



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

Item A. Commenter Information

American Council of the Blind (ACB)

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The American Council of the Blind (ACB) is a national grassroots consumer organization representing Americans who are blind and visually impaired. With 70 affiliates, ACB strives to increase the independence, security, equality of opportunity, and to improve quality of life for all blind and visually impaired people.

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The American Foundation for the Blind (AFB) works to create a world of no limits for people who are blind or visually impaired by mobilizing leaders, advancing understanding, and championing impactful policies and practices using research and data.

Association for Education and Rehabilitation of the Blind and Visually Impaired (AER)

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The Association for Education and Rehabilitation of the Blind and Visually Impaired (AER) strives to support and advocate for AER members who represent all major professional disciplines serving children, working-age adults and older people living with vision loss. Through direct member services, professional development, publications, networking, leadership development, accreditation, and public education, AER is the leading national and international voice of the professional vision loss community.

Privacy Act Advisory Statement: Required by the Privacy Act of 1974 (P.L. 93-579)

The authority for requesting this information is 17 U.S.C. §§ 1201(a)(1) and 705. Furnishing the requested information is voluntary. The principal use of the requested information is publication on the Copyright Office Web site and use by Copyright Office staff for purposes of the rulemaking proceeding conducted under 17 U.S.C. § 1201(a)(1). NOTE: No other advisory statement will be given in connection with this submission. Please keep this statement and refer to it if we communicate with you regarding this submission.

Association of Late-Deafened Adults (ALDA)

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The Association of Late Deafened Adults (ALDA) is a non-profit membership corporation comprised principally of people who lost some or all of their hearing after having acquired spoken language. Its members include people who communicate primarily through sign language and people who use hearing aids or cochlear implants and communicate aurally. Part of its mission includes advocating for measures that will better enable its members and other similarly situated people to fully participate in all aspects of life.

Association of Transcribers and Speech-to-Text Providers (ATSP)

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The Association of Transcribers and Speech-to-Text Providers (ATSP) is a non-profit organization devoted to advancing the delivery of real-time speech-to-text services to deaf or hard-of-hearing people.

Association on Higher Education and Disability (AHEAD)

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The Association of Higher Education and Disability (AHEAD) is the leading professional membership association for individuals committed to equity for persons with disabilities in higher education. Since 1977, AHEAD has offered an unparalleled member experience to disability resource professionals, student affairs personnel, ADA coordinators, diversity officers, AT/IT staff, faculty and other instructional personnel, and colleagues who are invested in creating welcoming higher education experiences for disabled individuals.

Benetech/Bookshare

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Bookshare is an ebook library that makes reading easier. People with dyslexia, blindness, cerebral palsy, and other reading barriers can read in ways that work for them with ebooks in audio, audio + highlighted text, braille, and other customizable formats.

Gallaudet University Technology Access Program

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The Gallaudet University Technology Access Program (TAP) conducts research related to communication technologies and services, with the goal of producing knowledge useful to industry, government, and deaf and hard of hearing consumers in the quest for equality in communications. The program provides education to Gallaudet students through coursework and mentored research projects related to TAP's research mission. TAP is one of Gallaudet University's research centers and has faculty affiliated with the School of Science, Technology, Accessibility, Mathematics and Public Health.

HathiTrust

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HathiTrust's Digital Library contains over 17 million books digitized from academic libraries. Through its Accessible Text Request Service, print disabled users in higher education institutions in the US and in Marrakesh Treaty nations may obtain DRM-free digital access to the text of any item in this collection, consistent with Section 121 of the Copyright Act.

Hearing Loss Association of America (HLAA)

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The Hearing Loss Association of America (HLAA) has opened the world of communication to people with hearing loss through information, education, support, and advocacy since 1979. In addition to the Walk4Hearing, HLAA holds annual conventions, publishes the magazine, Hearing Life, serves as an advocate for people with hearing loss across the broad spectrum of communication access needs. HLAA has a nationwide network of more than 140 chapters and state associations reaching out to and supporting people with hearing loss across the country.

Library Copyright Alliance (LCA)

The Library Copyright Alliance (LCA) consists of three major library associations—the American Library Association (ALA), the Association of College and Research Libraries (ACRL), and the Association of Research Libraries (ARL)—that collectively represent over 100,000 libraries in the United States. Libraries provide services to visually impaired people, both inside and outside of educational settings, in particular by converting works into formats accessible to the print disabled.

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National Association of the Deaf (NAD)

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The National Association of the Deaf, established in 1880, is the oldest national civil rights organization in the United States of America. The NAD is also the largest consumer-based advocacy organization safeguarding the civil and accessibility rights of deaf and hard of hearing individuals in the USA through public education, litigation, and policy advocacy. The advocacy scope of the NAD is broad, covering the breadth of a lifetime and impacting future generations in the areas of education, technology, and more.

National Federation of the Blind (NFB)

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The National Federation of the Blind has advocated for equality of opportunity for the nation's blind since 1940, and as part of that mission, the Federation has vigorously stood for equal access to information through its leadership in many ways including leading efforts to secure passage of the Chafee Amendment to the Copyright Act and adoption of the Marrakesh Treaty and its intervention as a party in the *HathiTrust* case.

Perkins Braille & Talking Book Library

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Perkins Library circulates more than a half million accessible books, newspapers and publications in braille, large print and digital audio formats annually to thousands of registered patrons in New England and beyond.

Telecommunications for the Deaf and Hard of Hearing, Inc.

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Telecommunications for the Deaf and Hard of Hearing, Inc.(TDI) shapes America's public policy in telecommunications, media, and information technology to advance the interests of all people who are deaf, hard of hearing, late-deafened, deafblind, and deaf-plus (with other disabilities).

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Item B. Proposed Class Addressed:

The above-referenced organizations respectfully submit these reply comments in response to objections to the Class 17 proposed exemption from the anti-circumvention provisions of Section 1201 of the Digital Millennium Copyright Act (DMCA) to make works accessible for noninfringing fair use by people with disabilities.

Item C. Overview

Proposed Class 17 would permit necessary circumvention to access all cognizable classes of works under Section 102(a) of the Copyright Act in order to facilitate accessibility for people with disabilities for noninfringing fair use. The proposed statutory language of the exemption would read as follows:

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.¹

The record strongly supports granting an exemption from Section 1201 for any inaccessible copyrighted work where the works share the common attribute of inaccessibility and the common users of people with disabilities and/or third parties assisting people with disabilities. The Office's historical approach to "class of copyrighted works" supports the proposed exemption's common-attributes "class" interpretation. This approach is necessary to grant this exemption, and this exemption must be granted to satisfy Congress's commitment to fair use and other critical federal public policy priorities.

The Office recognizes the need for this exemption. In the Notice of Proposed Rulemaking (NPRM) for the eighth triennial review, the Office acknowledged both the "important public policy considerations raised by this request," and the "past exemptions adopted with respect to facilitating accessibility uses."²

However, the Office also voiced a hesitancy to interpret "classes of works" beyond a restrictive definition that only considers narrow subsets of enumerated categories in Section 102(a) of the Copyright Act.³ The Office also articulated uneasiness in justifying a more flexible interpretation of "classes of works" by

¹ Long Comment of American Council of the Blind, et al. at 10 (Dec. 14, 2020) ("Long Comment"), [https://www.copyright.gov/1201/2021/comments/Class%2017 InitialComments Accessibility%20Petitioners%20III.pdf](https://www.copyright.gov/1201/2021/comments/Class%2017%20InitialComments%20Accessibility%20Petitioners%20III.pdf).

² Notice of Proposed Rulemaking, 85 Fed. Reg. 65,293, 65,309 (Oct. 15, 2020) ("NPRM"), <https://www.govinfo.gov/content/pkg/FR-2020-10-15/pdf/2020-22893.pdf>

³ *Id.*

defining classes by similar attributes—in this case, use intended to facilitate the accessibility of copyrighted works for people with disabilities.⁴

The proposed exemption meets and surpasses the statutory burden of demonstrating that the exemption is warranted and necessary. Our long comment presented factual and legal arguments demonstrating a need for a broad, clear, efficient exemption for accessibility for people with disabilities, rather than the current piecemeal approach, which is encumbered by three-year delays.⁵ Furthermore, our long comment contextualized the history of disability law in the United States and Congress’s longstanding commitment to the civil rights of people with disabilities.⁶ Finally, our long comment highlighted numerous examples in which the current exemption process is directly harming people with disabilities, as well as important factors that the Office should consider as justification for a fresh interpretation of “classes of works”—such as how the COVID-19 crisis has disparately adversely affected people with disabilities’ access to copyrighted works.⁷

There is little direct objection to these arguments on the record. The Office received three opposition comments: one from the Association of American Publishers (“AAP”),⁸ one from DVD CCA and AACCS LA,⁹ and one from the Joint Copyright Holders.¹⁰ All commenters articulate steadfast support for ensuring people with disabilities have access to lawfully acquired copyrighted works: AAP “recognizes accessibility as an important consideration of copyright policy,”¹¹ “[Joint Copyright Holders] believe strongly that accessibility issues are very important and would welcome the opportunity to voluntarily cooperate with

⁴ *Id.* at 65,309 (“As presently suggested, this proposed exemption is beyond the Librarian’s authority to adopt because it does not . . . refer to ‘a *narrow and focused subset* of the broad categories of works . . . identified in section 102 of the Copyright Act.”).

⁵ See Long Comment at 7.

⁶ See *id.* at 15-18.

⁷ See *id.* at 10-14, 25-27.

⁸ See Comment of Association of American Publishers (Feb. 9, 2021), https://www.copyright.gov/1201/2021/comments/opposition/Class_17_Opp'n_Association%20of%20American%20Publishers.pdf.

⁹ See Comment of DVD CCA and AACCS LA (Feb. 9, 2021), https://www.copyright.gov/1201/2021/comments/opposition/Class_17_Opp'n_DVD%20CCA%20and%20AACCS%20LA.pdf.

¹⁰ See Comment of MPA, et al. (Feb. 9, 2021) (“Joint Copyright Holders Comment”) https://www.copyright.gov/1201/2021/comments/opposition/Class_17_Opp'n_Joint%20Creators%20and%20Copyright%20Owners.pdf.

¹¹ AAP Comment at 2.

Petitioners and others to improve the availability of accessible content,”¹² and DVD CCA and AACCS LA states that their “underlying policy concerns for the proposed class are of substantial significance.”¹³

However, the few opposing comments raise unsupported and fragmented concerns with the proposed exemption that seem to center on two arguments:

- The Librarian lacks the authority to grant the proposed class because it contemplates a construction of the term “class of works” that is not permissible.¹⁴
- The petition is insufficient because it compromises some ill-defined set of interests of copyright holders.¹⁵

These concerns are rooted in a flawed notion that the triennial review should subordinate the civil rights of people with disabilities to access copyrighted works to vague and unspecified concerns about copyright infringement. Commenters do not seriously address any of the examples that our long comment outlined, which illustrate in detail the extent to which people with disabilities are and will continue to be denied meaningful access to copyrighted works—and to which they are entitled as a matter of law to make noninfringing fair uses to gain access.

People with disabilities are continually overlooked when it comes to creating born-accessible copyrighted works.¹⁶ Opposing commenters unfortunately invite the Office to deny people with disabilities the right to efficiently rectify these

¹² Joint Copyright Holders Comment at 2.

¹³ DVD CCA and AACCS LA Comment at 3 (footnote omitted).

¹⁴ AAP Comment at 1-2 (“The Copyright Office has already indicated that it is beyond the Librarian’s authority to adopt the exemption as proposed . . . AAP agrees with the Register’s assessment of the Librarian’s authority under section 1201.”); Joint Copyright Holders Comment at 8 (“Proponents have not provided any persuasive basis for the Register to alter her interpretation of the rulemaking or upon which she can grant the proposed exemption.”); DVD CCA and AACCS LA Comment at 2 (“We oppose the exemption as crafted because it is overbroad and covers all works for a category of users.”).

¹⁵ Joint Copyright Holders Comment 5-6 (“Such discussion is superfluous, and would result in the rulemaking lacking sufficient standards for it to be a valid exercise of delegated legislative power.”) (footnote omitted); DVD CCA and AACCS LA Comment at 3 (“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’ would, as the NPRM acknowledges, have consequences far beyond the accessibility context.”) (footnotes omitted).

¹⁶ See, e.g., Sarah Katz, *The Inaccessible Internet*, Slate (May 22, 2020), <https://slate.com/technology/2020/05/disabled-digital-accessibility-pandemic.html>.

oversights by engaging in self-help. The Office should reject this invitation by making clear that people with disabilities have the right to seek meaningful access through accessibility-directed fair uses. Unless and until accessibility truly becomes the norm across all categories of copyrighted works for people from all disability communities,¹⁷ the proposed exemption is essential to ensure that people with disabilities have an avenue to fulfill their civil right “to live in the world” through the cultural, economic, and democratic opportunities that attach to copyrighted works.¹⁸

Item D. Technological Protection Measure(s) and Method(s) of Circumvention

Our long comment discussed ways that technological protection measures (TPMs) often prevent meaningful access by people with disabilities,¹⁹ although commenters failed to substantially address these issues in their opposing comments. DVD CCA and AACS LA nevertheless argues that video content encrypted by the AACS2 scheme should not be covered by the proposed exemption.²⁰ The proposed exemption seeks broad access to copyrighted works for accessibility-oriented fair use across media on all formats and using all relevant TPMs. The distinction DVD CCA and AACS LA seeks to draw between AACS2 and other TPM schemes appears to rotely repeat an argument raised against other petitions²¹ that is both inapposite and antithetical to the proposed exemption. Thus, the Office should reject it.

Item E. Asserted Adverse Effects on Noninfringing Uses

Commenters contend that the proposed exemption is beyond the scope of the Librarian’s authority because our long comment does not identify a permissible

¹⁷ Bob Violino, *Software accessibility: An overlooked business imperative*, CIO (Jan. 7, 2021), <https://www.cio.com/article/3602688/software-accessibility-an-overlooked-business-imperative.html> (“There are a growing number of organizations recognizing the need to make products and services accessible to disabled people . . . But sadly, there are too many companies who do overlook the need for accessibility.”) (*citing* Jill Houghton, president and CEO of Disability:IN, a nonprofit resource for business disability inclusion.).

¹⁸ See generally Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CAL. L. REV. 841 (1966).

¹⁹ See Long Comment at 10-14.

²⁰ See DVD CCA and AACS LA Comment at 1-2.

²¹ See, e.g., Comment of DVD CCA and AACS LA on Class 3 at 1-2 (Feb. 9, 2021), https://www.copyright.gov/1201/2021/comments/opposition/Class_3_Opp'n_DV D%20CCA%20and%20AACS%20LA.pdf.

class of works.²² However, these comments fail to address, or even engage with, the relevant rationale we presented in our long form comment.²³ AAP's comment merely reiterates the Register's concern in the NPRM,²⁴ DVD CCA and AACS LA summarily disputes our discussion of the DMCA's legislative history,²⁵ and Joint Copyright Holders offers thin speculation about consequences for copyright holders.²⁶

Contrary to these arguments, our interpretation of "class of works" is within the Office's authority to adopt, and consequently the Librarian may grant the Class 17 exemption. The Class 17 exemption is paramount to securing the civil rights of people with disabilities; without it, people with disabilities will remain unlawfully denied access to works simply because they have a disability. The Librarian must utilize our approach to "class of works" to grant Class 17, and the Librarian's authority to adopt our approach is supported by the Office's historical approach to "class of works," and the text, legislative history, and purpose of the statute. Lastly, our petition is sufficient, as reasonable market availability and common security measures are implicit in its language.

1. The proposed exemption is necessary to ensure people with disabilities' lawful right to accessing copyrighted works.

Commenters' general statements regarding their commitment to accessibility²⁷ do not address any of the numerous examples we outlined in our long comment about people with disabilities being denied meaningful access to copyrighted works.²⁸ In particular, commenters did not address the uncontroversial reality that accessibility efforts typically constitute noninfringing fair use, nor acknowledge people with disabilities' expertise in discerning necessary accommodations, the adverse effect the triennial rulemaking process has on people with disabilities, or how the pandemic has magnified these adverse effects.²⁹ Pointedly sidestepping

²² See AAP Comment at 1-2; Joint Copyright Holders Comment at 8; DVD CCA and AACS LA Comment at 2.

²³ See Long Comment at 10-18, 20-27.

²⁴ See 2021 APP Comment at 1-2.

²⁵ See DVD CCA and AACS LA Comment at 3-4.

²⁶ See Joint Copyright Holders Comment at 3.

²⁷ AAP Comment at 2 ("AAP . . . recognizes accessibility as an important consideration of copyright policy."); DVD CCA and AACS LA Comment at 3 ("[T]he proponents' underlying policy concerns for the proposed class are of substantial significance."); 2021 Joint Creators and Copyright Owners Opposition Comment at 2 ("MPA, ARM and ESA ('Joint Creators and Copyright Owners') believe strongly that accessibility issues are very important.").

²⁸ See Long Comment at 10-18, 20-27.

²⁹ *Id.*

such an important aspect of our argument reflects the fundamentally flawed mindset regarding accessibility that lies inherent within the DMCA’s triennial exemption process.

2. People with disabilities are entitled to fair use and are often the most knowledgeable about what accommodations are necessary for their own access needs.

Even when content creators and copyright holders carefully consider accessibility at the inception of creative works, it is not uncommon to accidentally fail to consider certain complications during the design.³⁰ As such, people with disabilities need to have the flexibility to gain meaningful access to which they are lawfully entitled; both in situations where their access was accidentally barred by the copyright holder’s own negligence, and situations where their access was never considered in the first place.³¹

The proposed exemption is based on the acknowledgement that people with disabilities themselves are typically the most knowledgeable about their own needs and limits, and therefore are the best parties for determining what accommodations are necessary in order to allow them the ability to meaningfully access content. For example, Haben Girma—famed disability rights advocate and deafblind lawyer—has been able to succeed at Harvard Law School and in her legal career in part because of her own realization that she needed to connect a BrailleNote computer with an external Bluetooth keyboard and a relay system to help facilitate effective communication.³² Girma notes that people with disabilities are commonly tasked with having to develop solutions for themselves when it comes to meaningful access:

Adams: How often do you or others who are disabled have to come up with technology solutions on your own just simply because they don’t exist yet?

³⁰ See, e.g., Aaron Boyd, *9 Examples of Tech Making it Harder for People with Disabilities*, Fed. Times (Apr. 18, 2016), <https://www.federaltimes.com/smr/section-508/2016/04/18/9-examples-of-tech-making-it-harder-for-people-with-disabilities/>.

³¹ See, e.g., David M. Perry, *Disabled Do-It-Yourselfers Lead Way to Technology Gains*, NY Times (July 20, 2020), <https://www.nytimes.com/2020/07/14/style/assistive-technology.html>; Devin Coldewey, *As ADA Turns 30, Tech is Just Getting Started Helping People with Disabilities*, TechCrunch (July 27, 2020), <https://techcrunch.com/2020/07/27/as-ada-turns-30-tech-is-just-getting-started-helping-people-with-disabilities/>.

³² See Kimberly Adams, *Innovating for Disability, Because You Have To*, Market Place (Aug. 11, 2020), <https://www.marketplace.org/shows/marketplace-tech/disability-innovation-assistive-technology-braille/>.

Girma: Disabled people constantly have to come up with our own solutions. Most things in this world are designed for nondisabled white men who are right-handed. Most designs [are] for a very limited segment of our population, and everyone outside of that has to be creative and thoughtful and come up with solutions, especially disabled people.³³

Joint Copyright Holders assert that “[n]early everyone is a gamer.”³⁴ However, people with disabilities currently contend with numerous accessibility issues on various video game platforms.³⁵ YouTube content creator WallsiesDGP—a Twitch streamer and gamer with paralysis—notes that “[o]ne of the biggest issues for disabled gamers is the struggle to use the typical keyboard and mouse or controllers. Moreover, pre-made accessible controllers, such as the Xbox adaptive controller, are often very expensive.”³⁶ WallsiesDGP was effectively forced to create his own customized accessibility setup, stating that he made it for himself “because if [he] was going to use adaptations specifically made for people with disabilities, it would cost [him] probably five times the amount” of money that it cost to make his own customized accessibility setup.³⁷ WallsiesDGP also notes that accessibility needs can greatly vary depending on each individual person with disabilities.³⁸

Accessibility is not optional. As the Second Circuit explained in *Hathitrust*, “the doctrine of fair use allows [the] provi[sion of] full digital access to copyrighted works” to people with disabilities.³⁹ Making works accessible to people with sensory disabilities is an uncontroversially fair, noninfringing use. The proposed

³³ *Id.*

³⁴ Joint Copyright Holders Comment at 3.

³⁵ Williesha Moris, *Gamers Forge Their Own Paths When It Comes to Accessibility*, Wired (Oct. 29, 2020), <https://www.wired.com/story/accessibility-video-games-ablegamers/>.

³⁶ WallsiesDGP, *Homemade Disabled Accessible PC Gaming Setup with No Xbox Accessible Controller*, YouTube (Mar. 2, 2021), <https://www.youtube.com/watch?v=VHttKRQqas0> (comment below video).

³⁷ *Id.* at 0:34.

³⁸ *Id.* at 0:45 (“I’m gonna go through the hardware that I use, the software that I use, and a few examples of me using this equipment, software, and stuff in some gameplay, just so you can go ahead and make this at home yourself or try and do something similar. Like I said, I’ve done this for my needs, so your needs might be completely different.”).

³⁹ *Authors Guild v. HathiTrust*, 755 F. 3d at 103; see also Long Comment at 18-20 (discussing *Hathitrust* and the doctrine of fair use).

exemption is both necessary and the most effective way of ensuring that people with disabilities have meaningful access to their lawfully acquired content.

3. **The triennial review creates unfair and unnecessary delays that prevent meaningful access, especially during the COVID-19 pandemic.**

Commenters pointedly failed to address the indisputable reality that people with disabilities have been disparately negatively impacted when it comes to acquiring meaningful access to content during the COVID-19 crisis.⁴⁰ For example, a Pew Research Center survey found that “roughly half of U.S. adults (53%) say the internet has been essential for them personally during the pandemic and another 34% describe it as ‘important, but not essential.’”⁴¹

However, as discussed in our long comment, 98.1 percent of websites analyzed by WebAIM had at least one Web Content Accessibility Guidelines 2.0 (WCAG 2.0) failure, with an average of 60.9 WCAG 2.0 errors per home page.⁴² For example:

[A] web content publisher may use TPM to prevent an individual from changing content to an ‘easy-to-read’ or plain format text. TPM may also prevent assistive technologies from effectively rendering content in accessible formats and changing the primary mode of interaction.⁴³

The pandemic highlighted how important it is that people with disabilities have efficient avenues for receiving meaningful access. Forcing people with disabilities to engage in a lengthy, complex petitioning process every three years is already burdensome. During a pandemic, such a requirement is outright untenable.

⁴⁰ See Sarah Katz, *The Inaccessible Internet*, Slate (May 22, 2020), <https://slate.com/technology/2020/05/disabled-digital-accessibility-pandemic.html>; Ignacio Lobos, *No One Left Behind: COVID-19 Pandemic Underscores Need for Accessibility*, University of Washington (May 20, 2020), <https://www.washington.edu/uwit/stories/covid-19-pandemic-underscores-need-for-universal-accessibility-on-the-web/>.

⁴¹ Emily A. Vogels, Andrew Perrin, Lee Rainie, & Monica Anderson, *53% of Americans Say the Internet Has Been Essential During the COVID-19 Outbreak*, Pew Research (Apr. 30, 2020), <https://www.pewresearch.org/internet/2020/04/30/53-of-americans-say-the-internet-has-been-essential-during-the-covid-19-outbreak/>.

⁴² See Long Comment at 26.

⁴³ G. Anthony Giannoumi, et al., *Web Accessibility and Technology Protection Measures: Harmonizing the Rights of Persons with Cognitive Disabilities and Copyright Protections of the Web*, *Cyberpsychology: Journal of Psychosocial Research on Cyberspace*, Article 5 (2017), <https://cyberpsychology.eu/article/view/6733/6200>.

4. The Office may find a “class of works” where the works share common attributes, and so the Librarian may grant Class 17.

Commenters purport that the proposed exemption centers on an impermissible class of works.⁴⁴ DVD CCA and AACS LA asserts that the factual record is insufficient, that we have misapplied the Office’s historical approach to “class of works,” and that we have misinterpreted the legislative history.⁴⁵ Joint Copyright Holders argue that the proposed “class” interpretation will “have consequences far beyond the accessibility context” because “different categories of works present unique circumstances.”⁴⁶

Notwithstanding these summary contentions to the contrary, our proposed interpretation of “class of works” is a valid interpretation of the statute and one well within the Librarian’s authority to adopt. We have established a sufficient factual record to support the Librarian’s adoption of this additional interpretation. Our interpretation is clearly supported by the text of the statute, the legislative history, and the DMCA’s fair use purpose.

i. The record demonstrates the need for the Librarian’s adoption of our “class of works” interpretation.

The opposition admits that the Librarian is able to alter her interpretation of “class of works,” but argues that our proposed interpretation “go[es] far beyond any prior change.”⁴⁷ DVD CCA and AACS LA argues that the 2006 Register’s decision to reinterpret “class” “was premised on the record developed in that rulemaking.”⁴⁸ Asserting that the 2006 Register’s reinterpretation was only because the record necessitated it, DVD CA and AACS LA concludes that the Register’s “pronounced . . . change in the agency’s interpretation of its own rulemaking . . . was well reasoned under administrative law principles.”⁴⁹

Likewise, our factual record sufficiently necessitates the Librarian’s adoption of our proposed “class” interpretation. We present an exhaustive factual record in our initial comment that illustrates how people with disabilities are currently harmed by the Office’s “class” approach.⁵⁰ Our record also exemplifies how the current

⁴⁴ See AAP Comment at 1; DVD CCA and AACS LA Comment at 3-4; 2021 Joint Copyright Holders at 2.

⁴⁵ DVD CCA and AACS LA Comment at 3.

⁴⁶ Joint Copyright Holders Comment at 3

⁴⁷ Joint Copyright Holders Comment at 3, n.9; See DVD CCA and AACS LA Comment at 4.

⁴⁸ DVD CCA and AACS LA Comment at 4

⁴⁹ *Id.* at 5.

⁵⁰ See Long Comment at 10-18, 20-27.

exemption process complicates creating this factual record, which further underscores the need for our “class” interpretation.⁵¹

As illustrated in our long comment, people with disabilities are currently unlawfully denied access to copyrighted work because of 1201’s prohibition to circumvention. People with disabilities are unable to access any program that is encumbered by TPMs in ways beyond the scope of current accessibility exemptions. We have cited numerous examples of these harms in our initial comment.⁵²

The record also strongly supports the proposition that the Office’s current exemption approach hinders our ability to bulk up our factual record. As we explained in our long comment, the current approach does not allow for remediating accessibility issues presented by future technologies.⁵³ Furthermore, while industry creators know of commonly requested accessibility features, such as closed captioning, they cannot possibly predict what accommodation any one person’s disability will necessitate. These unique technological approaches to the inaccessibility of copyrighted works often are created after a person encounters a barrier, not beforehand, and thus not in a manner that can be articulated in a predictive exemption.

The record compels the Office to adopt our interpretation of “class of works,” just like the record did in 2006.⁵⁴ In 2006, the Register concluded her re-interpretation was necessary to ensure fair use;⁵⁵ the situation we raise in our record calls for the same.⁵⁶ Thus, the 2021 Register must adopt our proposed interpretation to remedy the issues stipulated above and developed in the factual record, and to enable fair use for people with disabilities.

⁵¹ See *id.* at 15-17 (detailing how innovation is constricted by the exemption process).

⁵² See *id.* at 10-18.

⁵³ See *id.* at 15-17.

⁵⁴ Recommendation of the Acting Register of Copyrights at 10 (2006) (“2006 Recommendation”), https://cdn.loc.gov/copyright/1201/docs/1201_recommendation.pdf (“However, in the current proceeding the Register has concluded, based upon the record before her, that in appropriate circumstances a ‘class of works’ that is defined initially by reference to a section 102 category of works or a subcategory thereof, may additionally be refined not only by reference to the medium on which the works are distributed or the access control measures applied to them, but also by reference to the particular type of use and/or user to which the exemption shall be applicable.”).

⁵⁵ See *id.* at 24.

⁵⁶ See Long Comment at 10-18, 20-27.

ii. The Office’s historical approach to “class of works” validates its authority to accept our interpretation.

Commenters claim that the proposal misinterprets the Office’s historical approach to “class of works.” Joint Copyright Holders explains that “[w]hile 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.”⁵⁷ DVD CCA and AACS LA asserts that the 2006 Register’s reinterpretation was only possible because of the factual record,⁵⁸ and that the 2010 Register’s hybrid “video game” class is, in fact, not a hybrid class.⁵⁹

Our interpretation of “class of works” aligns with the Office’s general approach to “class of works.” As we detailed in the long comment, the Office’s definition of “class of works” has broadened over the past two decades, which at the very least underscores the Librarian’s ability to alter the interpretation of “class of works.”⁶⁰ Moreover, our approach fits well with the Office’s pattern of broadening its interpretation of “class of works.” Thus, regardless of the Register’s motive for broadening the interpretation, the 2006 Register’s re-interpretation exemplifies the Register’s ability to broaden the “class” approach.

The 2010 Register’s video game exemption illustrates the Librarian’s ability to create a class from mixed 102(a) categories. The 2010 Register labeled the “video game” class a “hybrid” class.⁶¹ A “video game” is not one independent class—a literary work or an audio work—but a created class formed from various parts of at least two classes.⁶²

The 2006 and 2010 Registers’ actions exemplify that the Office has not always approached the 102(a) categories as an exhaustive list of independent categories. The Register should take a similar posture towards the 102(a) categories when interpreting our proposed class—i.e., that a class of works can be works of mixed

⁵⁷ Joint Copyright Holders Comment at 3n.9.

⁵⁸ See DVD CCA and AACS LA Comment at 4-5.

⁵⁹ See *id.* at 6-7; *but see* Recommendation of the Register of Copyrights at 178 (2010) (“2010 Recommendation”), <https://cdn.loc.gov/copyright/1201/2010/initialed-registers-recommendation-june-11-2010.pdf>.

⁶⁰ Long Comment at 28-31.

⁶¹ 2010 Recommendation at 178.

⁶² “Hybrid” is defined as “having or produced by a combination of two or more distinct elements.” *Hybrid*, Merriam-Webster (last visited Mar. 9, 2021), <https://www.merriam-webster.com/dictionary/hybrid>.

102(a) categories so long as these works share the common attribute of inaccessibility.

iii. The text, legislative history, and purpose of the statute supports the Librarian’s authority to adopt our interpretation of “class of works.”

Commenters superficially assert that the legislative history and the purpose of the DMCA do not support our proposed interpretation of “class.”⁶³ DVD CCA and AACS LA argues that “the specific discussion of what constitutes a ‘class’ should be discarded in favor of the general purpose of the rulemaking,”⁶⁴ but do not elaborate further. Joint Copyright Holders claim that the proposed approach “would . . . have consequences far beyond the accessibility context”⁶⁵ and seemingly argue that this is so because “different categories of works present unique circumstances.”⁶⁶

The text of the statute mandates our interpretation of “class of works,” as we detailed in our long comment.⁶⁷ Section 1201 was explicitly included in the Digital Millennium Copyright Act (DMCA) to protect fair use, such as accessibility.⁶⁸ The text of 102(a) itself articulates the list of categories as non-exhaustive, as exemplified by the 1990 addition of “architectural works.”⁶⁹

Moreover, DVD CCA and AACS LA’s interpretation of the legislative history is incorrect. Our long comment details how the legislative history supports the Librarian’s authority to adopt our interpretation of “class.”⁷⁰ The DMCA’s House Committee Report articulates Congress’ determination to create a process that would protect fair use as technology developed; this process became the exemption

⁶³ See DVD CCA and AACS LA Comment at 5.

⁶⁴ *Id.*

⁶⁵ Joint Copyright Holders Comment at 3.

⁶⁶ *Id.*

⁶⁷ See Long Comment at 31-32.

⁶⁸ See *id.* at 31; See also Letter from Gregory L. Rohde, Assistant Secretary of Commerce for Communications and Information and Administrator of National Telecommunications and Information Administration, to Marybeth Peters, Register of Copyrights, 2-3 (Sept. 29, 2000), <http://www.copyright.gov/1201/commerce.pdf>; H.R. Rep. No. 105–551, pt. 2, at 36 (1998); HathiTrust, 755 F. 3d at 103 (making items accessible for people with disabilities is fair use).

⁶⁹ See *id.* at 32; Architectural Works Copyright Protection Act, Pub. L. No 101-650 § 703, 104 Stat. 5089 (1990).

⁷⁰ See Long Comment at 31-32.

process.⁷¹ The 1975 House Judiciary Committee report iterates how the 102(a) categories are a non-exhaustive list of broad and intersecting categories.⁷²

Joint Copyright Holders nevertheless argue that the Office's current approach is vital because "different categories of works present unique circumstances."⁷³ Commenter uses sound recordings, motion pictures, and video games as examples of such works.⁷⁴ The opposition comment explains that "[s]ound recordings are largely available without access controls in compact disc or downloadable formats," "many motion pictures are available in accessible formats," and "the video game industry has embraced and supported efforts to expand accessibility features on consoles and video games."⁷⁵

Our proposed class is for copyrighted works that are inaccessible *and* encumbered with TPMs.⁷⁶ Sound recordings and motion pictures and video games available on accessible formats that are not encumbered by TPMs are not encompassed by the proposed class. Accordingly, these categories of works fail to exemplify the Joint Copyright Holders' concerns.

5. The proposed exemption satisfies the threshold for recommendation.

As evidenced by our long comment, the proposed exemption and long comment meets and exceeds the burden of persuasion.⁷⁷ Thus, the Office can grant this exemption. The Office's should focus its attention on the substance of the proposed exemption, which has been sufficiently articulated and supported.

In lieu of addressing the substance of the arguments used to support the proposed exemption, opposition comments focused primarily on the "class of works" interpretation.⁷⁸ Because the majority of the exemption remains unopposed, the Office should recommend the exemption as proposed. The proposed exemption aligns with the Office's longstanding view of publishing exemptions to the DMCA that support accessibility for people with disabilities.⁷⁹ The Office's commitment to both maintaining and expanding exemptions that encourage greater accessibility in the technological space, so long as the proponents of that exemption can appropriately articulate the statutory requirements necessary, is incredibly

⁷¹ See *id.* at 31; H.R. Rep. No. 105-551, pt. 2 at 36 (1998).

⁷² See *id.* at 32; H.R. Rep. No. 94-1476 at 53 (1976).

⁷³ Joint Copyright Holders Comment at 3.

⁷⁴ *Id.*

⁷⁵ *Id.* at 3.

⁷⁶ See Long Comment at 27-28.

⁷⁷ See Long Comment at 10-18, 20-27.

⁷⁸ See AAP Comment at 1-2; DVD CCA and AACS LA Comment at 3-7; Joint Copyright Holders Comment at 2-4.

⁷⁹ See Long Comment at 19.

important. The current proposed exemption has met this threshold of surpassing the necessary statutory requirements. Thus, the Office can and should grant this exemption to continue their commitment to furthering accessibility.

While this exemption does interpret “class of works” in a unique way, the substance of the exemption still fits squarely within the language allowing an exemption.⁸⁰ Commenters have not seriously opposed that the proposed exemption satisfies Section 1201’s statutory requirements:

- The proposed class includes at least some works protected by copyright.⁸¹ This requirement was sufficiently shown in the initial comment,⁸² and was not disputed by opposition comments.
- The proposed uses are noninfringing under Title 17.⁸³ As the long comment demonstrated, “Congress, the courts, and the Copyright Office have routinely recognized that accessibility is fair use.”⁸⁴ While opposing commenters are concerned that “unclear and unbounded exemption proposals . . . inherently facilitate infringement,”⁸⁵ the proposed exemption is plainly confined by noninfringing fair use boundaries.
- Users are adversely affected in their ability to make such noninfringing uses and users are likely to be adversely affected in their ability to make such noninfringing uses during the next three years.⁸⁶ It remains uncontested that people with disabilities are adversely affected when prohibited from making accessible versions of copyrighted works. Commenters even express their understanding that “accessibility uses are extremely important.”⁸⁷
- The statutory prohibition on circumventing access controls is the cause of the adverse effects.⁸⁸ Our long comment explained that “[t]he Office has consistently found that the Section 1201(a)(1)(C) statutory factors weigh in favor of accessibility-related exemptions. Likewise, the statutory factors weigh in favor of granting a broad, general exemption for disability

⁸⁰ *See id.* at 27-33.

⁸¹ *See* 17 U.S.C. § 1201(a)(1)(C).

⁸² *See* Long Comment at 15.

⁸³ *See* 17 U.S.C. § 1201(a)(1)(C).

⁸⁴ *Id.* at 33.

⁸⁵ Joint Copyright Holders Comment at 4.

⁸⁶ *See* 17 U.S.C. § 1201(a)(1)(C).

⁸⁷ Joint Copyright Holders Comment at 2; *See* DVD CCA and AACS LA Comment at 3; AAP Comment at 2.

⁸⁸ *See* NPRM, 85 Fed. Reg. at 65,301.

accessibility.”⁸⁹ This analysis of the statutory factors was not opposed by any opposition comments.

Finally, Joint Copyright Holders contend that the original proposed exemption is “flawed” because “[i]t makes no reference to remuneration or payment of a fair price to obtain a copy.”⁹⁰ Uses of the proposed exemption would still need to comport with principles of fair use, which is capable of handling concerns related to remuneration.

* * *

The proposed exemption is necessary to ensure an effective, efficient avenue for people with disabilities to gain meaningful access to works to which they are otherwise entitled fair use. Governing disability law prioritizes access over accommodations, and when copyright holders fail to make their content accessible on the front-end, people with disabilities need to have effective and efficient means of obtaining the access to which they are entitled without fearing that they could somehow run afoul of the law in ways that able-bodied people are unaffected. When people with disabilities are denied meaningful access and fair use to copyrighted content, they are being unlawfully discriminated against.

For the foregoing reasons, the Register should recommend the adoption of proposed Class 17.

⁸⁹ Long Comment at 23-24 (footnotes omitted).

⁹⁰ Joint Copyright Holders Comment at 4.