

Submission on behalf of Joint Creators and Copyright Owners
Class 6: Audiovisual Works – Space-Shifting

UNITED STATES COPYRIGHT OFFICE
 **Long Comment Regarding a Proposed
Exemption Under 17 U.S.C. § 1201**

[] Check here if multimedia evidence is being provided in connection with this comment.

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

Proposed Class 6: Audiovisual Works – Space-Shifting

ITEM C. OVERVIEW

MPA, ARM and ESA (“Joint Creators and Copyright Owners”) oppose SolaByte, Inc.’s petition for “[a] proposed exemption for circumvention of technological protection measures for audio/video works stored on optical disc media for the purpose of archive and preservation of use for the licensee or its designated service provider of the audio/video works. This exemption

would apply to any title of audio/video works 5 years after its public release date.”¹ The scope of this class is unclear, and SolaByte did not file a long-form comment to support its petition or explain its scope. The petition should be denied both for that reason and on the merits.² In short, space-shifting is not a fair use; the 1201 factors do not support an exemption; and alternatives to circumvention do exist.

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

In its petition, SolaByte requested an exemption for circumvention of technological protection measures for encrypted “A/V content stored on DVD and Blu-ray disc [sic].”³ Accordingly, the proposed class of works being considered is necessarily limited to motion pictures on those encrypted discs. Other audiovisual works, such as video games or motion pictures accessed through downloads or streams, are not subjects of this exemption request.

ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGING USES

Petitioners have not demonstrated any adverse effects on noninfringing uses. As noted in the NPRM, “in the 2006, 2012, 2015, and 2018 rulemakings, the Copyright Office rejected proposed exemptions for space-shifting or format-shifting, finding that the proponents had failed to establish under applicable law that space-shifting is a noninfringing use.”⁴ The Copyright Office “has consistently found insufficient legal authority to support the claim that these activities are likely to constitute fair uses under current law.”⁵ After the Ninth Circuit decided *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 862 (9th Cir. 2017), and stated that “the reported decisions unanimously reject the view that space-shifting is fair use under § 107,” the Office had even more reason to deny a space-shifting proposal in 2018.⁶ The record here does not contain anything that could alter those prior analyses. Additionally, the case law since the 2018 rulemaking is even less supportive of an argument that space shifting is lawful, especially when enabled by commercial enterprises, such as SolaByte.⁷

¹ SolaByte Corp., [Initial Petition](#) (Sep. 8, 2020) (“SolaByte 2020 Petition”).

² See [Exemptions To Permit Circumvention of Access Controls on Copyrighted Works: Notice of Proposed Rulemaking](#), 85 Fed. Reg. 65293, 65302 (Oct. 15, 2020) (“NPRM”) (“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.”). Free Software Foundation (“FSF”) submitted supportive comments, which expressed general philosophical objections to copyright law and the use of access controls, rather than evidence or legal arguments. FSF attached a list of purported “signatures” in support of every proposed class of works. Assuming the legitimacy of the list, it offers no support for the specific proposal here at issue, but at best marginal support for FSF’s general, well-worn, anti-copyright rhetoric.

³ SolaByte 2020 Petition.

⁴ NPRM at 65305.

⁵ [SECTION 1201 RULEMAKING: SIXTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION: RECOMMENDATION OF THE REGISTER OF COPYRIGHTS](#) 108 (2015) (“2015 Rec.”).

⁶ [SECTION 1201 RULEMAKING: SEVENTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION: RECOMMENDATION OF THE ACTING REGISTER OF COPYRIGHTS](#) 121 (2018) (“2018 Rec.”).

⁷ See generally *Capitol Records, LLC v. ReDigi Inc.*, 910 F.3d 649 (2d Cir. 2018).

Nor have the relevant facts changed. Indeed, the marketplace for access to digital copies and transmissions of motion pictures continues to develop for the benefit of consumers, such that a space-shifting exemption has become progressively less supportable in each successive rulemaking cycle. This cycle is no exception. Motion pictures are available to consumers in numerous formats and via numerous authorized platforms, products, and services that facilitate remote access, family sharing, and backup access. A summary of the marketplace availability of motion pictures is attached hereto as an Appendix.

SolaByte apparently seeks to compete commercially with these legitimate offerings by selling technology “to easily capture a group’s licenses from the movies and music they own on physical and electronic media, combine it with their digital creations and stream it on demand like the group’s private media channel.”⁸ However, SolaByte’s technology appears, as it did three years ago, to be nothing more than a scheme to profit from disseminating copyrighted works created by members of MPA and ARM. SolaByte’s use of terms like “preservation” to describe the conduct from which it seeks to profit is disingenuous.

The Copyright Office’s 2018 analysis of each fair use factor regarding space-shifting remains sound today.⁹ SolaByte’s proposed use is non-transformative, as it still seems to seek to “reproduce, or enable others to reproduce, audiovisual works for the same entertainment purposes as originally intended.”¹⁰ SolaByte is still a commercial enterprise. The second and third factors still weigh against a fair use finding because the proposal “would encompass motion pictures and television programs that are likely to be highly creative in nature and at the core of copyright’s protective purpose, and because the proposal [is] predicated on a desire to reproduce entire copyrighted works.”¹¹ On the fourth factor, as explained above, there is a vibrant market of physical and/or digital content that SolaByte would harm if its non-supported proposal were to prosper.

Even if SolaByte could demonstrate that the use it enables is noninfringing, which it cannot, the Section 1201(a) (1) (C) factors would still counsel that the Register decline to recommend the proposed exemption because Petitioner has failed to present evidence of an adverse effect. Moreover, marketplace alternatives render circumvention unnecessary.¹²

SolaByte makes the following cursory claims: “[m]any titles are unavailable from cloud media service providers”; “[i]ncomplete licensing of titles by internet media service providers requires the owner of the disc to subscribe to multiple service providers at high personal cost to cover a fraction of their library titles”; “[d]isc to digital services do not include all titles and the availability of disc to digital services can not [sic] be guaranteed in the future”; and “[c]ontent

⁸ [About](#), SOLABYTE (last visited Feb. 2, 2021). SolaByte’s reference to “licenses” appears to be a reference to the fact that some users license possession of copies of motion pictures, not that they have licenses to space-shift beyond the specific terms and conditions of use for any particular digital offering.

⁹ 2018 Rec. at 120-124.

¹⁰ *Id.* at 122.

¹¹ *Id.*

¹² *See id.* at 70 (citing 2015 Rec. at 124) (“[T]he 1201 exemption process is about access to copyrighted works; it is not meant to guarantee consumers the ability to access content through their preferred method or format.”).

owners are unresponsive to licensing requests to enable back up services and/or have instituted a regime of upfront payments that make providing the service economically infeasible.”¹³

These naked complaints, which have been made in prior cycles, do not form a sufficient basis to grant an exemption. As the Register has repeatedly noted, exemptions cannot be issued simply to remedy “mere inconveniences.”¹⁴ As discussed above and in the attached Appendix, consumers can access digital copies and transmissions through a variety of legitimate offerings and services, at different price points.¹⁵

SolaByte simply has not even attempted to establish a record to demonstrate there is any content that can only be accessed via physical media such as Blu-ray discs or DVDs. Even if such content exists, SolaByte’s proposed use would still be infringing because space-shifting entails the violation of copyright owners’ exclusive rights. In any event, this rulemaking should not deprive rights holders of revenues and potential revenues derived from the titles that are, or may soon be, available through the numerous options described above. Additionally, consumers still have options for accessing discs to watch movies when out of the home.¹⁶

F. DOCUMENTARY EVIDENCE

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

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¹³ SolaByte 2020 Petition at 2.

¹⁴ See 2015 Rec. at 15-16 (“To prove the existence of adverse effects, it is necessary to demonstrate ‘distinct, verifiable and measurable impacts’ occurring in the marketplace, as exemptions ‘should not be based upon *de minimis* impacts.’ Thus, ‘mere inconveniences’ or ‘individual cases’ do not satisfy the rulemaking standard.”); see also [SECTION 1201 RULEMAKING: FIFTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION: RECOMMENDATION OF THE REGISTER OF COPYRIGHTS](#) 165-66 (2012) (“2012 Rec.”) (“[C]onsumers’ inability to ‘access all of their media in a single interface and launch the video of their choice at the touch of a button’ goes to convenience rather than necessity.”).

¹⁵ See 2015 Rec. at 124 (“Nor have proponents sufficiently demonstrated that services, including online download or streaming services, disc-to-digital services, digital rights locker systems, ‘TV Everywhere’ or similar on-demand services, do not provide reasonable alternatives to circumvention. Opponents introduced detailed evidence of a wide variety of platforms and media that can serve as alternatives to circumvention.”).

¹⁶ See *id.* at 125 (“[I]t remains possible to access disc media through the use of peripheral devices.”). See also, Computer Optical Drives, AMAZON <https://www.amazon.com/External-Optical-Drives/b?ie=UTF8&node=1292112011> (last visited Feb. 3, 2021).

Appendix

The digital ecosystem for enjoying motion pictures continues to evolve to the benefit of copyright owners, their licensees and consumers. MPA's members, and other producers and distributors of quality motion pictures, continue to seize opportunities to reach viewers with content they want to watch, in the formats they desire, for prices that are reasonable, and via devices on which audiences prefer to watch movies and TV shows. Copyright owners are embracing digital technologies to expand the reach of creative works and to make them available to audiences more broadly than ever before.

(a) *Digital Copies Available With Disc Purchases*

DVDs, Blu-ray discs, and Ultra HD discs are often sold in “combination packs” that include a “digital code” the consumer can use to access a downloadable digital copy of the motion picture through a variety of channels. For example, each MPA member that distributes titles on discs generally provides an avenue for redeeming digital codes through its website or through the *Movies Anywhere* website and app (discussed further below). For years, discs have been sold with digital codes, or with actual digital copies included on discs in the package at the time of purchase. These offerings are usually sold at a higher price than offerings that include only a disc with no access to a separate digital copy.

(b) *Disc-To-Digital Through Vudu*

If a consumer owns a disc that did not offer access to a digital copy, that consumer may be able to obtain a digital copy through the [Vudu](#) mobile application by scanning the disc's barcode. This [Disc-to-Digital](#) program enables a consumer who owns a DVD to obtain access to a standard-definition digital copy for \$2.00 or a high-definition digital copy for \$5.00. If the consumer owns a Blu-ray disc or Ultra HD disc, the consumer can obtain access to a high-definition digital copy for \$2.00.

(c) *Digital Retailers and Movies Anywhere*

Numerous digital retailers offer consumers the opportunity to obtain downloads of digital copies of movies and TV shows produced, distributed or owned by MPA members and other copyright owners. New releases are frequently available for \$19.99 in HD quality. Older titles are frequently available in HD quality for as little as \$9.99.

[Movies Anywhere](#) (previously known as “*Disney Movies Anywhere*”) continues to provide consumers with the ability, via its “Key Chest” technology, to link their accounts with participating digital retailers in order to bring eligible movies from those accounts into one synched collection and to make them available across all of their connected retailer accounts. In October 2017, *Movies Anywhere* launched its service with titles from Disney, Marvel and Lucasfilm, and almost every other MPA member. Eligible titles obtained through the redemption of digital codes included with Ultra HD, Blu-ray, and DVD discs, as well as through purchase from participating digital retailers are accessible through *Movies Anywhere*. The number of participating retailers has expanded significantly since the 2018 rulemaking proceeding and now includes [Amazon Prime Video](#), [Google Play](#), [YouTube](#), [iTunes](#), [Apple TV+](#),

[Fandango Now](#), [Microsoft Movies](#), [Vudu](#), [Verizon](#), [Xfinity On Demand](#), and [DIRECTV Movies](#).¹ Any eligible title obtained from a connected account with one of those retailers also becomes available via connected accounts with the other participating retailers' platforms (*i.e.*, once you connect multiple retailer accounts to *Movies Anywhere*, you can view movies purchased from, for example, *Vudu*, within your *Amazon*, *Google Play* and *iTunes* accounts). Consumers have used *Movies Anywhere* to store more than 280 million movies in user collections.

Movies Anywhere users may download movies from *Movies Anywhere* to as many as eight permitted devices for viewing via *Movies Anywhere* at any given time. These downloads are in addition to downloads that may be permitted by the participating retailers through linked accounts (*e.g.*, for viewing via iTunes). The number of times a user may download a single movie through a *Movies Anywhere* account to devices associated with the account is unlimited. A user may download movies to a maximum of sixteen different devices within a rolling twelve-month period. Given the large number of devices that may be used to access content using *Movies Anywhere* and linked accounts with participating digital retailers, a user's movie library becomes accessible to her entire family. Through *Movies Anywhere*, viewers can start streaming a movie on one device and finish it on another; two viewers can watch the same title on different devices at one time; and up to four viewers can stream different content on different devices at the same time.

Viewers can also use the [co-viewing](#) feature to invite up to nine other viewers to join a synched viewing of a movie that the viewers have in their libraries. Finally, *Movies Anywhere* now offers a feature called [Screen Pass](#), which allows eligible users to send up to three *Screen Passes* per month to another user to view a movie in their collection for a limited time with no additional cost. By combining the *Screen Pass* and co-viewing features, the number of viewers eligible to join a synched viewing increases to include users who do not have a title in their personal collection.

(d) *Digital Rental*

Digital retailers, including those mentioned above, and others, make motion pictures available for temporary digital rental at low prices. Once rented, the movies may be streamed directly from these services or downloaded temporarily to devices to enable mobile viewing. Some services, like [Amazon Prime Video](#), give the user up to 30 days to begin watching the movie after the rental price is paid. New release titles are often made available for \$5.99, even in high definition quality. Older titles are available for as little as \$2.99. [Vudu](#) offers free, ad-supported viewing options for some titles. These services supplement the availability of on-demand rentals from cable and satellite television providers.

(e) *Online Streaming Services and Over-The-Top Services*

Consumers continue to embrace streaming services that existed in 2018 – like [Hulu](#) (currently owned by MPA member Disney and MPA member Universal's parent company,

¹ In July 2019, the Ultraviolet digital rights locker service discontinued its operations. Many of the studios and digital retailers in Ultraviolet are currently participating in *Movies Anywhere*. Many Ultraviolet users have transferred their movie collections to *Movies Anywhere*.

Comcast), [Netflix](#) (which is also now an MPA member), [Crackle](#), and *Amazon Prime Video*, among many others, for viewing of both movies and TV shows on mobile devices, computers, smart televisions, and (increasingly during the last three years) cable boxes. In addition, MPA members have launched multiple new streaming services in recent years. [Disney+](#), [HBO Max](#), and [Peacock](#) all offer subscription access to long-time favorites and original programming/movies. HBO Max is currently even making Warner Bros. movies available for streaming for a 31-day period at the same time the films premiere in theaters. For sports programming, [ESPN+](#) is available directly to consumers for \$5.99 per month providing access to exclusive live events, original studio shows, and acclaimed series that are not on the ESPN networks, as well as on-demand access to an extensive archive of ESPN content. [Paramount+](#), which will offer movies from Paramount as well as television shows from other Viacom properties such as *CBS*, *BET* and *Comedy Central*, is scheduled to launch in March 2021.² And streaming services offered by non-MPA members are also proliferating, including [Apple TV+](#), [Discovery+](#), and many others. Streaming services offer consumers access to numerous titles for low monthly fees. For instance, basic access to *Hulu* is currently available for \$5.99 per month (or \$1.99 for college students) or \$59.99 for a year; *Disney+* is available for \$6.99 per month, or \$69.99 for a year; basic *Netflix* access is available for \$8.99 per month; and *Amazon Prime Video* is free to Amazon Prime members. Streaming services are also frequently included in cable television provider bundles. Many titles available on streaming services may also be downloaded for offline viewing while the user remains a subscriber.

Several of these services have also increasingly offered add-on subscription access to additional sources of programming. For example, *Hulu* provides subscription access to *HBO Max*, *Cinemax*, *Showtime* and *Starz*, news networks, broadcast networks and sports programming including on ESPN. This includes *Hulu*'s [Live TV](#) option where consumers can view more than 65 live and on-demand TV channels on Roku, Android devices, iOS devices, Xbox One, Nintendo Switch, Playstation, Apple TV and Chromecast. These types of services allow for the use of multiple devices by a single account, which enables access throughout a household by multiple family members simultaneously.

(f) *Cable, Satellite, IPTV and Fiber-Optic Subscriptions*

Subscription television providers like [Comcast Xfinity](#), [Cox](#), [Spectrum](#), [AT&T TV](#), [Verizon Fios](#), [DISH Network](#), [DIRECTV](#), and [Sling TV](#) continue to offer large numbers of channels for real-time, in-home viewing. In addition, their on-demand and remote access options continue to grow rapidly and to enable access for subscribers to watch live programming. A subscriber to *Comcast Xfinity*, for example, can, on a laptop or mobile device, sign into an account, and watch all of the content stored on an in-home DVR associated with that account. The consumer can also order on-demand movies and TV shows on mobile devices, for limited-time rental or for long-term access. They may also watch linear and on-demand programming from various channels via computers or through apps on mobile devices, smart televisions or other connected devices simply by authenticating their cable or satellite subscription. For example, the same *Comcast Xfinity* subscriber can access the [Disney Now](#) app for free on their mobile device, AppleTV, Roku or other device to watch the live, linear stream of the *Disney*

² Brett Molina, [Streaming service Paramount+, featuring content from CBS, Viacom, to launch March 4](#), USA TODAY (Jan. 19, 2021).

Channel, Disney Junior and Disney XD, as well as to obtain on-demand access to a library of popular shows, shorts, and other content. These “TV Everywhere” services have revolutionized the way consumers enjoy their television and on-demand programming.

(g) *TV Shows and Movies Accessible Directly From Networks and Apps*

Networks continue to make more and more programming available for viewing directly to consumers, including back catalogues of programming and even live viewing of linear content, through websites and mobile applications, often for free (usually in exchange for watching advertising). For example, abc.com and the [ABC mobile app](#) allow free, ad-supported access to recent episodes of popular TV shows and full seasons of many “throwback” favorites. New episodes stream on-demand the day after they air for authenticated subscribers of cable and satellite provider partners. In addition, consumers have increasingly greater options for viewing movies and TV shows on ad-supported free video-on-demand (“AdVOD”) streaming platforms, such as *YouTube*, [IMDb TV](#) and [Tubi](#). These AdVOD platforms allow viewers to stream a variety of content via multiple devices without having to pay a fee to access such content.