
May 14, 2021

via e-mail to regans@copyright.gov and achau@copyright.gov.

Regan A. Smith, General Counsel and Associate Register of Copyrights
Anna Chauvet, Associate General Counsel
U.S. Copyright Office

**Re: Docket No. 2020–11
Exemptions to Prohibition Against Circumvention of Technological
Measures Protecting Copyrighted Works
Class 8 Post-Hearing Question Response**

Dear Ms. Smith and Ms. Chauvet,

On behalf of the below-signed proponents and commenters on the pending Class 8 exemption in the above-referenced proceeding, we respectfully respond to your April 16, 2021, post-hearing letter.¹ As you requested, counsel to the American Council of the Blind, the Library Copyright Alliance, and the Joint Creators and Copyright Owners discussed “specific definitional language to clarify that the exemption does not cover sound recordings of performances of musical works.”² We have reached consensus on the language below.

At the outset, we agree that this letter is limited to clarifying the specific contours of Class 8. This letter does not reflect and should not be read to reflect any change in the position of the below-referenced signatories regarding Class 17’s coverage of sound recordings of performances of musical works, and does not opine on or concede any points relating to Class 17 or that may arise in the Office’s consideration of any other exemption or matter, now or in the future.

Proponents initially proposed the following language in their long comment:

[L]iterary works or previously published musical works that have been fixed in the form of text or notation, distributed electronically, that are protected by technological measures that either prevent the enabling of read-aloud functionality or interfere with screen readers or other applications or assistive technologies:

(i) When a copy or phonorecord of such a work is lawfully obtained by an eligible person, as such a person is defined in 17 U.S.C. § 121; provided,

¹ Letter from Regan A. Smith to Jonathan Band, et al., <https://www.copyright.gov/1201/2021/post-hearing/letters/Class-8-Post-Hearing-Letter-04.16.2021.pdf>.

² See *id.* at 1.

however, that the rights owner is remunerated, as appropriate, for the market price of an inaccessible copy or phonorecord of the work as made available to the general public through customary channels;

(ii) When such a work is lawfully obtained and used by an authorized entity pursuant to 17 U.S.C. § 121; [optional language] or

(iii) When a copy or phonorecord of such a work is exported by an authorized entity pursuant to 17 U.S.C. § 121A(a) or is imported by an authorized entity or an eligible person, or someone acting on behalf of an eligible person, pursuant to 17 U.S.C. § 121A(b). [end optional language].³

Should the Office choose to recommend proponents' proposed language, the below-referenced signatories agree that the Office should also include the following subparagraph:

(iv) For the purposes of subparagraph (i), a “phonorecord of such a work” does not include a sound recording of a performance of a musical work unless and only to the extent the recording is included as part of an audiobook or e-book.⁴

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

³ Long Comment of the American Council of the Blind (ACB), et al., at 9-10 (Dec. 14, 2020), [https://www.copyright.gov/1201/2021/comments/Class%2008 InitialComments Accessibility%20Petitioners%20II.pdf](https://www.copyright.gov/1201/2021/comments/Class%2008%20InitialComments%20Accessibility%20Petitioners%20II.pdf)

⁴ This letter does not reflect and should not be read to reflect any position or concession of the below-referenced signatories on the scope of non-infringing conduct under Sections 121, 121A, or 107, or any other provision of the Copyright Act. Specifically, the Joint Creators and Copyright Owners do not concede that creating an accessible version of an e-book/literary work or a musical work that has been fixed in the form of text or notation by creating a phonorecord that incorporates a sound recording of a performance of a musical work is non-infringing.

Respectfully submitted,

/s/

Blake E. Reid, Director
Samuelson-Glushko Technology Law &
Policy Clinic
blake.reid@colorado.edu
*Counsel to the American Council
of the Blind*

/s/

Jonathan Band
jband@policybandwidth.com
Counsel to the Library Copyright Alliance

/s/

J. Matthew Williams
Mitchell Silberberg & Knupp LLP
1818 N Street, NW, 7th Floor
Washington, DC 20036
mxw@msk.com
202-355-7904
*Counsel to the Joint Creators and
Copyright Owners*