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U.S. Copyright Office
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July 28, 2021

RE: Docket No. 2020-11
Exemptions to Prohibition Against Circumvention of Technological Measures Protecting Copyrighted Works
Proposed Classes 11, 12

Dear Mr. Gray and Ms. Counts,

On July 26, 2021, the undersigned had an ex parte meeting with Copyright Office staff Kevin Amer, Nick Bartelt, Brad Greenberg, and Melinda Kern. As requested, we submit this letter memorializing the conversation.

Proposed Class 12: Modification & Repair

EFF reiterated that our proposal includes not only modification in furtherance of repair, but also noninfringing modification to expand the functionality of devices or enable new expression.

We discussed the Supreme Court's decision in *Google v. Oracle*. Relevant to the proposed class, the Supreme Court's fair use analysis applied to code copying to create new software and new functionality. The Court found such copying to be a fair use even within a similar marketplace and with a similar functional purpose. The Court reiterated that copyright's function is to promote progress, and reiterated the importance of limits on copyright to prevent the extension of rights beyond their traditional scope to the detriment of creativity and innovation. This statement of the fair use test does not exclude commercial uses. The Court's rationale applies across the entire range of device software in the proposed class, which underlines that the analysis is very consistent from device to device.

The Office asked about the relationship between the covered modifications and the derivative works right. We explained that fair use and other defenses limit the derivative works right just as they limit the reproduction right. To the extent that any of the

modifications covered by our proposal can be found to create a derivative work, they would still be noninfringing uses under the analysis set forth in our written submissions.

The Office asked about the definition of works encompassed in the 2018 repair exemption, and we expressed that the definition encompassed the works for which we seek an exemption, except for one key distinction: the requirement that the software be contained on the device could be interpreted to exclude common, significant use cases, particularly cases where software updates, directed at controlling the particular device, are decrypted on a general-purpose computer in order to enable a person to customize it prior to loading it onto the device, or in order to determine how to bypass the TPM in the device itself using the technology contained in the update. We proposed that the definition be amended to make clear that the software that controls the functioning of the device is not required to be on the device at the time of circumvention, to enable these uses.

The Office asked about the limitation in prior exemptions requiring that circumvention not be done to gain access to copyrighted works other than the subject of the exemption. We suggested a slight modification, for that limitation to apply only to *unlawful* access to other copyrighted works. This modification would prevent an unintended trap for the unwary where someone with the legal right to access a work might nonetheless be subject to liability to a device manufacturer for doing so.

We revisited the possible distinction between commercial and noncommercial users. While noncommercial users have an even stronger fair use argument, commercial users ought not to be excluded. As reiterated in *Google v. Oracle*, enabling new functionality, creativity, and competition are goals of copyright law that strongly favor fair use even for commercial users. We reemphasized that market harm is unlikely because copyright owners are compensated when the buyer acquires the copy of the software in the device they wish to control, and that this is true of firmware generally irrespective of device category. We also explained that the same modification could have both noncommercial and commercial uses, and drawing a legal distinction between the two could lead to illogical results. For example, the digital camera firmware modifications discussed in our submissions may be useful to both hobbyists and professional photographers in producing new creative works; the same person may even use the same camera for both professional and personal photography.

We also discussed the government-wide Executive Order on Promoting Competition in the American Economy issued by President Biden on July 9th, 2021. This order explained the importance of removing anti-competitive restrictions on technological innovation and competition, specifically calling out repair of electronic devices. We noted that, consistent with its focus on promoting competition, the Executive Order did not distinguish commercial from noncommercial repairs and specifically referenced the need to allow repairs to be performed by independent repair shops.

Class 11: Jailbreaking of Non-Integrated Smart TVs (Streaming Boxes)

Regarding Proposed Class 11, we explained that EFF's proposal is intended to correct an inconsistency or ambiguity in the disparate treatment under the temporary Section 1201 exemptions for Smart TVs that include a display, as opposed to a separate piece of hardware like a "streaming box" or "streaming media player" that is equivalent but does not include a display.

We explained that the legal analysis for these devices and for Smart TVs is the same, and that the legal analysis for jailbreaking generally has been the same across multiple rulemakings. We pointed out that opponents of the exemption have not raised any new legal arguments or legal arguments specific to the devices at issue. We also observed that the only significant change in the law, the Supreme Court's decision in *Google v. Oracle*, supports jailbreaking exemptions.

We then discussed the proper scope of the exemption. In particular, we discussed how to define the category of devices at issue, recognizing that the paradigmatic examples of Fire Sticks, Apple TVs, and Roku boxes were intuitively different and easily distinguishable from opponents' examples of devices they felt should be excluded, such as video game consoles.

As in our papers and at the hearing, we described a "primary function test" that distinguishes streaming boxes from video game consoles (whose primary function is playing games, not streaming video). We noted that these two devices are currently very distinct in their markets and are likely to remain so, since a person who wishes to stream and not play video games will purchase a cheaper streaming box rather than paying for a video game console. Consoles have traditionally been premium items in part because they include specialized rendering hardware and storage needed for playing games but not for streaming video. We noted that the Office has already applied a primary function test to jailbreaking exemptions.

We also discussed a means of distinguishing a streaming box from a cable box, as described in our written submissions: whether the device receives signals over the internet or from a proprietary physical network such as a cable TV system. We reiterated that the proposed exemption does not allow circumvention of the separate TPMs on video signals.

Finally, the office inquired as to why a limitation to "TVs" might be problematic, and we explained that other display devices such as computer monitors or projectors ought not be excluded.

Thank you again for the opportunity to discuss these issues. We are available to address any follow-up questions you may have.

Regards,

Cara Gagliano
Mitch Stoltz
Kit Walsh

on behalf of the Electronic Frontier Foundation