Short Comment Regarding a Proposed Exemption Under 17 U.S.C. 1201 (Proposed Class #24)

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Item 1. Commenter Information

This Comment is submitted on behalf of Entertainment Software Association; Motion Picture Association of America, Inc.; and Recording Industry Association of America (collectively the "Joint Creators and Copyright Owners"). The Joint Creators and Copyright Owners may be contacted through their counsel, Steven J. Metalitz, J. Matthew Williams and Naomi Straus, Mitchell Silberberg & Knupp LLP, 1818 N St., NW, 8th Fl., Washington, D.C., 20036, Telephone (202) 355-7900.

The Joint Creators and Copyright Owners are trade associations representing some of the most creative and innovative companies in the United States.

The Entertainment Software Association ("ESA") represents all of the major platform providers and nearly all of the major video game publishers in the United States. ESA is the U.S. association exclusively dedicated to serving the business and public affairs needs of companies that publish computer and video games for video game consoles, handheld devices, personal computers, and the Internet. ESA offers a range of services to interactive entertainment software publishers, including but not limited to: a global content protection program; business and consumer research; government relations; and intellectual property protection efforts.

The Motion Picture Association of America, Inc. ("MPAA") is the voice of one of the country's strongest and most vibrant industries – the American motion picture, home video and television industry. MPAA works to advance the business and the art of filmmaking and to celebrate its enjoyment around the world. MPAA members include: Walt Disney Studios Motion Pictures; Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Twentieth Century Fox Film Corporation; Universal City Studios LLC; and Warner Bros. Entertainment Inc.

The Recording Industry Association of America ("RIAA") is the trade organization that supports and promotes the creative and financial vitality of the major music companies. Its members comprise the most vibrant record industry in the world. RIAA members create, manufacture and/or distribute approximately 85% of all legitimate recorded music produced and sold in the United States. In support of its mission, the RIAA works to protect the intellectual property and First Amendment rights of artists and music labels; conduct consumer, industry and technical research; and monitor and review state and federal laws, regulations and policies.

Item 2. Proposed Class Addressed

Proposed Class 24: Abandoned Software—Music recording software.

The December 12, 2014 Notice of Proposed Rulemaking ("NPRM") described this proposed class as permitting "circumvention of access controls consisting of the PACE content protection system, which restricts access to the full functionality of lawfully acquired Ensoniq PARIS music recording software." 79 Fed. Reg. 73,856, 73,869 (Dec. 12, 2014).

One proponent of this exemption, Richard Kelley, proposed the following language to define what appear to be two distinct classes of works:[1]

(1) "Obsolete software/hardware combinations protected by a software based copy protection mechanism (software dongle) when the manufacturer is unable (because of no longer being in business) or unwilling to provide access via this system to those who are otherwise entitled access." Kelley Petition at 1 (Nov. 3, 2014).

(2) Obsolete software/hardware combinations protected by a software based copy protection mechanism (software dongle) that prevents the hardware and software from running on current operating systems or current hardware by those otherwise entitled to access to the software and hardware." *Id.*

Item 3. Statement Regarding Proposed Exemption

The Joint Creators and Copyright Owners are sympathetic to the issues confronting musicians and sound engineers who rely on the PARIS music recording software to create new music and to access previously recorded music of their own making. If the proponents of the exemption offer more evidence for the record and work with the Copyright Office on crafting a narrow exemption, the Joint Creators and Copyright Owners may not ultimately oppose the creation of an exemption that could give this community of musicians a remedy for the specific problem that they have identified. This is especially true because the PARIS system involves both software and hardware, which are apparently inextricably intertwined.

However, at this stage of the proceeding, the Joint Creators and Copyright Owners oppose the proposed exemption because the proponents have not, in response to the NPRM, (i) placed any evidence in the record to confirm that Intelligent Devices and Emu/Ensoniq actually stopped issuing challenge codes to PARIS users in January of this year and otherwise refused to rectify the situation; (ii) submitted a copy of the applicable EULA(s) or otherwise addressed the Copyright Office's question regarding "the applicability of 17 U.S.C. § 117 to the maintenance or repair of the hardware and software comprising Ensoniq PARIS or the PACE protection

[1] Although it appears that in the NPRM the Copyright Office has narrowed the proposals contained in Mr. Kelley's comment such that an exemption is only being considered for PARIS-specific use, the NPRM does not expressly so state. Thus, the Joint Creators and Copyright Owners respond herein to the language proffered by Mr. Kelley.

system;" or (iii) explained "[w]hether the proposed circumvention could impact others … who use the PACE protection system."[2] NPRM at 73,870.

In addition, the formulations for the exemption, as proffered Mr. Kelley, are overly broad and not specifically targeted to resolving problems associated with the discontinuation of challenge codes for the PARIS system. Although the first formulation comes closer to addressing problems caused by the unsupported "software dongle" than the second formulation, both formulations imply that circumvention is necessary because the PARIS system, *rather than the PACE access control*, is obsolete because the manufacturer does not enable users to employ the software/hardware combination with the host computer and operating system of the user's choosing. That implication is inconsistent with how the Register has approached obsolescence in prior proceedings. For example, in 2006, the Register, in connection with an exemption that was limited to non-profit archival activities, defined a product as obsolete if a "machine or system necessary to render perceptible a work … is no longer manufactured or is no longer reasonably available in the commercial marketplace." Recommendation of the Register of Copyrights in RM 2005-11; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 25 (Nov. 17, 2006) ("2006 Recommendation").[3]

Indeed, the Register has previously rejected proposals where alternative devices and operating systems are available to make use of a previously acquired product. *See, e.g.*, Recommendation of the Register of Copyrights in RM 2008-8; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 211-212; 215-24 (June 11, 2010) ("2010 Recommendation"). Thus, the fact that the PARIS system is apparently incompatible with devices that run 64 bit versions of the Windows operating system, for example, does not render PARIS obsolete or justify an exemption given that 32 bit versions of Windows remain widely available for purchase.

Nor is PARIS obsolete because it is apparently incompatible with certain operating systems. *See* Kelley Petition at 4; McCloskey Petition at 3 (Nov. 3, 2014). This is especially true because PARIS apparently functions, with the right driver, with most of the newest operating systems on the market. And, the PACE technology apparently does not interfere with this functionality. As Mr. Kelley describes it, "a number of coders have taken on the responsibility of developing drivers first for Win Xp, then on modern multicore systems, then on Windows Vista, Windows 7, 8 and 9, all while carefully and diligently respecting the PACE copy protection and without 'reverse engineering' the PARIS application or its associated proprietary file formats." Kelley Petition at 4. Accordingly, the proponents have not established that operating system incompatibility is causing a substantial adverse effect on their ability to use the PARIS system. Regardless, incompatibility between products, as opposed to denial of access

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[2] The only commenter who filed in support of this class in response to the NPRM, Mike Barrilana, did not focus on the PARIS recording system. Instead, he attempted to cast this proposed class as part of a broader set of issues.

[3] All cited materials from previous rulemaking cycles can be accessed via the Copyright Office website at http://www.copyright.gov/1201/ under "Past Proceedings."

by a technological protection measure, is not a harm that this proceeding was designed to address. *See* 2010 Recommendation at 215-24.

Given that the burden of coming forward with evidence in support of the proposed exemption, as well as the burden of establishing that the exemption should be recognized on the narrow grounds authorized by the statute, must always remain with the proponent of an exemption, the Register should not recommend an exemption for class 24 based on the current record. However, if the proponents introduce additional facts to support their proposal and craft language focused on the obsolescence *of the PACE software dongle* rather than the purported obsolescence of the PARIS system, the Joint Creators and Copyright Owners might reconsider their position. In the past, when proponents identified hardware dongles that were obsolete because they were "no longer manufactured [and] replacement or repair [was] no longer reasonably available in the commercial marketplace," the Joint Creators and Copyright Owners did not oppose the narrowly tailored exemptions that were ultimately granted.