

BEFORE THE UNITED STATES COPYRIGHT OFFICE

In the Matter of:)
)
SECTION 1201 PUBLIC HEARING:)
AUDIENCE PARTICIPATION)
)

Suite 206
Heritage Reporting Corporation
1220 L Street, NW
Washington, D.C.

Thursday,
April 18, 2024

The parties convened remotely, pursuant to notice,
at 4:15 p.m.

PARTICIPANTS:

Government Representatives:

MARK GRAY, U.S. Copyright Office
BRANDY KARL, U.S. Copyright Office

Also Present:

KEN AUSTIN
WILLIE CADE
CHARLES CRAIN
HARLEY GEIGER

1 reply comments.

2 So the purpose of good faith AI
3 trustworthiness research is to identify and correct
4 algorithmic flaws that create potentially harmful
5 effects, such as racial or gender bias,
6 discrimination, copyright infringement, synthetic
7 intimate imagery, and other undesirable output, and
8 the purpose of good faith AI trustworthiness research
9 is not to infringe on copyright, and the exemption
10 language proposed by the Hacking Policy Council would
11 expressly restrict information derived from the
12 research from being used or maintained in a manner
13 that facilitates copyright infringement.

14 So regarding the first fair use factor, the
15 purpose and character of the use, many of the
16 activities involved in good faith AI trustworthiness
17 research are highly transformative and do not merely
18 supersede the objects of original creation. The
19 research and the creative works produced by the
20 research, such as academic papers and discussions, are
21 of a wholly different nature than the AI systems that
22 are subject to the research.

23 So the purpose of AI trustworthiness
24 research is not to replicate the copyrighted material
25 but to test, analyze, and improve the AI system's

1 reliability and fairness. This transformational use
2 shifts the original purpose of the copyrighted
3 material towards a critical evaluative or testing
4 function that enhances our understanding of AI
5 systems' societal impacts, and, typically, this type
6 of research is conducted to facilitate scientific
7 dialogue, teaching scholarship, and the advancement of
8 computer science. So, even if it is conducted within
9 commercial entities, the primary intent is to improve
10 safety and efficacy, not to substitute the value of
11 copyrighted works.

12 Second, the nature of the copyrighted work
13 and AI trustworthiness testing involves code, so the
14 software that drives an algorithm, APIs that let AI
15 interact with other software, and interfaces that
16 enable users to provide input and receive output, so
17 the proposed class focuses on functional code rather
18 than expressive or imaginative work by researching the
19 algorithmic output of computer programs.

20 The third factor, the amount and
21 substantiality of the portion that is used, when AI
22 trustworthiness research may access significant
23 portions of an AI system, it is for the purpose of
24 ensuring rigorous testing and validation, and these
25 systems tend to be extremely large and complex, and

1 so, in most instances, it will not be necessary or
2 even desirable to reproduce more than small or de
3 minimis portions of the copyrighted AI system. Good
4 faith research is really interested only in access to
5 the portions of the work that is necessary to
6 demonstrate the validity of the research and uncover
7 flaws that are in the public interest to address.
8 Publication of AI trustworthiness research rarely
9 contains substantial portion of the AI system code.

10 Fourth, the effect of the use on the
11 potential market or value of copyrighted work, good
12 faith AI trustworthiness research does not replace the
13 market for the original work but complements it by
14 identifying improvements or trustworthiness risks, and
15 so, by enhancing the trustworthiness of AI systems,
16 the research can indirectly increase the market appeal
17 and user confidence in these products, and where AI
18 trustworthiness research leads to corrections of
19 algorithmic flaws, the value of the original work
20 would ultimately be strengthened. We'd also note that
21 AI trustworthiness research tends to lead to the
22 creation of many other protected works, such as
23 presentations, new code to correct algorithmic flaws,
24 and academic papers just to name a few examples.

25 So, in conclusion, when evaluated under the

1 fair use framework, good faith AI trustworthiness
2 research strongly aligns with the principles of
3 copyright exceptions designed to facilitate innovation
4 and public benefit. Thank you.

5 Do you have any questions?

6 MS. KARL: No questions during this session.
7 Thank you, Mr. Geiger.

8 MR. GEIGER: Thank you.

9 MS. KARL: Mark?

10 MR. GRAY: Next, we'd like to have Mr.
11 Willie Cade from Farm Action speak. Mr. Cade, I
12 believe you're still on mute. I'm so sorry.

13 MS. KARL: Yeah, we're going to ask our team
14 to unmute you. There you go.

15 MR. CADE: Thank you. Sorry. My name is
16 Willie Cade. I'm from Farm Action, Senior Policy
17 Advisor on the issue of right to repair. I am
18 speaking on behalf of farmers and not only the
19 equipment that they use in the fields or in the barns
20 but also their commercial equipment that is so
21 integrated into their systems for total production in
22 their operations, and, clearly, I believe that it is
23 an important element that we have not only the already
24 granted exemptions for agricultural right to repair of
25 equipment but also with the commercial equipment

1 that's involved in rural America because oftentimes
2 getting a authorized repair person out into a rural
3 environment in time to meet the needs of harvest
4 and/or planting is extremely difficult. Thank you
5 very much.

6 MR. GRAY: Great. Thank you.

7 Next, we'd like to have Mr. Charles Crain
8 from the National Association of Manufacturers, who I
9 believe is also speaking about Class 5, which is
10 computer programs repair.

11 MR. CRAIN: Absolutely. So good afternoon.
12 As you just said, my name is Charles Crain. I'm the
13 Vice President of Domestic Policy at the National
14 Association of Manufacturers. The NAM represents
15 14,000 manufacturers of all sizes in every industrial
16 sector and across all 50 states. I'm joining today to
17 share the NAM's perspectives on both Class 5 and Class
18 7. So the basis of the so-called right to repair
19 movement hinges on the false notion that owners do not
20 have the ability to repair their own equipment.

21 The truth, however, is that the majority of
22 OEMs already provide a wide of range of resources and
23 tools that allow users and critically third-party
24 repair businesses to maintain, diagnose, and repair
25 products. In short, right to repair is a solution in

1 search of a problem, which brings us to this specific
2 rulemaking, and NAM's perspective is that the
3 Copyright Office should reject the proposed Class 5
4 and Class 7 exemptions. These exemptions would
5 undermine manufacturers' IP rights in service of right
6 to repair, and the record does not support their
7 adoption.

8 First, both proposed exemptions are
9 overbroad, poorly defined, and unclear about permitted
10 uses. For Class 5, proponents actually concede that
11 it's unusually broad in nature. Basic key terms in
12 the proposed exemption are vague and overly broad, and
13 they potentially implicate a wide range of products
14 that operate very differently. Proponents also claim
15 commonality because the products in question are used
16 for a "commercial" purpose. But the mere fact of
17 commercial use does not mean that all commercial
18 devices operate in the same way, use the same TPMs, or
19 have identical users or use cases.

20 For Class 7, on the other hand, that would
21 allow the circumvention of TPMs across a broad and
22 abstract class that could include any lawfully
23 acquired vehicle or vessel. This proposed exemption
24 also does not specify the precise types of data that
25 would be accessed or even what the terms in the

1 proposal, vehicle, operational data, diagnostic and
2 telematics data, would precisely mean.

3 Second, for both classes, Class 5 and Class
4 7, proponents have not supplied direct evidence about
5 the specific TPMS that would be subject to the
6 proposed exemptions, whether those TPMS are the same
7 throughout each class or whether circumvention of
8 those specific TPMS would allow for the proposed uses
9 that are contemplated.

10 Finally, proponents for both Class 5 and
11 Class 7 have failed to show that users will be
12 adversely affected absent the ability to circumvent.
13 Indeed, proponents have not even shown that the
14 proposed uses and the circumvention that's allegedly
15 necessary to access them are even desired by users.
16 For Class 5, the examples are both de minimis and
17 speculative, and for Class 7, that proposal fails to
18 include any specific examples of a user wanting to but
19 being unable to access, store, or share vehicle
20 operational data.

21 In the past, the Copyright Office has held
22 that the totality of the rulemaking record must on
23 balance reflect the need for an exemption. When the
24 record offered by exemption proponents does not
25 clearly define the proposed category or justify the

1 need for an exemption, the Copyright Office has
2 historically recommended against adoption. Here, it's
3 clear the petitioners have not met that burden. The
4 totality of the record does not support the adoption
5 of the proposed exemptions in either Class 5 or Class
6 7.

7 Further, granting these exemptions absent
8 this necessary evidence or justification would
9 undermine manufacturers' intellectual property rights
10 in service of so-called right to repair when, in fact,
11 as I've said, users already have access to the
12 resources and tools necessary to conduct repairs and
13 maintenance. Accordingly, the Copyright Office should
14 recommend against adoption of both the Class 5 and
15 Class 7 proposed exemptions. Thank you.

16 MR. GRAY: Okay. Thank you very much, Mr.
17 Crain.

18 Finally, our final speaker for today is
19 going to be Mr. Ken Austin, who is here to speak about
20 Class 6(b).

21 MR. AUSTIN: Hello. Testing, one, two. Can
22 you hear me?

23 MR. GRAY: Yes, thank you.

24 MR. AUSTIN: Wonderful. Yeah. So, just for
25 context, I am the person who submitted a request for

1 an exemption regarding an additional exemption for
2 TPMs for video games. I'm not going to talk about
3 that. I think that ship has probably sailed for this
4 year or for this rulemaking process, but I did watch
5 all of these, you know, I'm new to this process, and I
6 just have a couple comments about things that I saw
7 today.

8 One is that Mr. Rotstein was talking about I
9 think something called like final draft 7, some kind
10 of word processing software, I guess, and he seemed to
11 suggest that people shouldn't have access to Version 7
12 or shouldn't be able to buy Version 7 because 13 is
13 for sale, and as far as I know, you know, in my
14 layman's understanding of copyright, copyright doesn't
15 guarantee sales of future iterations of a product and,
16 therefore, access to an old version, even if it causes
17 market harm to the current version of a product, isn't
18 really relevant.

19 And so sort of to that point, I have about
20 10 years of experience in software and web development
21 for a hobbyist project. I bought a copy of Borland's
22 C++ or Borland Turbo C++ 3.0 on eBay. It's an old
23 compiler that runs on MS DOS, and the software is
24 about 30 years old, and it's not going to run on a
25 modern computer. I installed it on an old computer

1 that natively runs MS DOS, and with that software, I
2 wrote the code for a small text adventure video game
3 that will run on MS DOS, but under Mr. Rotstein's
4 logic, it seems like, you know, if there was a
5 Borland's C++ 20, that I shouldn't have had access to
6 3.0 to be able to engage in this project, which is not
7 really something I agree with.

8 And then, as far as something specific to
9 video games, Mr. Englund mentioned during the
10 discussion about remote access that a button, a
11 checkbox, even with human review, wouldn't be
12 sufficient to verify the purpose of a use. Yet, I
13 guess the constituents that he represents, you know,
14 the rights holders, seem to find a click of a button
15 perfectly adequate to enforce an end-user license
16 agreement, and, indeed, those license agreements can
17 be enforced without the click of a button.

18 Simply using the software could be a reason
19 to enforce that license agreement, so it seems to me
20 that the bar for what the click of a checkbox can
21 accomplish is quite high, so, surely, then, you know,
22 clicking a button to affirm that, you know, you're
23 accessing something for a scholarly use should be
24 sufficient, especially with human review, because
25 there's nobody looking over my shoulder when I agree

1 to an end-user license agreement for a game or
2 whatever software I want to run. And as far as any
3 market harm is concerned, I would suggest, you know, I
4 don't know if this applies here, but if the best way
5 for somebody to access a piece of software is by
6 jumping through the hoops of academia, I guess I would
7 argue that that is a market service problem, not a
8 legitimate concern for not allowing people to remotely
9 access software for academic or scholarly use.

10 And then, finally, just there was some talk
11 about, you know, windowing as far as what software is
12 available, and I personally released a game on iOS,
13 self-published it back in like 2011, and that game is
14 no longer for sale. I made, like, a few hundred
15 dollars on it, not a big deal, not like a historically
16 relevant game, but just as an example of a real-world
17 scenario here of why something might not be available
18 on the market. Basically, financially, it didn't make
19 sense for me to continue to pay the fee to keep that
20 game on the app store given the sales.

21 Additionally, there were compatibility
22 issues with, you know, as we know, operating systems
23 are ever-evolving, so to make the game run on whatever
24 the next version of iOS was, I would have had to do a
25 bunch of work to update it, and I chose to discontinue

1 support basically. However, even if I wanted to bring
2 the game back, I'm not even sure I have the source
3 code anymore, so for all intents and purposes, you
4 know, that game will never be played again most
5 likely, unless somebody's able to find it and
6 circumvent surely some kind of TPM in the package
7 that's distributed as, you know, the game executable,
8 whatever it is, on iOS.

9 So, yeah, I think that's everything that I
10 really wanted to address here outside from just
11 generally I'm concerned about the state of technology
12 in the United States. It seems like copyright law is
13 sort of, along with software licensing, is sort of
14 being used as a bit of a Trojan horse to rob consumers
15 of, you know, what was, I suppose, taken for granted
16 as ownership of their goods. You know, it used to be
17 you would buy a printer and you could buy whatever ink
18 that would fit in the thing and use your printer, but
19 now, you know, there's a TPM solution in the cartridge
20 and/or the printer or both, and that seems like the
21 road to digital dystopia, I guess, in my opinion.

22 And with that, I think, you know, I'll leave
23 it at that. I appreciate the opportunity to speak. I
24 don't know if you're allowed to answer this question,
25 but I wonder if there's a specific person at the

1 Office that I could contact to sort of ask questions
2 about the process so that maybe in three years, if I
3 feel the need for my proposed exemption exists, you
4 know, I could come in a little better prepared as
5 somebody who's not an attorney or a CEO or anything
6 like that.

7 MR. GRAY: Great. Thank you. So we do have
8 our website with contact information, and we have our
9 Public Information and Education Office that is able
10 to answer questions like that. The website for that,
11 the URL is copyright.gov. There should be a contact
12 page, I think, fairly prominently displayed. Thank
13 you so much, Mr. Austin.

14 Thank you very much, everyone else, all of
15 our hearing panelists throughout the week who were
16 here today with us. We really appreciate all of the
17 time, the thoughts, the comments you provided. With
18 this, our hearing is now closed. Thank you again very
19 much for your valuable contributions. It's been a
20 wonderful week. Thank you.

21 (Whereupon, at 4:35 p.m., the audience
22 participation in the above-entitled matter was
23 adjourned.)

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REPORTER'S CERTIFICATE

CASE TITLE: Section 1201 Public Hearing: Audience
Participation

HEARING DATE: April 18, 2024

LOCATION: Washington, D.C.

I hereby certify that the proceedings and
evidence are contained fully and accurately on the
tapes and notes reported by me at the hearing in the
above case before the United States Copyright Office

Date: April 18, 2024



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