

**Submission on behalf of Joint Creators and Copyright Owners
Class 16: Computer Programs – Copyright License Investigation**



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ITEM A. COMMENTER INFORMATION

The Motion Picture Association, Inc. (“MPA”) is a trade association representing some of the world’s largest producers and distributors of motion pictures and other audiovisual entertainment for viewing in theaters, on prerecorded media, over broadcast TV, cable and satellite services, and on the internet. The MPA’s members are: Netflix Studios, LLC, Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc.

The Alliance for Recorded Music (“ARM”) is a nonprofit coalition comprising the many artists and record labels who together perform, create, and/or distribute nearly all of the sound recordings commercially released in the United States. Members include the American Association of Independent Music (“A2IM”), the Music Artists Coalition (“MAC”), the Recording Industry Association of America, Inc. (“RIAA”), hundreds of recording artists, the major record companies, and more than 600 independently owned U.S. music labels.

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.

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ITEM B. PROPOSED CLASS ADDRESSED

Class 16: Computer Programs – Copyright License Investigation

ITEM C. OVERVIEW

MPA, ARM and ESA (“Joint Creators and Copyright Owners”) oppose the proposed exemption as crafted because it is too broad. Petitioner Software Freedom Conservancy (“SFC”) requests an exemption for “[c]ircumvention of TPMs protecting computer programs for purposes of (a) investigating potential copyright infringement of the computer programs; and (b) making lawful

use of computer programs (e.g., copying, modifying, redistributing, and updating free and open source software (FOSS)).”¹

First, where a copyright owner bypasses an access control that is applied to that owner’s work, Section 1201 imposes no liability because the copyright owner of the protected work has provided authorization for access to be obtained.² Accordingly, to the extent SFC wants to access its own software programs, SFC’s petition does not identify a circumstance where Section 1201 is inhibiting access. To the extent that is what is at issue in SFC’s petition, it should be denied as unnecessary.

Second, the proposal in prong (a) is not limited to scenarios where a copyright owner has a particularized reason to believe that a work is being infringed. Given the expansive scope of the proposed language, such a limitation would be necessary. In addition, where there is a particularized reason to believe infringement has occurred, the Federal Rules of Civil Procedure allow an attorney to file a complaint and to seek discovery to access the code at issue to analyze it for infringement. Accordingly, alternatives to circumvention exist.

Third, prong (b) of the proposed language is simply a request to circumvent all computer programs for any lawful use. As noted in the Notice of Proposed Rulemaking (“NPRM”), such proposals do not comply with the ground rules for this proceeding because they would be “beyond the Librarian’s authority to grant.”³ Moreover, the purported lawful uses presented as examples are not inherently lawful. Although the comments focus on use of open source software, the proposed language is not limited as such. And the Copyright Office has on multiple occasions concluded that modifying software is not always lawful.⁴ Moreover, redistributing software, or any copyrighted work, is certainly not inherently lawful.⁵

Fourth, the comments specifically target circumvention of access controls on videogame consoles and set-top boxes.⁶ This is disconcerting, especially when combined with the concern

¹ SFC, [Class 16 Long Comment](#) at 5 (Dec. 14, 2020) (“SFC 2020 Comment”).

² 17 U.S.C. § 1201(a)(1)(3) (“to ‘circumvent a technological measure’ means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, *without the authority of the copyright owner.*”) (emphasis added).

³ [Exemptions To Permit Circumvention of Access Controls on Copyrighted Works: Notice of Proposed Rulemaking](#), 85 Fed. Reg. 65293, 65308 (Oct. 15, 2020) (“NPRM”).

⁴ See, e.g., [SECTION 1201 RULEMAKING: SEVENTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION, RECOMMENDATION OF THE ACTING REGISTER OF COPYRIGHTS](#) 211 (2018) (“2018 Rec.”) (“[F]ollowing two policy studies where the Copyright Office concluded respectively that section 117 is fact-dependent and that there was no consensus regarding the meaning of lawful modification, the Acting Register declines to extrapolate from briefly sketched statements to conclude more definitively as to whether the class of modifications sought in this exemption are likely noninfringing.”).

⁵ See, e.g., *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1107 (9th Cir. 2010) (“The exclusive distribution right is limited by the first sale doctrine, an affirmative defense to copyright infringement that allows owners of copies of copyrighted works to resell those copies. The exclusive reproduction right is limited within the software context by the essential step defense, another affirmative defense to copyright infringement [...]. Both of these affirmative defenses are unavailable to those who are only licensed to use their copies of copyrighted works.”).

⁶ SFC 2020 Comment at 5.

expressed above regarding prong (a) of the proposal. The Copyright Office has repeatedly differentiated consoles from other categories of devices, and opening them up to circumvention in any circumstance poses significant risks of infringement. Set-top boxes, disc players and other devices that deliver entertainment content present similar issues.

Fifth, other limiting language common to existing exemptions is omitted from SFC's proposal.

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

It is impossible to address all of the access controls and methods of circumvention covered by the petition in this proposed class because SFC seeks an exemption covering circumvention of all access controls protecting computer programs.

ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGING USES

1. Investigating Infringement

Section 1201(a) (1) does not prohibit circumvention of an access control by the owner of the copyright to the protected work.⁷ Where a copyright owner knows that it is circumventing to access its own work, the statute imposes no liability. Thus, in many circumstances, SFC's proposed exemption is likely unnecessary.

Assuming *arguendo* circumstances exist where a copyright owner could not lawfully access its own work under Section 1201(a)(1), SFC's proposal is overbroad because it is not limited to instances where a copyright owner has a particularized reason to believe that a work is being infringed. Indeed, SFC seeks permission for any person to circumvent any access control on any computer program purportedly to investigate whether the program infringes another program.

SFC also fails to discuss in any detail that where there is a particularized reason to believe infringement has occurred, a copyright owner could file a complaint and obtain evidence under the Federal Rules of Civil Procedure to determine whether infringement has actually taken place.⁸ A copyright owner could also write a pre-lawsuit letter to the alleged infringer requesting access to a program for purposes of investigation of infringement. These are two obvious alternatives to circumvention.

SFC admits that when it

receives a report that a member project's copyright might be infringed as the result of license non-compliance, it investigates the device's software ... for indication that the device contains one of its project's software and that there is an absence of license compliance. ... If Conservancy elects to pursue the matter, it

⁷ See note 2, *supra*.

⁸ FED. R. CIV. R. 11(b) ("Representations to the Court. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: . . . (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery;...").

contacts the entity that is out of compliance to assist it with remediation of the infringement by providing education and information about how to meet the requirements of the license. As stated in its Principles of Community-Oriented GPL Enforcement, the primary goal of the engagement is to bring about compliance. Legal action is a last resort, but it is sometimes a necessary resort.⁹

In such circumstances, it seems likely that many issues raised by the petition could be resolved short of circumvention. Many users would likely start complying and the potential disputes would be resolved, if SFC (1) approaches a potential software user; (2) informs the user of its suspicions and of the reasonable nature of the license terms; and (3) expresses no desire to sue unless compliance is not forthcoming. This all can be done without circumvention.¹⁰ When lawsuits are necessary, it appears SFC and its members have been able to successfully litigate the issue without the necessity of circumvention or any counterclaims being levied under Section 1201.¹¹

SFC also appears to admit that in many cases circumvention is unnecessary because there are other ways to access software.¹² Given the availability of many alternatives to circumvention, SFC has not established the need for an exemption for infringement investigation.¹³

2. Modifying and Redistributing Software/All “Lawful Uses”

The NPRM explains that this prong of the proposed class of works is overbroad and inconsistent with the ground rules for the rulemaking. It states: “It is somewhat unclear whether the requested exemption for ‘lawful use of computer programs’ would apply to any lawful use or seeks merely to allow licensed uses of FOSS software. To the extent the former is intended, the proposed exemption appears beyond the Librarian’s authority to grant.”¹⁴ The NPRM accordingly instructed that “SFC and any other proponents of this request therefore must narrow

⁹ SFC 2020 Comment at 4.

¹⁰ SFC states that it does not want to contact potential infringers in advance of circumvention because they may alter their code to somehow hide the infringement. *Id.* at 4, n. 16. This strategic decision does not justify circumvention, especially when SFC claims that their objective is not to file lawsuits but instead to ensure compliance with terms and conditions. For its part, commenter Free Software Foundation (“FSF”) provides very little detail on how it investigates the reports of infringement vaguely referenced in its comments or regarding its investigative practices. FSF, Class 16 Long Comment (Dec. 14, 2020).

¹¹ *See id.* at 4, n. 18 (listing cases).

¹² *Id.* at 6 (“Conservancy can sometimes access the software through a hardware connection with the device or it may be able to obtain a copy by intercepting the upgrade process. Alternatively, a device manufacturer may provide a binary file on their website for the software. . . . Conservancy also investigates software applications that are intended for use on a general purpose computer, server, mobile device, or virtual machine. These software programs are available by download, whether through a mobile device app store or directly from a company’s website or reseller site.”).

¹³ SFC makes unsupported accusations that some gaming consoles and set-top boxes may infringe open source software. There is no evidence to support these allegations. Such devices should not be subject to circumvention for investigation based on no evidence, especially given the real threats of piracy and unauthorized access discussed below and identified in prior rulemaking cycles.

¹⁴ NPRM at 65308.

or clarify the specific uses of computer programs that the proposed exemption seeks to permit, so that participants and the Office may fairly assess whether they are likely to be noninfringing and adversely affected by the prohibition on circumvention.”¹⁵ Yet, SFC did not narrow its request.

As discussed in our comments concerning the pending *Proposed Class 11: Computer Programs – Jailbreaking*, which are hereby incorporated by reference, modification of software in devices remains a use that is not clearly noninfringing. Indeed, in the majority of instances it is likely infringing. It appears that Petitioner does not seek to exercise any rights under Section 117 and instead seeks to create derivative works of all computer programs, including software and firmware resident in every imaginable device.¹⁶ No case law justifies this proposal.¹⁷ And the Copyright Office rejected similar proposals three years ago.¹⁸

That the proposed class includes “redistributing” modified programs is even more problematic. Perhaps there are circumstances where open source licenses require that some programs be available for redistribution, but the class as submitted does not target those circumstances alone. Moreover, even if a person adapted an open source program or incorporated it into a larger program in violation of a license, that would not justify the Copyright Office sanctioning the redistribution of the entire new work. Setting aside whether the owner of rights in the open source program would have a claim for infringement or breach of contract, this proceeding has never resulted in exemptions that allow for unrestrained distribution of works.¹⁹

Accordingly, the second prong of the proposed class should be rejected because it does not cover only non-infringing uses.

3. Consoles, Set-Top Boxes and Disc Players

To the extent the proposed exemption covers circumventing access controls on video game consoles, it should be denied for all of the reasons similar proposals have been denied in the past and for all of the reasons articulated in our comments in opposition to the pending *Proposed Class 12: Computer Programs – Repair*, which are hereby incorporated by reference. Put

¹⁵ *Id.*

¹⁶ SFC provided no evidence that consumers in fact own the software on any devices, as opposed to licensing copies.

¹⁷ See generally *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992); *Sony Computer Entm’t Inc. v. Connectix Corp.*, 203 F.3d 596, 599, 609 (9th Cir. 2000); *Atari Games Corp. v. Nintendo of Am. Inc.*, 975 F.2d 832, 843 (Fed. Cir. 1992). See also 2018 Rec. at 208 (“[I]t is not clear that the two cases cited by proponents go so far as to support the broader range of activities envisioned by the proposal [so] the Acting Register does not conclude that modification of a function of a device as a general category is likely to be noninfringing.”).

¹⁸ 2018 Rec. at 189–94, 206–09, 310–11. SFC’s proposal also appears to be coextensive with the proposal of the Electronic Frontier Foundation in this proceeding, covered by the NPRM under *Proposed Class 12 – Repair*. NPRM 65307.

¹⁹ See, e.g., 37 C.F.R. § 201.40(2) (2018) (“(C) the accessible versions are provided to students or educators and stored by educational institution in a manner intended to reasonably prevent unauthorized further dissemination of a work.”); 37 C.F.R. § 201.40(6) and (7) (2018) (allowing circumvention of computer programs only for purposes of interoperability of devices and applications).

simply, jailbreaking or otherwise modifying consoles without authorization is an infringing use that also facilitates infringement and unauthorized access to works.

Yet, Petitioner offers no new evidence on any adverse effect of the circumvention prohibition specific to video game consoles.²⁰ And, as discussed above, circumventing access controls on consoles undermines the technological protection measures securing video games and other protected content accessible via these devices, a point the Copyright Office clearly recognized three years ago (and in cycles prior to that).²¹

Finally, Petitioner provided no information concerning consoles in the record aside from unsupported assertions that claims of infringement of open source software in consoles have been reported. A petitioner should not be allowed to introduce evidence for the first time on reply.²²

Similar to consoles, set-top boxes and disc players also incorporate access controls that protect copyrighted content against infringement and unauthorized access. Petitioner provides no evidence to support a need to circumvent to modify these devices or to redistribute associated programs.

If the Copyright Office recommends any exemption related to modification, it should only cover specific programs and specific devices supported by the evidentiary record. In our view, no such programs or devices have been identified and no evidence has been submitted. Thus, Petitioner has failed to meet its burden.

4. Necessary Limitations

In addition to the reasons discussed above, the proposed exemption should be denied because it does not include standard limitations common to previously granted exemptions. To the point, it (1) includes no limitation stating that the covered activity must be “solely for the purpose of” the covered circumvention; (2) no limitation against gaining unauthorized access to expressive content/facilitation of infringement; (3) no definition of who is allowed to conduct the

²⁰ See 2018 Rec. at 219 (“to recommend an exemption, there must be a record that shows distinct, verifiable, and measureable adverse effects, or that such effects are likely to occur”).

²¹ See *id.* at 205 (“Opponents have provided compelling, uncontradicted evidence that circumvention of access controls to permit interoperability of video game consoles—regardless of purpose—has the effect of diminishing the value of, and impairing the market for, the affected code, because the compromised code can no longer serve as a secure platform for the development and distribution of legitimate content.”); [SECTION 1201 RULEMAKING: FIFTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION, RECOMMENDATION OF THE REGISTER OF COPYRIGHTS](#) 49 (2012) (“2012 Rec.”) (“[D]ue to the particular characteristics of the video game marketplace, the circumvention of access controls protecting a console computer program so that it can be copied and modified for the purpose of enabling unauthorized applications has the effect of decreasing the market for, and value of, that program, as it can no longer serve to facilitate a secure gaming platform. Further, by enabling the ability to obtain and play pirated games and other unauthorized content, the dismantling of console access controls undermines the value of legitimate copyrighted works in the marketplace, many of which require a substantial investment of creative and financial resources to create.”).

²² NPRM at 65302 (“Proponents 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 . . . Reply comments should not raise new issues . . .”).

circumvention; (4) no prohibition against violating other laws; and (5) no requirement that the person engaged in circumvention own a copy of the program or the device or even have lawful possession of it or access to it. Also, with respect to the copyright investigation proposal, consideration should be given to a requirement similar to Section 117 that the device/program be restored/re-encrypted after the investigation.²³ Finally, although Petitioner only discusses investigating infringement of open source software or to making use of programs or devices that function through use of open source software, the exemption is not limited to such uses.

ITEM F: DOCUMENTARY EVIDENCE

We have included hyperlinks to webpages/documents within the body of this document. We are not submitting any other documentary evidence

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²³ 17 U.S.C. § 117(d)(2) (2020) (“[T]he ‘repair’ of a machine is 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.”).