July 14, 2021

Mark Gray and Rachel Counts
U.S. Copyright Office, Library of Congress

via e-mail to mgray@copyright.gov and rcounts@copyright.gov

Re: Docket No. 2020-11
Exemptions to Prohibition Against Circumvention of Technological Measures Protecting Copyrighted Works

Dear Mr. Gray and Ms. Counts:

On July 12, 2021, Gretchen Rumsey-Richardson and Jason Kapcala of the Association of Transcribers and Speech-to-text Providers (ATSP) and Blake Reid and Dakotah Hamilton of the Samuelson-Glushko Technology Law and Policy Clinic at Colorado Law, counsel to ATSP, met with Kevin Amer and Mr. Gray to discuss the proposed Class 3 exemption in the above-referenced proceeding.

We noted that our conversations with other commenters on the exemption were productive and despite our separate filings[1] led to some degree of consensus on key issues. We discussed in turn:

1. Issues on which we were able to reach apparent agreement on specific language;
2. Issues on which we proposed substantively similar language but were unable to agree on specific language; and
3. Issues on which we substantively disagreed.

For convenience, this letter will refer to the proposed language in ATSP's, AHEAD's, and LCA's post-hearing letter as "*Proponents [subsection]*" and to the proposed language in the attachment to the Joint Creators and Copyright Holders', DVD CCA's, and AACS LA's post-hearing letter[2] as "*Opponents [subsection]*."

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[1] Post-Hearing Response of ATSP, et al. (May 14, 2021), https://www.copyright.gov/1201/2021/post-hearing/letters/Class-3-Accessibility-Petitioners-Post-Hearing-Response.pdf; Letter from J. Matthew Williams to Regan Smith (May 14, 2021) ("Opponents' Letter"), https://www.copyright.gov/1201/2021/post-hearing/letters/Class-3-Joint-Creators-DVD-CCA-Post-Hearing-Response.pdf.

[2] https://www.copyright.gov/1201/2021/post-hearing/letters/Class-3-Joint-Creators-Proposed-Compromise-Language.pdf.

Points of Agreement. We noted that there are several points of apparent agreement in the language submitted by both proponents and opponents in response to the two issues raised by the Office's post-hearing letter—the appropriate contours of proactive remediation and the "sufficient quality" component of the market check requirement:[3]

- **Conditioning proactive remediation on a reasonable belief of use for a specific future activity of the institution and prompt remediation after circumvention** *(Proponents (iii), Opponents (iv))*
  We noted apparent agreement on the addition of an additional section to the exemption language to specify that proactive circumvention and remediation should be allowed under two conditions. First, circumvention must be based on a "reasonable belief that the motion picture will be used for a specific future educational activity of the institution," which balances the need for disability services professionals to be able to flexibly exercise judgment while ensuring that circumvention is tied to an articulable need to use the motion picture for an activity of the institution. Second, the addition of captions must occur "promptly" after circumvention, ensuring that disability services offices can use their discretion to develop flexible workflows that allow different personnel to circumvent and remediate works within reasonable time periods. While the record lacks evidence that either of these limitations is necessary, we do not object to these formulations at this time, reserving the possibility that they may need to be revisited in a future triennial review.
- **Clarifying the standard for determining "sufficient quality"** *(Proponents (iv), Opponents (v)*
  We noted apparent agreement on the addition of an additional section to the exemption language to clarify the contours of whether an existing work contains captions or descriptions of "sufficient quality" under the market check requirement. Specifically, there is apparent agreement that this determination should be left to the "reasonable judgment" of the educational institution unit that the captions or descriptions are "sufficient to meet the needs" of the relevant users and "substantially free of errors that would materially interfere with those needs. This language would appropriately address the needs of disability services professionals to make judgments about the adequacy of accessibility materials while reflecting that disability services professionals typically do not remediate works that already meet the needs of their users.

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[3] Letter from Regan A. Smith to Jonathan Band, et al. (Apr. 16, 2021), https://www.copyright.gov/1201/2021/post-hearing/letters/Class-3-Post-Hearing-Letter-04.16.2021.pdf.

Points of Non-Substantive Disagreement. We noted that some points of apparent disagreement in the letters emerged from language aimed at the same substantive goal but using different language:

- **"Students, faculty, or staff with disabilities" vs. "individuals with disabilities"** *(Proponents* passim*, Opponents (iii) and* passim*)*
  Our formulation adapts the existing exemption's language by referring to "students, faculty, or staff with disabilities," while opponents propose a separate subsection to define "individuals with disabilities." Our formulation is more concise and spares adding an additional subsection to already-lengthy exemption language. We urged the Office to adopt our formulation.
- **"Including" vs. "excluding" in the storage requirement** *(Proponents (i)(C), Opponents (i)(C))*
  We and opponents suggested clarifying language that the storage requirement allows for storage necessary for future reuse, but offered alternative formulations. We believe our formulation is marginally clearer. However, there appears to be agreement on the underlying goal of the clarification and we defer to the Office on the optimal formulation to reach that goal.
- **Framing the "prompt" remediation requirement as a condition of the exception instead of a regulation**
  As noted above, we and opponents have apparent agreement on the inclusion of a condition that proactive remediation occur "promptly" after circumvention. However, we urged the Office to adopt our formulation, which properly frames the mechanism as a condition of eligibility for the exemption, and urged the Office not to adopt opponents' formulation, which is improperly framed as a regulatory requirement.

Substantive Disagreement. Finally, we noted specific points of apparent substantive disagreement:

- **Inappropriate addition of "educational" limitations** *(Opponents (i)(A), (iv), (v))*
  Opponents suggest adding the qualifier "educational" to the core scope of the exemption ("create an accessible version for *educational* uses"), to the "specific future activity" condition of the proactive remediation subsection ("the motion picture will be used for a specific future *educational* activity of the institution"), and to the sufficiency assessment in the market check requirement ("captions and/or audio description that are sufficient to meet the *educational* needs of the relevant individuals with disabilities") (emphases added). We explained that "educational" is a term of art in many contexts that if added to the exemption would imply but not elaborate on new limitations to the exemption that have not been justified

or even discussed in the record. This would include potentially narrowing the core scope of the existing exemption, which does not include this limitation, to which the opponents did not object, and which the Office has already indicated its intent to renew.[4] Given the potential for unintended consequences and lack of justification or discussion on the record for the inclusion of the term in any of the contexts above, we urged the Office to reject its inclusion in those contexts in the final exemption language, which would be procedurally and substantively inappropriate.

- **"[I]ncludes" vs. "means" in the proactive remediation subsection** *(Proponents (iii), Opponents (iv))*
  Our formulation of the proactive remediation subsection clarifies that "creat[ing] accessible versions" *includes*, but is not limited to, proactive remediation. Opponents, however, suggest the term "means." We urged the Office to use our formulation to make clear that the added proactive remediation subsection is only intended to articulate the additional conditions for the proactive remediation of works, and not to suggest additional conditions on the existing exemption's core allowance of remediation in non-proactive circumstances, such as in response to an accommodation request. We noted that the opponents' formulation would again risk narrowing the scope of the existing exemption, which as described above would be procedurally and substantively inappropriate.
- **Inappropriate qualifications on the market check and storage conditions** *(Opponents (i)(B), (vii))*
  Opponents suggest the addition of the qualification "or accessed whether in physical media or via digital transmission" to the market check requirement of a determination "that an accessible version of sufficient quality cannot be obtained." Opponents likewise suggest creating from whole cloth a new set of conditions for the storage requirement that would specify "the use of technological protection measures such as encryption, authentication, copy controls, and passwords." Aside from transcending the Office's authority to exempt classes of works by accumulating an increasingly elaborate regulatory regime for disability services professionals within the guise of an anti-circumvention exemption, these additions again would impermissibly alter the existing exemption after opponents have failed to timely object to its renewal—and

[4] Exemptions to Permit Circumvention of Access Controls on Copyrighted Works, Notice of Proposed Rulemaking, Docket No. 2020-11, 85 Fed. Reg. 65,293, 65,298 (Oct. 15, 2020), https://www.govinfo.gov/content/pkg/FR-2020-10-15/pdf/2020-22893.pdf.

without any substantive justification.[5] Moreover, the Office provided ample explanation of the contours of these conditions in the 2018 triennial review,[6] and opponents have offered no evidence that more elaboration is necessary. We urged the Office to reject these suggestions accordingly.

- **Inappropriate non-retention obligation** *(Opponents (vi))*
  Opponents suggest a non-retention obligation with unclear scope and no obvious justification that apparently would apply to the entirety of the existing exemption and proponents' proposed changes. Opponents do not identify even hypothetical circumstances under which they believe disability services professionals could engage in unnecessary retention without escaping the basic scope of the exemption or running afoul of one of its many conditions. Given the lack of explanation or evidence on the record for such a restriction, its unclear operation, and its potential to impermissibly alter the core scope of the exemption, we urged the Office to reject it.

In addition to these issues, we also discussed a new issue that disability services professionals have begun facing in the months since the triennial review began: the need to caption pre-recorded video programming that is used during live lectures and other events that are made publicly available via the Internet. While live captioners typically provide captioning for such events, live captioners frequently decline to caption prerecorded content, and disability services professionals are increasingly receiving requests to caption that content in advance of public-facing events to comply with disability law and educational institutions' policies. Unfortunately, it is unclear that these scenarios fit neatly within the scope of the Class 3 exemption, even including the changes proposed by proponents.

We noted that this scenario illustrates how even the most diligent efforts of proponents performing critical accessibility work to carefully document the need

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[5] Opponents' cursory, unexplained contention that this and other untimely introduced limitations on the exemption are justified by reference to proponents' proposed changes to the exemption—proposed changes that are all fully briefed and properly under the Office's consideration—provides no procedural or substantive support for the Office to consider opponents' last-minute proposals to alter the scope of the exemption. *See* Opponents' Letter at 1.

[6] *See Section 1201 Rulemaking: Seventh Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention*, Recommendation of the Acting Register of Copyrights at 109-110 (Oct. 2018).

for changes to an exemption can evade the short window of the triennial review. We urged the Office to consider how it can fully meet its obligations to mitigate the adverse effects of Section 1201's provisions in circumstances like this, including by issuing the more generalized accessibility exemption proposed in Class 17.

Please don't hesitate to contact us if you have any questions.

Respectfully submitted,

/s/

Blake E. Reid

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[7] This filing was drafted with the substantial assistance of Dakotah Hamilton.