

Submission on behalf of Joint Creators and Copyright Owners
Class 17: All works – Accessibility



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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.

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 17: All Works – Accessibility

ITEM C. OVERVIEW

Petitioners American Council for the Blind, American Foundation for the Blind, Association of Late-Deafened Adults, Association of Transcribers and Speech-to-Text Providers, Association on Higher Education and Disability, Benetech/Bookshare, Gallaudet University, HathiTrust,

Hearing Loss Association of America, Library Copyright Alliance, National Association of the Deaf, National Federation of the Blind, and Telecommunications for the Deaf and Hard of Hearing, Inc. (ACB *et al.*) propose an exemption that, depending on the phrasing contained in the record, covers either “circumvention to access ‘all cognizable classes of works under Section 102 (a) of the Copyright Act’ to facilitate accessibility for persons with disabilities,”¹ or “any work protected by a technological protection measure where circumvention is undertaken for the purpose of creating an accessible version of the work for people with disabilities.”² Although MPA, ARM and ESA (“Joint Creators and Copyright Owners”) believe strongly that accessibility issues are very important and would welcome the opportunity to voluntarily cooperate with Petitioners and others to improve the availability of accessible content, we oppose the exemption as crafted because it is overbroad and covers all works for a category of users. Even when deserving communities are identified, as noted in the Notice of Proposed Rulemaking (“NPRM”), such proposals are not properly tailored and cannot be adopted consistent with Section 1201.³

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

The access controls at issue cannot be comprehensively identified because the proposed exemption covers every work protected by any access control.

ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGEMENT USES

The NPRM stated: “As presently suggested, this proposed exemption is beyond the Librarian’s authority to adopt because it does not meet the statutory requirement to describe ‘a particular class of copyrighted works.’”⁴ It also provided detailed information to the Petitioners concerning the statutory requirements:

Based on prior exemptions adopted, the Office anticipates Accessibility Petitioners to be seeking exemptions related to TPMs protecting literary works as well as motion pictures distributed electronically, and proponents should provide evidence and proposed regulatory language with respect to these and any other relevant classes, and clearly identify and propose contours for each such class. For example, the Office is not inclined to recommend an exemption for printed copies of literary works, for which no TPMs are employed. Nor is the Office empowered to recommend regulatory language that extends to sound recordings, musical works, architectural works, etc. without development of an adequate administrative record demonstrating that an exemption is appropriate for each of these classes.⁵

¹ [Exemptions To Permit Circumvention of Access Controls on Copyrighted Works: Notice of Proposed Rulemaking](#), 85 Fed. Reg. 65293, 65308 (Oct. 15, 2020) (“NPRM”).

² American Council for the Blind *et al.*, [Class 17 Long Comment](#) at 10 (Dec. 14, 2020) (“ACB 2020 Comment”).

³ See NPRM at 65309 (Oct. 15, 2020).

⁴ *Id.*

⁵ *Id.*

However, the Petitioners did not address these requests and instead requested a change in the ground rules for the proceeding.⁶

The Joint Creators and Copyright Owners recognize the needs of the accessibility communities. Each represented industry endeavors to make their works accessible and works to meet their needs. However, to “adopt an attribute-based interpretation of ‘class of works’—i.e., a group of works that share common attributes among works, users, and/or uses”⁷ would, as the NPRM acknowledges, have consequences far beyond the accessibility context.⁸ If this proceeding is to respect the Copyright Office’s longstanding regulatory guideposts, “all works” exemptions must not be eligible for adoption.⁹

One important reason to retain the ground rule is that different categories of works present unique circumstances:

- Sound recordings are largely available without access controls in compact disc or downloadable formats (even though subscription services rely heavily on access controls). When unencrypted copies are widely available for download in the marketplace, that presents an alternative to circumvention of access controls associated with streaming services, which prevent unauthorized access both to streaming music and any recordings downloaded for offline listening.
- As the record from 2018 and our comments on Proposed Class 3 during this cycle (which we incorporate by reference) reflect, many motion pictures are available in accessible formats. MPA members have worked with the disabilities community to consistently improve access to captioned and audio-described titles. Yet, the proposed exemption language does not limit circumvention to motion pictures or other works that are not available in accessible formats.
- Nearly everyone is a gamer. Recognizing this, the video game industry has embraced and supported efforts to expand accessibility features on consoles and video games and continues to welcome collaboration with accessibility groups to ensure that gamers of all backgrounds and abilities are able to participate in the gameplay experience. Indeed, across a variety of game titles, genres, and hardware platforms, ESA members have taken positive steps both to improve game accessibility and to collaborate with accessibility

⁶ ACB 2020 Comment at 7, 14.

⁷ *Id.* at 33.

⁸ NPRM at 65309 (“As presently suggested, this proposed exemption is beyond the Librarian’s authority to adopt because it does not meet the statutory requirement to describe ‘a particular class of copyrighted works.’”).

⁹ Petitioners suggest that prior changes by the Copyright Office to the ground rules for the proceeding – changes the Joint Creators and Copyright Owners opposed at the time – indicate that the “all works” style proposal presented could be properly considered. While it is true that new approaches and interpretations of the scope of statutory authority vested in the Copyright Office and the Librarian of Congress have been adopted over time, Petitioners’ proposed interpretations of the statute and legislative history go far beyond any prior change.

advocates on raising awareness.¹⁰ Turning to the proposed exemption, it appears to encompass the circumvention of access controls used in connection in protecting video game consoles. In numerous prior cycles, the Register and the Librarian have denied unclear and unbounded exemption proposals because, *inter alia*, they inherently facilitate infringement.¹¹ That would seem to be the case here. Our concern is that an overly broad exemption, even one motivated by the positive benefit of improved accessibility, could create substantial risk not only with respect to copyright protection, but also consumer privacy as well as console security and functionality.

Petitioners' proposal is flawed in other respects. It makes no reference to remuneration or payment of a fair price to obtain a copy. Indeed, it does not: (i) require that a copy used to generate accessible copies be lawfully acquired; (ii) prohibit infringement or the use of infringing copies; or (iii) disallow further dissemination of the copies beyond disabled individuals with a need for them. There is no limitation on who may engage in circumvention or how many copies may be distributed to how many people, which potentially implicates the antitrafficking prohibitions of Section 1201. The proposal also lacks a workable definition of the users covered, and does not specifically point to the disability law requirements of the uses enabled by the proposal. Finally, there is no requirement that copies generated after circumvention be protected by any security measures to avoid further dissemination.

Although accessibility issues are extremely important to the Joint Creators and Copyright Owners, the exemption as proposed should be denied. However, we welcome and support voluntary collaboration to improve the accessibility of works and are committed to working with groups, including Petitioners and other proponents, to ensure that our shared goal of achieving accessibility can be realized in a manner that does not compromise the copyright protections, integrity, privacy, or security of products and platforms that make works more available today than they have ever been. For that reason, we respectfully request that the Copyright Office follow its historical approach of specifying works and accessibility uses, rather than adopting the broader, open-ended, and unrestricted nature of the current request.

¹⁰ For example, Electronic Arts ("EA") offers a consumer-facing website (<https://www.ea.com/able>) that announces new and innovative accessibility features found in its games as well as listing different accessibility options and settings broken down by title. EA also partners with disability advocacy groups like the Neil Squire Society to produce events, such as the Powered to Game tournament, for gamers with disabilities. Microsoft's ongoing commitment to accessible gaming for all includes development of accessibility features. *E.g.*, [Accessibility features on Xbox Series X/S and Xbox One](#), XBOX (last visited Feb. 8, 2021); [Accessible Gaming for All](#), XBOX (last visited Feb. 8, 2021). Ubisoft has an award-winning record with respect to accessibility and has a dedicated mission to continue improving the status quo. *See* Giancarlo Varanini, [How Ubisoft Is Putting the Spotlight on Accessibility](#), UBISOFT (May 17, 2018). Nintendo has also been cited by the media as an example of a platform that provides accessible features for its consoles and games. *See* Grant Stoner, [For Physically Disabled Gamers, the Switch is Incredibly Accessible. Here's Why](#), THE WASHINGTON POST (Apr. 21, 2020). USA Today, and others, wrote about how the Sony Playstation game, "The Last of Us Part II," made strides with respect to increasing accessibility. *See* Mike Snider, [Video Game 'The Last of Us Part II' Advances Accessibility Options for Gamers Who Have Disabilities](#), USA TODAY (Jul. 3, 2020).

¹¹ [SECTION 1201 RULEMAKING: SEVENTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION: RECOMMENDATION OF THE ACTING REGISTER OF COPYRIGHTS](#) 15 (2018) (requiring that proponents "provide sufficient detail so that the proposed uses are cognizable for the Register to evaluate them and determine whether they are likely to be noninfringing under relevant statutory and case law.").

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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