

Submission on behalf of Joint Creators and Copyright Owners

Class 4: Audiovisual Works – Livestream Recording

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UNITED STATES COPYRIGHT OFFICE



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

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 4: Audiovisual Works – Livestream Recording

ITEM C. OVERVIEW

MPA, ARM and ESA (“Joint Creators and Copyright Owners”) ask the Copyright Office to deny this petition because it is confusing and unsupported by coherent factual support or legal arguments. Also, neither Petitioner nor its sole supporter responded satisfactorily to the Copyright Office’s express request for clarification on: (i) the particular classes of works at issue; (ii) why the uses at issue should be lawful; (iii) whether TPMs caused the adverse effects and whether alternatives to circumvention exist; or (iv) whether the intended uses are

educational, and/or noncommercial. In addition, Petitioner, a commercial enterprise, does not seem to represent the interests of the purported beneficiaries of the exemption.

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

Petitioner states that it seeks to circumvent “HTTP Live Streaming (“HLS”), a live-video streaming technique that enables high quality streaming of media content over the internet from web servers.”¹ HLS is, therefore, the only access control that the Copyright Office should consider when analyzing issues related to whether to recommend an exemption. Although the petition lacks clarity regarding whether any other access controls may be at issue, only HLS should be considered, as FloSports had the burden to identify the technologies at issue.

ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGING USES

The class of works for which FloSports seeks an exemption is fatally unclear. The petition proposes an exemption “for circumvention of technology used in the digital storage of audiovisual works originating as a livestream of sports and other competitive events.”² The exemption “would enable a livestreaming service to provide individual viewers, via a virtual digital video recorder (‘vDVR’), with access to a recording on a server for fair use purposes.”³ However, as noted in the Notice of Proposed Rulemaking (“NPRM”), it is impossible to determine whether, for example, the petition is intended to cover the use of copyrighted broadcasts owned by another party or other works that may be captured in broadcasts owned by FloSports.⁴ The petition simply does not identify an appropriate, particular class of works.⁵

The presentation of issues in the petition is incomprehensible, and FloSports has not established that any of the identified uses is likely noninfringing. Depending on the scope of the sporting events, musical performances, and audiovisual works at issue, it is very unlikely FloSport’s uses of them would be lawful, even if only excerpts were used.⁶ Indeed, it appears FloSports might want to create a vDVR to enable copying and streaming of entire audiovisual works of any type, owned by others, for viewing online. That clearly would be infringing.⁷

¹ FloSports, Inc., Initial Petition at 2 (September 8, 2020), <https://www.copyright.gov/1201/2021/petitions/proposed/New%20Pet.%20-%20FloSports.pdf> (“FloSports Initial Petition”).

² *Id.* We assume that other audiovisual works, such as video games, are not at issue.

³ *Id.*

⁴ See Exemptions To Permit Circumvention of Access Controls on Copyrighted Works: Notice of Proposed Rulemaking, 85 Fed. Reg. 65293, 65304 (Oct. 15, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-10-15/pdf/2020-22893.pdf> (“NPRM”).

⁵ Petitioner points to “[a]udiovisual works originating as a livestream of sports or other competitive events”; “audiovisual recordings of musical performances as identified in 17 U.S.C. §102(a)(6) and 17 U.S.C. §106(a)(5), both as defined in 17 U.S.C. §101”; “any and all works for which audiovisual recordings may be made and used as fair use”; “individual school performances”; “individual recordings of audiovisual performances”; “individual performances in the audiovisual streams”; and “educational recordings.” FloSports Initial Petition at 2-3.

⁶ See *Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169 (2d Cir. 2018).

⁷ See *Am. Broad. Companies, Inc. v. Aereo, Inc.*, 1573 U.S. 431, 432 (2014).

To the extent FloSports attempts to argue that its uses will be educational and assist teachers and “directors” who need to circumvent in order to critique and teach their students,⁸ FloSports does not seem to teach or direct, and no teachers or directors are part of the petition. It appears that FloSports seeks to offer a commercial circumvention service to that target audience and perhaps others. It is inappropriate to use teachers and students as a pretense for seeking this exemption.⁹

The Copyright Office was thus correct in its preliminary assessment, articulated in the NPRM, that Petitioner failed to meet the statutory requirement of identifying a particular class.¹⁰ Despite the Copyright Office’s express request for clarification regarding causation and the nature of the intended uses, neither FloSports nor anyone else offered any substantive comments to support the need for the requested exemption or its legitimacy.¹¹ Given that the time for submitting supporting evidence has now expired, the only information that the Copyright Office should consider is that of FloSports’ petition.¹² As a result, the exemption should be rejected.¹³

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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⁸ FloSports Initial Petition at 3.

⁹ There also appear to be alternatives to circumvention. FloSports claims that screen capture technology is inadequate because “no educator can screen capture a live performance of his or her group that is broadcast as they perform.” *Id.* at 3. This seems to be a misunderstanding of available screen capture technology, whereby the user simply turns on software that records whatever is happening on the screen. At least some of FloSports’ intended uses could be accomplished using this type of readily available screen capture technology. FloSports also does not explain why it, educators, and others are electing to utilize a technology that would prevent them from recording the events they themselves are organizing and streaming.

¹⁰ *See* NPRM at 65304.

¹¹ 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. They offer no argument in support of the specific proposal here at issue, but at best marginal support for FSF’s general, well-worn, anti-copyright rhetoric.

¹² *See* 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.”).

¹³ *Id.* at 65304.