



June 11, 2018

VIA E-MAIL ONLY

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

Re: Docket No. 2017-10 - Exemption to Prohibition Against Circumvention of Technological Measures Protecting Copyrighted Works (Proposed Class 7)

Dear Ms. Smith:

Thank you for your letter of May 21, 2018 regarding Proposed Class 7 (computer programs for repair). I herein respond to your questions on behalf of the Association of American Publishers, the Entertainment Software Association, the Motion Picture Association of America, Inc., and the Recording Industry Association of America (the "Joint Creators and Copyright Owners").

First, the proponents have failed to submit sufficient evidence or legal arguments to justify any expansion of the existing exemption for repair of motor vehicles *or* any new exemption concerning repair. With respect to the existing exemption, they have not established that circumvention to access computer programs for the purpose of repairing in-vehicle entertainment systems or telematics systems does not inherently put other copyrighted works at risk of unauthorized access or infringement.¹ With respect to an expansion to devices not resident in motor vehicles, they have not established that repair is likely to be noninfringing without regard to the type of device at issue; that adequate alternatives to circumvention are unavailable; or that repair will be unlikely to facilitate unauthorized access and infringement.

Second, if the Register nevertheless concludes that the current record justifies recommendation of a new exemption concerning software resident in electronic devices that are not contained in motor vehicles, she should, by crafting a narrowly targeted exemption, take all steps available to her to prevent unauthorized access to, and infringement of, copyrighted works.²

¹ Although the Joint Creators and Copyright Owners' primary concern related to motor vehicles is protecting content accessed through in-vehicle entertainment systems, proponents have not established that such systems are not intertwined with telematics systems such that circumvention to repair telematics systems would not also implicate entertainment content and other works.

² The existing motor vehicle exemption, which covers certain modifications of software, should remain separate from any new exemption, which should not cover modifications.

- The simplest approach, and the one most consistent with the ground rules for this proceeding, would be to cover in the new exemption *only* the specific devices for which the Register concludes the proponents have built an adequate record.
- An alternative would be to exclude from the scope of the new exemption circumvention to access computer programs resident on devices that enable access to any other category of works (including videogames, which are also audiovisual works).³ Such an exclusion should not focus only on “device[s] that [are] *primarily* ... media playback device[s] for audiovisual works and sound recordings.” (Emphasis added.) Instead, devices such as personal computers, smart phones, tablets, and voice assistants should also be excluded. For many people, these devices are primarily used as media playback devices, or as devices through which they access other expressive content. Moreover, the proponents have not submitted evidence to establish that such devices cannot be repaired through alternative, authorized channels; that all repairs to such devices require circumvention of access controls; or that any access controls that would require circumvention are not designed specifically to prevent unauthorized access to, and infringement of, copyrighted works other than functional software.
- An additional, necessary step toward protecting expressive works would involve incorporating limitations from Section 117, including by defining “repair” of a device as “the restoring of the machine to the state of working in accordance with its original specifications and any changes to those specifications authorized for that machine.” 17 U.S.C. § 117(d)(2).

Third, if the Register concludes, despite the dearth of specific evidence in the record, that the proponents have met their burden to support a somewhat broader exemption for repair of all devices, other than those primarily used to access expressive content, the regulations should expressly exclude devices that are primarily used, designed or marketed for facilitating access to any works that are not solely computer programs. In this circumstance, the regulations should also identify several exemplary, excluded devices.

In order to respond directly to the questions posed in the May 21, 2018 letter, and without conceding that any expanded or new exemption in the area of repair should be recommended, the Joint Creators and Copyright Owners offer the following potential language.

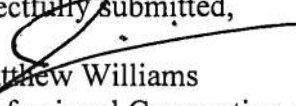
³ In 2015, the Register concluded that an exemption to repair videogame consoles was unwarranted. U.S. Copyright Office, *Section 1201 Rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention: Recommendation of the Register of Copyrights 200-01* (2015). The current record includes even less evidence and fewer arguments attempting to support the inclusion of consoles in any repair exemption. Indeed, prior to the public hearings, repair of consoles was barely discussed in *any* written comments. Microsoft, Nintendo, and Sony continue to offer warranties for their consoles, as well as low-cost options for out-of-warranty repairs. These warranty and repair services are fast and reliable; use authentic parts; can return consoles to conformance with factory specifications; and are well-rated by consumers. In addition, access controls remain a critical part of consoles’ anti-piracy mechanisms. In the absence of any evidence whatsoever that lawful repair alternatives are insufficient, including consoles within any repair exemption is unsupportable.

Computer programs that are contained in and control the functioning of an electronic device primarily designed for use by individual consumers, when circumvention is a necessary step undertaken by the owner of the device for the sole purpose of maintenance or repair of a device function; and where such circumvention does not (i) enable unauthorized access to any work that is not solely a computer program; (ii) facilitate copyright infringement; (iii) violate any other law; or (iv) involve a device that is primarily used, designed or marketed for facilitating access to any work that is not solely a computer program. The terms “maintenance” and “repair” are defined in 17 U.S.C. § 117. Under subpart (iv) above, circumvention to access computer programs contained in, for example, videogame consoles, portable videogame players, DVD players, Blu-ray and Ultra-HD Blu-ray players, television set-top boxes, e-book readers, smart speakers, and mp3 players, remains prohibited.

Finally, your letter requested discussion of “the extent to which such an exemption would accommodate a legitimate need for diagnosis and repair of particular types of devices, including any specific examples of repair activity that would be addressed.” As discussed above, the proponents failed, even at the hearing stage, to meet their burden to introduce evidence regarding specific devices that would be excluded by the above language and that require circumvention to make legitimate repairs possible. Indeed, they did not even submit sufficient evidence related to other devices that this language would not exclude. Accordingly, the Joint Creators and Copyright Owners do not believe that the above language would fail to accommodate any legitimate need for circumvention. Moreover, at this late stage, it would be procedurally improper for proponents to submit, or for the Register to consider, additional evidence.⁴

The Joint Creators and Copyright Owners appreciate the opportunity to comment on these issues. Please let me know if you have any additional questions, including comments on any regulatory language under consideration.

Respectfully submitted,



J. Matthew Williams
A Professional Corporation of
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cc: Anna Chauvet

⁴ The Notice of Proposed Rulemaking (“NPRM”) stated that “[p]ersons wishing to address proposed exemptions in written comments should familiarize themselves with the substantive legal and evidentiary standards for the granting of an exemption under section 1201(a)(1)[.]” Exemptions To Permit Circumvention of Access Controls on Copyrighted Works, 82 Fed. Reg. 49,550, 49,558 (Oct. 26, 2017). The NPRM also informed parties that, “[i]n addressing factual matters, commenters (both proponents and opponents) should be aware that the Office favors specific, ‘real-world’ examples supported by evidence over speculative, hypothetical observations.” *Id.* Finally, the NPRM instructed that “[p]roponents 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.*