UNITED STATES COPYRIGHT OFFICE

Long Comment Regarding a Proposed Exemption Under 17 U.S.C. § 1201

Although we will not be providing multimedia evidence in connection with this comment, we provide in-text hyperlinks throughout the comment (represented as blue, underlined words) that link to documentary evidence and/or some cited documents.

ITEM A. COMMENTER INFORMATION

These comments are submitted on behalf of the Motion Picture Association of America, Inc. ("MPAA"), the Entertainment Software Association ("ESA"), the Recording Industry Association of America ("RIAA"), and the Association of American Publishers ("AAP"). They are collectively referred to herein as the "Joint Creators and Copyright Owners." They may be contacted through their counsel at Mitchell Silberberg & Knupp LLP, J. Matthew Williams, 202-355-7904, mxw@msk.com, 1818 N. Street, NW, 8th Floor, Washington, D.C. 20036.

The Motion Picture Association of America, Inc. ("MPAA") is a trade association representing some of the world's largest producers and distributors of motion pictures and other audiovisual entertainment material for viewing in theaters, on prerecorded media, over broadcast TV, cable and satellite services, and on the internet. The MPAA's members are: Paramount Pictures Corp., Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corp., Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc.

The Entertainment Software Association ("ESA") is the United States trade association serving companies that publish computer and video games for video game consoles, handheld video game devices, personal computers, and the internet. It represents nearly all of the major video game publishers and major video game platform providers in the United States.

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 are the music labels that comprise the most vibrant record industry in the world. RIAA members create, manufacture and/or distribute approximately 85% of all recorded music produced in the United States.

The Association of American Publishers ("AAP") represents the leading book, journal, and education publishers in the United States on matters of law and policy, advocating for outcomes that incentivize the publication of creative expression, professional content, and learning solutions. As essential participants in local markets and the global economy, our members invest in and inspire the exchange of ideas, transforming the world we live in one word at a time.

The Joint Creators and Copyright Owners all rely on technological protection measures to offer innovative products and licensed access to consumers. Access controls make it possible (i) for consumers to enjoy recorded music through subscription services like SiriusXM, Spotify, Amazon Music Unlimited, YouTube Red, Apple Music and Pandora, including on mobile devices, through in-home voice assistants, and in their vehicles; (ii) for consumers to view motion pictures at home or on the go via discs, downloadable copies, digital rental options, cloud storage platforms, TV Everywhere, video game consoles, and subscription streaming services; (iii) for consumers to play their favorite video games on consoles, computers, and mobile devices; and (iv) for consumers to enjoy and learn from books, journals, poems and stories (including through subscription, lending, and rental options) on dedicated e-book readers, such as the Kindle and the Nook, on tablets and smartphones, and via personal computers. As the Register concluded in the recent Section 1201 Study, "[t]he dramatic growth of streaming

services like Netflix, Spotify, Hulu, and many others suggests that for both copyright owners and consumers, the offering of access—whether through subscriptions, *à la carte* purchases, or ad-supported services—has become a preferred method of delivering copyrighted content. . . . [T]he law should continue to foster the development of such models." U.S. Copyright Office, *Section 1201 of Title 17: A Report of the Register of Copyrights* 45-46 (2017) ("1201 Study").

ITEM B. PROPOSED CLASS ADDRESSED

Proposed Class 9: Computer Programs – Software Preservation

ITEM C. OVERVIEW

The Joint Creators and Copyright Owners support legitimate, lawful preservation efforts. Indeed, motion picture studios, record labels, video game publishers, and book publishers and learning companies all participate in preservation efforts and work with non-profit institutions focused on preservation, including the Library of Congress. *See, e.g.*, ESA, Class 9 Long Comment (Feb. 12, 2018). However, the exemption requested by the Software Preservation Network, *et al.* ("SPN"),[1] which would allow all "libraries, archives, museums, and other cultural heritage institutions to circumvent technological protection measures on lawfully acquired computer programs for the purposes of preserving computer programs and computer program-dependent materials," is vastly overbroad.[2] SPN, Class 9 Long Comment at 2 (Dec. 18, 2017) ("SPN 2017 Comment"). Indeed, because the proposal covers "program dependent materials," and almost every type of work can now be accessed using software, it could be read

[1] Other than the petitioners, no comments were filed in support of this exemption, except for the comments of Free Software Foundation, which expressed general, anti-copyright grievances and submitted 163 purported "signatures," most of which were submitted from outside the U.S. and all of which were submitted in support of every proposed class of works, indicating a lack of specific support for the issues presented and more of a philosophical objection to § 1201. Free Software Foundation, Class 9 Long Comment (Dec. 18, 2017).

[2] "Other cultural heritage institutions" is an undefined term in the proposal.

to cover circumvention of technological protection measures to access all categories of copyrightable works for the purpose of preservation. This broad-stroke approach would be an impermissible, use-based exemption, rather than an exemption for a "particular class of works." *See* U.S. Copyright Office, *Section 1201 Rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention: Recommendation of the Register of Copyrights* 99 (2015) ("2015 Rec.") ("A mere requirement that a use be 'noninfringing' or 'fair' does not satisfy Congress's mandate to craft 'narrow and focused' exemptions. For this reason, the Register has previously rejected broad proposed categories such as 'fair use works' or 'educational fair use works' as inappropriate.").

In prior rulemaking cycles, exemptions have been granted where obsolete access controls prevent preservation. This led the Register, in the Section 1201 Study, to recommend a permanent statutory exception for, *inter alia*, circumvention where obsolete access controls prevent preservation. However, this recommended exception would not cover all activities referred to by the petitioners as "preservation." And yet, the petitioners do not limit the proposal to cover preservation only where issues of obsolescence are presented. Nor do they try to define the term "preservation."

Neither do the petitioners limit the covered preservation activities to conduct that fits within the scope of § 108. Indeed, the petitioners concede that they want to go far beyond what § 108 allows them to do. SPN 2017 Comment at 14-15 ("Unlike the *expansive* scope of the fair use doctrine discussed above, non-infringing use under 17 U.S.C. § 108(c) covers only a slim subsection of the many important uses the exemption would enable.") (emphasis added). In fact, the petitioners did not even see fit to limit covered uses to those that the Register has proposed should be addressed by an amended § 108 in the recently published "Discussion Document."

U.S. Copyright Office, *Section 108 of Title 17: A Discussion Document of the Register of Copyrights* (2017). Until the Register completes the process of considering what amendments to § 108 are advisable, firm recommendations are made to Congress, and Congress acts to amend § 108 (if it acts at all), this proceeding should not be used to "break new ground on the scope of fair use" as a substitute for attempting to reform § 108.[3] As the Register has done in prior cycles, she should use the current § 108 as a guideline to assess whether the uses at issue are noninfringing.

ITEM D. TECHNOLOGICAL PROTECTION MEASURE(S) AND METHOD(S) OF CIRCUMVENTION

The proposed exemption is so broad that the petitioners describe the access controls at issue as "varied," and then provide an "including without limitation" list of examples of access controls. SPN 2017 Comment at 5-6. As discussed further below, with the inclusion of "software dependent materials," the proposed class could include every access control applied to every copyrighted work accessible in a digital format.

[3] It is also premature to grant an exemption to circumvent access controls protecting software for the purpose of preservation because the Library of Congress and other governmental bodies around the world are exploring collaborative approaches to preservation efforts. For example, the National Digital Information Infrastructure and Preservation Program ("NDIIPP") has been working on different strategies to preserve software and has issued a report on the same. Moreover, the Standing Committee on Copyright and Related Rights at the World Intellectual Property Organization recently released draft action plans focusing on copyright limitations and exceptions for libraries, museums, and archives. Studies on conservation, preservation, and access will be conducted throughout 2018-19. Consensus-based best practices and voluntary agreements on software preservation policies, with multi-stakeholder input, are preferable to action through a government rulemaking that would permit uncontrolled circumvention in a broad-based approach.

ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGING USES

1. Prior Preservation Exemptions Were Limited To Issues Of Obsolescence In Order To Be Consistent With Section 108.

Congress amended § 108 when it passed the DMCA. Accordingly, the Register has appropriately concluded that any exemptions related to preservation related activities should closely track that provision's parameters. *See* U.S. Copyright Office, *Section 1201 Rulemaking: Second Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention: Recommendation of the Register of Copyrights* 51 (2003) ("2003 Rec.") ("Because §108 was enacted specifically to address reproduction by libraries and archives, and was amended by the Digital Millennium Copyright Act to address certain digital issues, analysis of noninfringing archival and preservation activities logically begins with that section.").

"In its 1998 amendments to §108, Congress chose to exempt formats that have 'become obsolete,' not to exempt formats that are becoming obsolete. Therefore, the only digital reproduction of published works that would be noninfringing under §108 relates to copies or phonorecords that are damaged, deteriorating, lost, or stolen, or those works distributed on formats that have already become obsolete." *Id.* at 52-53. Moreover, "[e]ven in cases where the format is obsolete, §108(c) imposes two additional requirements before a library or archive is permitted to make copies: (1) the library or archives must have determined that an unused replacement cannot be obtained at a fair price and (2) the digital reproduction of a copy or phonorecord may not be made available to the public 'outside the premises of the library or archives in lawful possession of such copy.'" *Id.* at 53-54.

Although petitioners in prior cycles asked the Register to disregard § 108's parameters, she consistently declined to do so. In 2003, she explained her reasoning as follows:

> The Register does not recommend broadening the exemption based on fair use, which is codified in §107. In determining whether libraries and archives may circumvent access controls for the purpose of systematic preservation of digital works, the Register believes that reliance on §107 is inappropriate. While it is true that some preservation activity beyond the scope of §108 may well constitute a fair use, it is improper in this context to generalize about the parameters of §107. Fair use involves a case-by-case analysis that requires the application of the four mandatory factors to the particular facts of each particular use. Since disparate works may be involved in the preservation activity and the effect on the potential market for the work may vary, sweeping generalizations are unfounded.

Id. at 54-55.

In 2006, the Register reiterated these conclusions:

> [T]here is no legal basis to assert that systematic archival activity of libraries and archives that is outside the scope of § 108 would necessarily be covered by the fair use doctrine in § 107. The primary basis for the . . . claim that such archival activity is, in general, noninfringing, and the basis that is most clearly applicable, is the extent to which its activity falls within the scope of § 108.

U.S. Copyright Office, *Section 1201 Rulemaking: Third Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention: Recommendation of the Register of Copyrights* 29 (2006) ("2006 Rec."). Based on this reasoning, the Register has recommended four exemptions over the course of the rulemakings related to preservation of software where circumvention is necessary as a result of obsolescence or marketplace unavailability.

In 2000, the Librarian granted an exemption applicable to: "Literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage or obsoleteness." *Exemptions to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies: Final Rule*, 65 Fed. Reg. 64,556, 64,561 (Oct. 27, 2000) ("2000 Final Rule"). The Register recommended this exemption in response to, *inter alia*, complaints from libraries regarding the inability to access and preserve works protected by access controls. She defined the term "obsolete" using language from § 108.

> For definition of the term ‘‘obsolete,’’ it is instructive to look to section 108(c), which also addresses the issue of obsoleteness. For the purposes of section 108, ‘‘a format shall be considered obsolete if the machine or device necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.’’

2000 Final Rule at 64,565.

> In 2003, the Librarian granted an exemption applicable to:
>
> Computer programs and video games distributed in formats that have become obsolete and which require the original media or hardware as a condition of access. A format shall be considered obsolete if the machine or system necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.

Copyright Office; Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies: Final Rule, 68 Fed. Reg. 62,011, 62,014 (Oct. 31, 2003).

> In 2006, the Librarian granted a slightly modified exemption applicable to:
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> Computer programs and video games distributed in formats that have become obsolete and that require the original media or hardware as a condition of access, when circumvention is accomplished for the purpose of preservation or archival reproduction of published digital works by a library or archive. A format shall be considered obsolete if the machine or system necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.

Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies: Final Rule, 71 Fed. Reg. 68,472, 68,474 (Nov. 27, 2006).

During the 2009/2010 rulemaking cycle, no petitioner requested renewal of the exemption. In fact, preservation issues were not again presented to the Register until the 2015 cycle. In that cycle, the Librarian granted an exemption that was not strictly limited to "obsolete" computer programs, but did limit the exemption to the circumstance where a video game publisher "ceased to provide access to an external computer server necessary to facilitate an authentication process . . . ." "Ceased to provide access" was then defined to mean "that the copyright owner or its authorized representative has either issued an affirmative statement

indicating that external server support for the video game has ended and such support is in fact no longer available or, alternatively, server support has been discontinued for a period of at least six months; provided, however, that server support has not since been restored." 37 C.F.R. § 201.40.

Although the Register strayed a bit from § 108 in 2015, and concluded that some preservation activities were likely fair uses under § 107, she continued to consider § 108 to be an important part of her fair use analysis. *See* 2015 Rec at 342 ("The Register finds that section 108 provides useful and important guidance as to Congress's intent regarding the nature and scope of legitimate preservation activities, and hence the types of uses that are most likely to qualify as fair in this area.").

Based on the Copyright Office's experiences with these prior rulemakings, the Section 1201 Study also limited its recommendation that Congress create a permanent statutory exception related to preservation to issues of obsolescence. The Register stated:

> In part because past rulemakings have demonstrated both a repeated need for this exemption and the limited reach of the rulemaking to adequately address this issue, the Office recommends a permanent exemption for obsolete, damaged, or malfunctioning access controls, where circumvention is necessary for continued functionality.

1201 Study at 91.

During the Section 1201 Study process, the Register also considered whether to recommend a broader, permanent exception for preservation activities. However, she concluded that doing so would be "premature" given that, *inter alia*, there are ongoing deliberations related to potentially amending § 108. 1201 Study at 100-01. Instead of recommending a broad preservation exception, the Register stated that, because "many of the comments from library associations focused on the specific problem of obsolete access controls, the Office believes that

the more targeted proposed exemption for obsolete TPMs discussed above is a preferable first step." *Id.* at 101.

2. Prior Exemptions Were Not Applicable To All Categories Of Copyrightable Works.

While recommending the first exemption related to circumventing obsolete access controls at the conclusion of the 2000 rulemaking, the Register noted that, "[a]lthough it might be tempting to describe this class as 'works protected by access control mechanisms that fail to permit access because of malfunction, damage or obsoleteness,' that would not appear to be a legitimate class under § 1201 because it would be defined only by reference to the technological measures that are applied to the works, and not by reference to any intrinsic qualities of the works themselves." 2000 Final Rule at 64,565. She also recommended at that time, and in subsequent years, that Congress take action to amend § 1201 to create a statutory exception covering obsolete access controls. *Id.* Congress never did so, and in subsequent cycles exemptions were limited to computer programs or video games restricted by obsolete access controls. *See, e.g.,* 2003 Rec. at 49-50 (rejecting inclusion of literary works and motion pictures).

3. The Proposed Exemption Is Overbroad.

Although their comments often focus on the difficulties posed by obsolete formats, the petitioners declined to request an exemption applicable to circumvention of obsolete access controls protecting computer programs, and instead proposed an extremely broad exemption that would cover all circumvention for any purpose that the petitioners deem to constitute "preservation," which they do not define. Even worse, the petitioners seek to circumvent to access not only computer programs, but also "program dependent materials."

Their definitions of "computer programs" and "dependent materials" are as follows:

> For the proposed exemption, "computer program" will refer to any device program or application that: (1) allows a user to interact with a device, (2) allows other programs or applications to complete instructed tasks, and/or (3) otherwise allows the device to function. "Computer program" includes but is not limited to: Internet browsers, operating systems, word processors, video games, device drivers, spreadsheets, database viewers, media players, etc. . . .
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> Our proposed exemption also refers to "computer program-dependent materials," meaning all digital file formats where accessibility depends on a software program. We seek to allow libraries, archives, and other heritage institutions to access and preserve any digital material that they collect—writings, calculations, software programs, etc. The ability to read and preserve a significant portion of this digital material is dependent upon the often-outdated software programs used to create it, which includes system software.

SPN 2017 Comment at 4.

By defining "computer programs" to include things like "database viewers" and "media players" and defining "dependent materials" to include "all digital file formats where accessibility depends on a software program," the petitioners propose an exemption that appears to cover all types of works for all preservation-related purposes. The proposal is no more proper under the statute, the legislative history, and the Register's prior recommendations than creating a class for all works subject to obsolete access controls. It does not involve a "particular class of copyrighted works." 17 U.S.C. § 1201(a)(1)(C).

If Congress wanted to allow the creation of such exemptions, it would have done so. Instead, when Congress enacted § 1201, it made clear that the phrase "'particular class of copyrighted works' [is intended to] be a narrow and focused subset of the broad categories of works . . . identified in § 102 of the Copyright Act." H.R. Rep. No. 105-551, pt. 2, at 38 (1998). Based on this directive, the Register has developed an approach to crafting classes of works to be defined, initially, by reference to a sub-set of a § 102 category of works (*i.e.*, literary works in the form of computer programs), with additional limitations based on particular types of conduct

(*i.e.*, preservation) and categories of users (*i.e.*, non-profit archives). 2015 Rec. at 17-18. The petitioners' proposal does not follow this framework. Instead, the proposal essentially starts, and stops, with whether a person is engaged in "preservation," without even defining what that means. Based on the foregoing, the Register should decline to recommend the requested exemption.

4. The Proposed Exemption Is Not Properly Linked To Section 108.

As discussed *supra*, the Register has previously only recommended preservation related exemptions that focus on obsolescence or marketplace unavailability and tracked the parameters of § 108. The petitioners elected to propose an exemption that does neither. The "preservation" activities that would be covered by the proposed exemption are undefined and likely include infringing conduct.

There is a good reason why the Register has previously been hesitant to grant exemptions that ignore the parameters of § 108 – Congress amended that provision in the DMCA and thus already spoke as to what it considered to be the necessary limitations on exclusive rights to further preservation-related objectives in the digital age. Although the Register recommended statutory change as early as 2000, and recommended additional change in 2017 through both the Section 1201 Study and the Section 108 Discussion Document, Congress has not yet acted on those recommendations. Indeed, with respect to § 108, the Register has not yet made formal recommendations. The Discussion Document is only a preliminary report (which petitioner Library Copyright Alliance has announced it will not support).

As the Register has repeatedly concluded, this proceeding was not created to enable the Register to "break new ground on the scope of fair use." 2015 Rec. at 109. By proposing an extremely broad exemption based on the petitioners' self-described "expansive," SPN 2017

Comment at 14, view of what the fair use doctrine allows them to do with copyrighted materials, the petitioners have ignored this cautionary instruction, and the past proceeding results, and requested something that they know is inconsistent with the Register's views on her statutory mandate.[4] Until the Register has an opportunity to consider the outcomes of the various preservation-related efforts referenced in footnote 3, *supra*, makes her final recommendations to Congress on the scope of advisable § 108 reform, and Congress passes legislation that becomes law (if at all), the Register should refrain from recommending a broad exemption applicable to all preservation activities involving software and all other works accessible via software.

DOCUMENTARY EVIDENCE

The Joint Creators and Copyright Owners are not submitting any exhibits for this proposed class.

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[4] The petitioners even admit that "non-infringing use under 17 U.S.C. § 108(c) covers only a slim subsection of the many important uses the exemption would enable." SPN 2017 Comment at 14-15.