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VIA EMAIL

David Carson, Esq.
General Counsel
U.S. Copyright Office
Library of Congress
101 Independence Avenue, S.E.
Washington, DC 20559

Dear David:

On behalf of the Joint Creators and Copyright Owners, I am pleased to respond to your request to comment on the definition of "tablet" put forward orally by Marcia Hoffmann on behalf of the Electronic Frontier Foundation (EFF) at the rulemaking hearing on June 5, and circulated by her via e-mail the following morning, June 6. I believe that you asked all members of the June 5 hearing panel to respond in writing within ten days.

As you know, EFF's proposed definition would define a "tablet computer,"[1] for purposes of proposed exemption #5, as:

"(a) a personal mobile computing device, typically featuring a touchscreen interface,

(b) that contains hardware technically capable of running a wide variety of programs,

(c) that is designed with technological measures that restrict the installation or modification of programs on the device, and

(d) is not marketed primarily as a wireless telephone handset."

This strikes us as an exceptionally broad definition. In fact, it would even appear to sweep in, for example, all laptop computers. Although the first part of the definition states that a tablet would "typically" feature a touchscreen interface, the definition does not require such an interface.[2] The record is replete with evidence that personal computers, including laptops, enable the sort of interoperability EFF

[1] We note that the formulation of exemption #5 set out in the Office's Notice does not refer to "tablet computers," but rather to "tablets."

[2] Moreover, even if the definition identified only devices with touchscreen interfaces as "tablets," that would do little to explain why an exemption is justified for programs resident on such devices.

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claims to champion.[3] Thus, if EFF cannot define tablets in a manner that distinguishes them from laptops, it is evident that there are viable alternatives available in the marketplace that enable the purported noninfringing conduct EFF claims is being adversely impacted by the prohibition on circumvention.

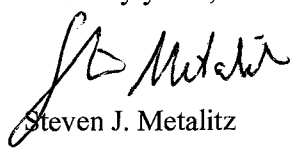
In addition, the definition does nothing to distinguish among the myriad mobile devices offered for distinct purposes (e.g., reading ebooks, playing video games, or browsing the internet). The second part of the definition makes it clear that specialized devices like ebook readers that "contain[] hardware technically capable of running a wide variety of programs" would also be considered tablet computers, and subject to hacking under EFF's proposal.

Furthermore, the proposed definition relies on qualifiers that are both vague and seemingly unrelated to the class of works for which an exemption is sought. It is unclear, for instance, what would qualify a device as "personal." We are likewise puzzled by the concept that a "particular class of works" could be defined in significant part by the human interface characteristics of a device upon which a work has been installed, especially when the proposed exemption is in no way related to access control measures that purportedly affect the interoperability of computer programs that enable any particular type of user interface. In the same vein, defining the class to turn on how an entity (perhaps even an entirely different party than the one that produced or marketed the device or developed the computer program) chooses to market (or to "market primarily") a device on which a computer program has been installed appears to have no relationship to the purpose of the proposed exemption (which is not specifically about making – or not making – phone calls), nor to the purportedly non-infringing use at issue.

To the extent that the definition was put forward in an effort to narrow the ill-defined "particular class of works" which EFF proposes, it instead expands that proposal well beyond what "tablet" might connote in common parlance. The effect of such a broadening, of course, is to elevate the burden of persuasion that the proponent of any exemption in this proceeding must bear: to demonstrate a causal link between the prohibition against circumvention of access controls and a concrete impediment on a specific non-infringing use of works falling within the "particular class." As the class broadens, the burden on the proponent increases correspondingly.

EFF's attempt to define a "tablet" has merely highlighted the boundless nature of the proposal and the lack of any credible basis for recommending or granting it. Where, as here, a proponent's professed interest lies in gaining access to hardware, it is critically important that the class be clearly and narrowly defined. If the proponent is unable to meet its burden with respect to the entire range of devices that would be subject to its proposed exemption, the class must be rejected. The Office should therefore reject the proposal.

Sincerely yours,



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cc: Ben Golant
Jesse Feder
Corynne McSherry
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[3] Android devices also enable such interoperability.