

Submission on behalf of ESA, MPA, and RIAA
Class 1: Audiovisual Works – Noncommercial Videos

UNITED STATES COPYRIGHT OFFICE



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

[] Check here if multimedia evidence is being provided in connection with this comment.

ITEM A. COMMENTER INFORMATION

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.

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 Recording Industry Association of America, Inc. (“RIAA”) is a nonprofit trade organization that supports and promotes the creative and financial vitality of recorded music and the people and companies that create it in the United States. RIAA’s several hundred members—ranging from major American music companies with global reach to artist-owned labels and small businesses—make up the world’s most vibrant and innovative music community. RIAA’s members create, manufacture, and/or distribute the majority of all legitimate recorded music produced and sold in the United States. In supporting its members, RIAA works to protect the intellectual property and First Amendment rights of artists and music labels.

Represented By:

Robert H. Rotstein (rhr@msk.com)
James Berkley (jdb@msk.com)
Stacey Chuvaieva (stc@msk.com)
MITCHELL SILBERBERG & KNUPP LLP
2049 Century Park East, 18th Floor
Los Angeles, CA 90067
301-312-2000

J. Matthew Williams (mxw@msk.com)
Lucy Holmes Plovnick (lhp@msk.com)
MITCHELL SILBERBERG & KNUPP LLP
1818 N Street, NW, 7th Floor
Washington, D.C. 20036
202-355-7904

ITEM B. PROPOSED CLASS ADDRESSED

Class 1: Audiovisual Works – Noncommercial Videos

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 website 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.

ITEM C. OVERVIEW

ESA, MPA, and RIAA once again do not oppose renewal of the existing exemption for motion pictures on DVDs, Blu-ray discs, and digitally transmitted video for use in noncommercial videos as codified at 37 C.F.R. § 201.40(b)(1)(i)(B). However, for the second time in as many cycles, the Organization for Transformative Works (“OTW”) has submitted a petition for renewal that seeks a substantive change in the language of the existing exemption—in fact, the very same change that the Copyright Office considered and rejected in the last cycle. Specifically, OTW asserts that the exemption “could be made more understandable” by reverting to “the relatively simple language” adopted during the 2008-2010 rulemaking cycle, notwithstanding significant changes in the exemption made since that time, including at OTW’s request.

As previously, the Copyright Office appropriately declined in its Notice of Proposed Rulemaking to treat OTW’s request as a mere request for renewal, agreeing with other stakeholders that as stated in the Notice of Inquiry, “the Office’s streamlined proceedings for renewals is ‘only’ for exemptions ‘as they are currently written in the Code of Federal Regulations, without modification.’”¹ The Office also took notice that “OTW made the same request to amend the language of the exemption in the previous rulemaking,” and that “[t]he Office ultimately concluded that modification of the language was unnecessary, based on statements by OTW to that effect.”²

The Office nonetheless agreed, again, to treat the request as a proposal for a new or expanded exemption, and sought “comment on whether there are legal or factual circumstances that have changed and warrant altering the determination from the prior rulemaking.”³ Notably however, not a single commenter, *including OTW itself*, has come forward to provide any Round 1 comment, including any evidence in support of OTW’s proposed change or of there being any relevant change of legal or factual circumstances since the 2021 rulemaking.

This absence of support is dispositive, and alone warrants refusal by the Copyright Office. A petitioner, together with supporting commenters, bears the burden of proof to establish that a newly proposed exemption is needed, and OTW here has obviously not met that burden.⁴ Several times, the Office has asserted that “[t]hose who seek an exemption from the prohibition on circumvention bear the burden of establishing that the requirements for granting an exemption

¹ See Exemptions To Permit Circumvention of Access Controls on Copyrighted Works: Notice of Proposed Rulemaking, 88 Fed. Reg. 72,013, 72,016 (Oct. 19, 2023), <https://www.govinfo.gov/content/pkg/FR-2023-10-19/pdf/2023-22949.pdf> (“2023 NPRM”) (quoting DVD CCA & AACS LA Noncom. Videos Opp. at 2 (Aug. 10, 2023), available at <https://www.regulations.gov/comment/COLC-2023-0004-0043>, in turn quoting Exemptions To Permit Circumvention of Access Controls on Copyrighted Works: Notification of Inquiry and Request for Petitions, 88 Fed. Reg. 37,486, 37,487 (June 8, 2023), <https://www.govinfo.gov/content/pkg/FR-2023-06-08/pdf/2023-12250.pdf> (“2023 NOI”).

² 2023 NPRM at 72,024.

³ *Id.*

⁴ See SECTION 1201 RULEMAKING: EIGHTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION, RECOMMENDATION OF THE ACTING REGISTER OF COPYRIGHTS, 7-8 (2021), https://cdn.loc.gov/copyright/1201/2021/2021_Section_1201_Registers_Recommendation.pdf (“2021 Rec.”).

have been satisfied,”⁵ and it has made clear that the so-called “burden of production”—*i.e.*, “the burden to come forward with evidence at different points in the proceeding”—“will effectively be on exemption proponents.”⁶

Regardless, OTW’s Renewal Petition standing alone cannot and does not constitute such supporting evidence. For one, “[t]he *sole purpose* of [a] petition is to provide the Office with basic information about what uses of copyrighted works petitioners believe are adversely affected by the statutory prohibition on circumvention,” with evidence to be supplied later during the public comment process.⁷ Moreover, OTW’s Petition largely duplicates, in most places nearly verbatim, its prior renewal petition from the 2021 rulemaking cycle, which made the same procedurally improper request and which was rejected after full consideration during the public comment process.⁸ Nowhere in the current Petition is there *any* comment on whether there are legal or factual circumstances that have changed since the prior rulemaking specifically as to the proposed change of language.

Neither can a failure to provide necessary evidentiary support in Round 1 comments be cured on reply. *See* 2023 NPRM at 72,027 (“Reply comments should not raise new issues, but should instead be limited to addressing arguments and evidence presented by others during prior rounds.”). Resubmission of the identical request with no evidence and no assertion of any justifying change in fact or law places unnecessary burdens on stakeholders and the Copyright Office alike and should be discouraged. The petition must be denied.

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

By the language of OTW’s Petition, the access controls at issue encompass “both DVDs and Blu-Ray (and streaming where necessary).”⁹ However, the language of the exemption adopted in 2010 referred only to “[m]otion pictures on DVDs,”¹⁰ and Petitioners do not refer to any limitations on methods of circumvention at all, despite the presence of such limitations in the current exemption. *See* 37 C.F.R. § 201.40(b)(1)(i)(B).

⁵ *Id.* at 7 (quoting SECTION 1201 RULEMAKING: SIXTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION, RECOMMENDATION OF THE REGISTER OF COPYRIGHTS, 13 (2015), <https://cdn.loc.gov/copyright/1201/2015/registers-recommendation.pdf> (“2015 Rec.”)).

⁶ 2021 Rec. at 7-8 (quoting U.S. COPYRIGHT OFFICE, SECTION 1201 OF TITLE 17 at 110 (2017), <https://www.copyright.gov/policy/1201/section-1201-full-report.pdf>).

⁷ 2023 NOI at 37,489 (emphasis added).

⁸ Compare OTW Renewal Petition (July 6, 2023), <https://www.copyright.gov/1201/2024/petitions/proposed/New-Pet-The-Organization-for-Transformative-Works-Renewal-Pet-Noncom-Videos.pdf> (“2023 Petition”) with OTW Renewal Petition (July 22, 2020), <https://www.copyright.gov/1201/2021/petitions/proposed/New%20Pet.%20-%20Organization%20for%20Transformative%20Works.pdf>; *see* 2021 Rec. at 40-42. Notably, the single additional piece of “evidence” to which the Petition refers, a 2023 article appearing on the website CNBC.com, does not begin to support OTW’s proposed change to the exemption language even if considered.

⁹ 2023 Petition at 4.

¹⁰ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies: Final Rule, 75 Fed. Reg. 43,825, 43,827 (July 27, 2010), <https://www.govinfo.gov/content/pkg/FR-2010-07-27/pdf/2010-18339.pdf>.

ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGEMENT USES

Despite having the burden to do so, neither Petitioner, nor any other party, has come forward with evidence of any adverse effects of the current exemption language upon noninfringing uses, or any change in circumstances since the previous rulemaking cycle. In the previous cycle, the Copyright Office identified numerous reasons to maintain the exemption’s existing language, including that an OTW representative affirmed in testimony that the existing exemption was “enough in the sense that it provides for what vidders do,” and that reversion to older language from the 2008-2010 cycle would eliminate important revisions that have been introduced since that time.¹¹ By eliminating such language, including provisions pertaining to the use of screen-capture technology, OTW’s proposal would eviscerate the requirement that exemptions be narrowly tailored, not to mention the requirement that they be granted only when likely adverse effects are demonstrated on a preponderance of the evidence.¹²

By failing to offer evidence of any change of circumstances—and in the absence of supporting comments from any other party—OTW has confirmed the soundness of the Copyright Office’s 2021 determination as to OTW’s reiterated proposal. It is appropriate that the Copyright Office again decline the requested change to the exemption.

DOCUMENTARY EVIDENCE

We have included hyperlinks to webpages/documents within the body of this document. We are not submitting any other documentary evidence.

Respectfully submitted:

/s/ J. Matthew Williams

J. Matthew Williams (mxw@msk.com)
Lucy Holmes Plovnick (lhp@msk.com)
MITCHELL SILBERBERG & KNUPP LLP
1818 N Street, NW, 7th Floor
Washington, D.C. 20036
202-355-7904

Robert H. Rotstein (rhr@msk.com)
James Berkley (jdb@msk.com)
Stacey Chuvaieva (stc@msk.com)
MITCHELL SILBERBERG & KNUPP LLP
2049 Century Park East, 18th Floor
Los Angeles, CA 90067
301-312-2000

¹¹ See 2021 Rec. at 40-42.

¹² See *id.* at 35-36, 40-42; see also *id.* at 322 (“The Register will recommend exemptions where the preponderance of the evidence shows that users are, or are likely to be, adversely affected in their ability to make a noninfringing use.”).