adhere to these standards, which have been established for some time and are necessary to ensure a rulemaking process that preserves the spirit and intent of Section 1201.

The JCCO understand that persons with disabilities sometimes encounter difficulties with access controls and their members work hard to address that reality. Where, during this proceeding, accessibility advocates have proposed renewal of existing exemptions or specific expansions to existing exemptions that adhere to the ground rules, the JCCO have – while also requesting reasonable and appropriate limitations – not opposed these renewals or expansions. For instance,

[1] The Entertainment Software Association, The Motion Pictures Association of America, Inc. and the Alliance for Recorded Music comprise the JCCO.

[2] Exemptions To Permit Circumvention of Access Controls on Copyrighted Work, Notice of Proposed Rulemaking, 85 Fed. Reg. 65293, 65293-94 and fn. 4 (Oct. 15, 2020).

we did not oppose the renewal of the existing exemptions for literary works and motion pictures in educational settings.[3] In our comments and during the hearings, we also embraced nearly all of the proposed expansions to those exemptions and spent significant time meeting and conferring with counsel for petitioners during the post-hearing period to resolve any outstanding differences. This investment of time resulted in a jointly proposed agreement on Class 8 and the development of counter-proposals from proponents and opponents on Class 3 that considerably narrowed the issues for the Office to decide.

In contrast to Classes 3 and 8, Proposed Class 17 did not comply with the requisite standards from its inception. The NPRM so stated.[4] Moreover, even after being invited to provide specific evidence on issues briefly mentioned in comments regarding Proposed Class 17, its proponents elected to focus on advocating for a change in the rules, rather than seeking to meet the standards required by the statute, the legislative history, and the Office's longstanding interpretation of those authorities. The proponents' post-hearing letter primarily poses hypothetical issues that might arise without explaining why an exemption is required now to address them or whether alternatives exist for access or accomplishing the referenced objectives.[5] "[F]or a temporary exemption from the prohibition on circumvention to be granted through the triennial rulemaking, it must be established that 'persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition . . . in their ability to make noninfringing uses under [title 17] of a particular class of copyrighted works.'"[6] This requires more than hypotheticals concerning issues that are undocumented. Moreover, in some instances,

[3] The existing exemption for motion pictures was contested during the 2018 cycle and MPA has made no concessions concerning the legal conclusions of the Register and the Librarian articulated at the conclusion of that cycle. However, we concluded that disputing those conclusions during this cycle would unnecessarily burden the Office and the proceeding participants.

[4] "As presently suggested, this proposed exemption is beyond the Librarian's authority to adopt because it does not meet the statutory requirement to describe 'a particular class of copyrighted works.'" 85 Fed. Reg. at 65293 (quoting 17 U.S.C. 1201(a)(1)(C)).

[5] The few specific claims in the letter are unsupported. For example, access to digital copies of sound recordings without access controls can be obtained from digital retailers. Moreover, as discussed during the hearing, accessible video game controllers can be obtained through console manufacturers or created without circumvention. Microsoft makes an Xbox Adaptive Controller, which has received widespread praise, including by one of the sources referenced in proponents' post-hearing letter. *See* Arielle Pardes, *The Internet Is for Everyone, Right? Not With a Screen Reader*, WIRED, Oct. 24, 2019, https://www.wired.com/story/web-accessibility-blind-users-dominos/ ("Other companies, like Microsoft, have worked to build accessibility earlier into the design process, rather than as a compliance checklist at the end. Microsoft has seen some real innovations out of this process, like its adaptive controller for Xbox or a browser plug-in that uses AI to write alt text. This kind of work speaks to the goal of BATS, which isn't just to fix websites or platforms when there's a bug. It's to build accessibility into these platforms in a way that really upgrades them."); *see also* Microsoft, *Xbox Adaptive Controller wins major award at Golden Joysticks*, Nov. 16, 2018, https://news.microsoft.com/en-gb/2018/11/16/xbox-adaptive-controller-wins-major-award-at-golden-joysticks/. And the example of an individual designing his own, accessible gaming set up referenced in proponents' reply comments does not appear to involve circumvention but instead the connection of interoperable hardware. *See* WallsiesDGP, *Homemade Disabled Accessible PC Gaming Setup with No Xbox Accessible Controller*, Mar. 2, 2021, https://www.youtube.com/watch?v=VHttKRQqas0.

[6] 85 Fed. Reg. at 65293 (quoting 17 U.S.C. 1201(a)(1)(C)).

proponents do not explain how circumvention, if allowed, could enable the effective remediation of works.[7]

It is now too late in the proceeding for presentation and consideration of speculative problems or inadequately documented proposals.[8] Indeed, we are concerned that the Office's post-hearing letter may have gone further than necessary to solicit new evidence and argument from the proponents that should have been contained in prior comments such that we would have had a full opportunity to respond at the appropriate time – when we submitted our opposition comments and elaborated upon them and the proponents' reply comments during the hearing (where participants had no opportunity to make opening statements). While we share the Office's commitment to addressing concerns related to accessibility, in the interest of due process, it is very important that the proceeding remains governed by consistently applied ground rules for all categories of proposed exemptions.

Proponents argue in their letter that an open-ended, "all works" exemption that is not allowed by the statute is necessary here because too many issues arise in-between rulemaking cycles for them to adequately address the needs of individuals with disabilities in triennial proceedings. However, the historical record from the proceedings held through to this day does not support this assertion. Prior to the 2018 cycle, there had only been two accessibility related exemptions created since 2000. In most cycles, the literary works exemption for enabling read-aloud functionality on e-books – created in 2003 – was the only accessibility exemption. Its renewal typically went unopposed. In 2012, there was an exemption created for circumventing access controls to attempt to create DVD players that would render inaccessible motion pictures on discs accessible. But, in the absence of a renewal request, that exemption was not renewed. Finally, in 2018, the existing exemption was created for educational uses of motion pictures involving the creation of captioning or audio description. Aside from the specific records built related to those prior exemptions, there is no established record of accessibility problems being caused by access controls. The Office's 1201 Policy Study acknowledged this fact when it did not recommend a general accessibility exemption because the only consistent evidentiary record built that caused the Office to recommend the creation of a permanent statutory exemption was the record concerning literary works in e-book formats that prevent read aloud functionality.[9]

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[7] For example, it is unclear how proponents seeking to address color blindness or to alter challenges that rely upon audio cues in video games would accomplishes their objectives. Significant editing of the underlying code would likely be required.

[8] "To ensure a clear and definite record for each of the proposals, commenters *are required* to provide a separate submission for each proposed class during each stage of the public comment period." 85 Fed. Reg. at 65302 (emphasis added). "Proponents of exemptions should present their *complete affirmative case* for an exemption during the initial round of public comment, *including all legal and evidentiary support* for the proposal." *Id.* (emphasis added).

[9] "The Office agrees with some commenters that 'outside the narrow context of literary works' there has been 'very little in the records from prior rulemaking proceedings regarding other entertainment products' such as 'video games, motion pictures or recorded music.'" U.S. COPYRIGHT OFFICE, SECTION 1201 OF TITLE 17: A REPORT OF THE REGISTER OF COPYRIGHTS 87-88 (June 2017) (quoting AAP, ESA, MPA and RIAA Additional Reply Comments).

Given this background, we oppose proponents' request for round tables on accessibility issues hosted by the Copyright Office in-between rulemaking cycles. However, the JCCO are willing to have private conversations in-between cycles to attempt to address specific concerns. No such discussions were requested prior to this cycle. Such future discussions could obviate the need for protracted debate during proceedings; narrow any issues of disagreement in advance thereof; and lessen the burden of the Office as a result. That said, even where private parties are able to reach consensus outside of the rulemaking context, that would not remove the statutory requirement that the ground rules for the proceeding, including related to the articulation of particular classes of works and the presentation of sufficient evidence, must be preserved.

Thank you for your consideration of these issues.

Respectfully,
/s/J. Matthew Williams
Partner of
MITCHELL SILBERBERG & KNUPP LLP
Cc: Anna Chauvet, Assistant General Counsel