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UNITED STATES COPYRIGHT OFFICE

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

Please submit a separate comment for each proposed class.

NOTE: This form must be used in all three rounds of comments by all commenters not submitting short-form comments directly through Regulations.gov, whether the commenter is supporting, opposing, or merely providing pertinent information about a proposed exemption.

When commenting on a proposed expansion to an existing exemption, you should focus your comments only on those issues relevant to the proposed expansion.

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

Commenters can provide relevant multimedia evidence to support their arguments. Please note that such evidence must be separately submitted in conformity with the Office's instructions for submitting multimedia evidence, available on the Copyright Office website at copyright.gov/1201/2024.

ITEM A. COMMENTER INFORMATION

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ITEM B. PROPOSED CLASS ADDRESSED

Class 5: Computer Programs – Repair

ITEM C. OVERVIEW

Proponents have requested to dramatically expand the already broad Class 5 DMCA exemption for consumer devices to now also cover all industrial and commercial equipment. An exemption covering such a multitude of systems would insulate infringing conduct the DMCA was enacted to prohibit and should be rejected for at least the following reasons. First, the proposed class broadly covering industrial and commercial equipment would arguably include medical devices, which are already covered by a separate exemption that is currently subject to a legal challenge. Second, the Register cannot appropriately apply the highly contextualized, fact-specific fair use test to the vast number of systems and copyrighted works that could fall within the expansive proposed class. Finally, because users of commercial and industrial equipment are commercial actors and circumventions of technological measures on such equipment is therefore likely to be an infringing use, the proposed class is dissimilar to the existing class of users of consumer devices and would sweep illegal conduct into the safety net created by the proposed expanded exemption. Accordingly, Philips hereby opposes the petitions to expand the existing Class 5 DMCA exemption for consumer devices. Should the Librarian further consider such a vast expansion of the consumer device class to also cover industrial and commercial equipment, Philips requests that the Librarian add clarifying language expressly stating that the proposed expansion does not cover medical devices.

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

Philips North America, LLC ("Philips") is a well-known leader in the business of developing, manufacturing, selling, supporting, maintaining, and servicing medical imaging systems. Philips' proprietary software enables certain functions on these systems that can be modified only by Philips, thereby allowing Philips to control, update, and track the use of its medical device software in the marketplace in accordance with FDA guidance. Philips' high-quality products and proprietary software have made Philips a trusted producer, manufacturer, and supplier of medical imaging systems worldwide.

Philips includes access controls on its medical imaging systems to protect its copyright-protected software and to restrict access to its software to authorized personnel. This includes software designed for use by Philips engineers to diagnose and service the systems. Its proprietary Philips' Integrated Security Tool is a suite of applications designed to secure Philips' Customer Service Intellectual Property—including Philips' copyrighted documents, service software, and other proprietary information created for the purpose of servicing Philips' products—from unauthorized access or use.

Through use of its Integrated Security Tool and account entitlements, Philips provides access to many software service tools on its medical devices upon request to individuals in the United States, including employees of independent service organizations. However, Philips has also learned of several individuals and service organizations who have acquired methods to bypass Philips' security measures and make unlicensed use of the copyrighted software service tools developed by Philips. Those individuals and independent service organizations have used Philips' software service tools for their original, intended purpose without modification; therefore their use was non-transformative. Those individuals and service organizations are the only entities known to Philips to have exploited mechanisms to bypass Philips' security measures, and Philips is not aware of instances of its security measures being bypassed for any purpose other than to use Philips' proprietary software for its intended purpose without modification. Further, their unlicensed use of Philips' software service tools has been to sell commercial services that compete against Philips.

ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGING USES

I. The Expanded Exemption Should Be Denied.

A. The Expansive Scope of the Proposed Class Could Arguably Include Medical Devices.

Proponents' comment in support of their petition calls for significant expansion of the Class 5 exemption to now include "physical devices, controlled by copyrighted software, that are designed for use in commercial or industrial settings."[1] Indeed, Proponents themselves acknowledge the "unusually broad nature of the proposed class."[2] Despite Proponents' assurances to the contrary,[3] the breadth of the proposed class could arguably encompass medical devices like those Philips manufactures because those devices are, as Proponents put it, "designed for, marketed at, sold to, and utilized by commercial actors."[4] After the initial sale, medical devices are then serviced by manufacturers or independent service organizations for additional commercial benefit. Thus, medical devices could arguably fall within the proposed class as commercial equipment.

Expanding the Class 5 exemption to a proposed class that potentially includes medical devices is unnecessary and would cause confusion in the industry because medical devices are the subject of an existing DMCA exemption.[5] Philips and others opposed enactment and renewal of that exemption, arguing that the proposed exemption was for infringing, commercial purposes and

[1] Public Knowledge and iFixit Comment at 9.

[2] *Id*. at 7.

[3] *Id*. at 9 ("Devices designed or marketed for medical…use should remain outside the scope of this class.").

[4] *Id*.

[5] 86 Fed. Reg. at 59,627; 37 C.F.R. § 201.40(b)(15).

not fair use and would cause risks to patient safety, among other reasons.[6,7] While the Librarian ultimately overruled Philips' objections and the Copyright Office indicated its intent to renew the exemption, two industry groups sued the Librarian over enactment of the medical devices exemption, and that lawsuit is currently on appeal before the U.S. Court of Appeals for the District of Columbia Circuit.[8] Accordingly, the proposed expansion of the Class 5 exemption should be rejected, or, at least, narrowed to expressly exclude medical devices.

B. The Register Cannot Engage in the Requisite Fair Use Analysis for a Class as Vast and Varied as the Proposed Class.

As the Copyright Office has instructed, exemptions should only be granted where the evidence shows that it is "more likely than not that users of a copyrighted work will, in the succeeding three-year period, be adversely affected by the prohibition on circumvention in their ability to make noninfringing ***uses*** of a particular class of copyrighted works."[9] To establish a case for an exemption, "proponents must show at a minimum (1) that uses affected by the prohibition on circumvention are or are likely to be noninfringing; and (2) that as a result of a technological measure controlling access to a copyrighted work, the prohibition is causing, or in the next three years is likely to cause, an adverse impact on those uses."[10] More particularly, "[i]t is not enough that a particular use could be noninfringing. Rather, the Register will assess whether the use is likely to be noninfringing based on current law."[11] "There is no 'rule of doubt' favoring an exemption when it is unclear that a particular use is noninfringing."[12]

In determining whether the use of a copyrighted work is likely to be a noninfringing "fair use" under 17 U.S.C. § 1201, the Register considers: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

As the U.S. Supreme Court has stated, both the historical background of fair use and modern precedent "make[] clear that the concept [of fair use] is flexible, that courts must apply it

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[6] *See* Long Comment Regarding a Proposed Exemption Under 17 U.S.C. § 1201 by Philips North America, LLC (Feb. 8, 2021), available at https://www.copyright.gov/1201/2021/comments/opposition/Class_12_Opp'n_Philips%20North%20America.pdf.

[7] *See* Comments Regarding Petitions to Renew DMCA Exemption Relating To Medical Devices by Philips North America, LLC (Aug. 11, 2023), available at https://www.copyright.gov/1201/2024/petitions/renewal/Opp-Medical-Devices-Philips-North-America-LLC.pdf.

[8] *Medical Imaging & Technology Alliance, et al. v. Library of Congress, et al.*, No. 23-5067 (D.C. Cir.).

[9] U.S. Copyright Office, Section 1201 of Title 17 at 112 (June 2017), https://www.copyright.gov/policy/1201/section-1201-full-report.pdf.

[10] Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 83 Fed. Reg. at 54,011.

[11] U.S. Copyright Office, "The Triennial Rulemaking Process for Section 1201," at 6, https://cdn.loc.gov/copyright/1201/1201_rulemaking_slides.pdf.

[12] *Id*.

in light of the sometimes conflicting aims of copyright law, and that its applications may well vary depending upon context." *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1197 (2021). In other words, "the fair use analysis is highly fact-specific and must be performed on a work-by-work basis." *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1261 (11th Cir. 2014); *see also Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 51 (2d Cir. 2021) ("[D]eterminations of fair use are highly contextual and fact specific, and are not easily reduced to rigid rules."). Indeed, courts often deny class certification in cases where fair use defenses are at issue given the context-specific inquiry required of those defenses. *See, e.g.*, *FPX, LLC v. Google, Inc.*, 276 F.R.D. 543, 551 (E.D. Tex. 2011) (denying plaintiffs' request for class certification "because of the fact-specific inquiries the court would have to evaluate to address [defendants'] affirmative defenses [including fair use]").

Here, the Register cannot possibly engage in the requisite fact-intensive fair use analysis for the myriad products and uses that fall within the proposed class. Indeed, Proponents' comment effectively acknowledges the futility of engaging in a fair use analysis for this proposed class. For example, Proponents admit that the cost of downtime for equipment in the proposed class, offered as justification for hacking of security measures on commercial and industrial devices, "varies by device and industry" and "ranges from hundreds to millions of dollars per day."[13] Further, any infringement or fair use analysis must focus on the copyrighted work itself, as opposed to simply the device or industry, because a use of a copyrighted work for its intended purpose would be non-transformative independent of the industry or justification for hacking of security measures. Thus, contrary to Proponents' assertions, systems in the proposed class are not even similarly situated among themselves, let alone among the existing class of consumer devices. That is why courts postpone resolution of class certification, which also requires that class members be similarly situated, until fair use defenses are resolved. *See FPX, LLC*, 276 F.R.D. at 551 (E.D. Tex. 2011); *see also Authors Guild, Inc. v. Google Inc.*, 721 F.3d 132, 134 (2d Cir. 2013) ("resolution of Google's fair use defense in the first instance will necessarily inform and perhaps moot our analysis of many class certification issues, including those regarding the commonality of plaintiffs' injuries, the typicality of their claims, and the predominance of common questions of law or fact").

Because the breadth of the proposed class effectively bars the Register from engaging in fair use analysis, the Librarian should deny Proponents' request for expansion of the Class 5 exemption.

C. The Proposed Class Is Overbroad Because It Includes Infringing Uses.

Should the Register proceed to fair use analysis, such analysis will show that users of commercial and industrial systems are not similarly situated to the users of consumer products. While consumer product users may circumvent access controls for non-commercial reasons, users of commercial and industrial systems would circumvent access controls for commercial motivations. Further, the proposed class would cover non-transformative use of copyrighted software after circumvention: namely, use of the software for its intended purpose of servicing or repairing commercial and industrial systems. Accordingly, the proposed class is overbroad because it sweeps within its protection infringing uses that the DMCA was created to prohibit.

[13] Public Knowledge and iFixit Comment at 8.

In *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258 (2023), the U.S. Supreme Court clarified that commercial use of a copyrighted work for the same purpose as the original work weighs against a finding of fair use. There, the Court held that the "purpose and character" factor of the fair use test focuses on "whether an allegedly infringing use has a further purpose or different character, which is a matter of degree, and the degree of difference must be weighed against other considerations, like commercialism."[14] The Court further clarified that "[i]f an original work and a secondary use share the same or highly similar purposes, and the secondary use is of a commercial nature, the first factor is likely to weigh against fair use, absent some other justification for copying."[15] The Court ultimately found that the use at issue was infringing, emphasizing that the "commercial nature of the use, on the other hand, looms larger."[16] District courts have followed *Warhol* and emphasized commerciality in considering fair use.[17]

Here, like *Warhol*, the non-transformative and commercial character of circumventions for the repair of commercial and industrial equipment, and specifically for medical devices, both "point in the same direction."[18] As to transformation, the commercial actors that service Philips' medical imaging systems, for example, do not transform Philips' copyrighted material. In comments in support of the medical device exemption, one service provider expressly disclaimed transformative use, explaining in its petition that "[m]odifying the software would likely lead to the system being considered remanufactured, which is not the purpose of diagnose, repair, or maintenance. Indeed, remanufacturing is to be avoided."[19] *Warhol* clarified that this falls far outside the bounds of fair use.

As to commercialism, servicers of commercial and industrial equipment are commercial entities that stand to profit from their unlicensed use of copyrighted software. Indeed, in litigation Philips brought against an independent service organization, evidence at trial established that the defendant bypassed the security measures on Philips' imaging systems for commercial use of Philips' proprietary software and the jury found that the defendant made millions of dollars from its illegal access to Philips' copyrighted materials.[20] Pure commercial use of such software for its intended purpose is not fair use.

Supreme Court precedent thus confirms that non-transformative, commercial use of copyrighted software on commercial and industrial equipment cannot constitute fair use. The Librarian should follow the Supreme Court's holding in *Warhol* emphasizing that such commercial

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[14] 143 S. Ct. at 1273.

[15] *Id*. at 1277.

[16] *Id*. at 1285.

[17] *See, e.g.*, *Oracle Int'l Corp. v. Rimini St., Inc.*, 2023 U.S. Dist. LEXIS 126766, at *259 (D. Nev. July 24, 2023) (holding that fair use did not apply where defendant's copying of software "was for a commercial purpose" "to save significant time, money, and effort").

[18] 143 S. Ct. at 1280.

[19] Avante Health Solutions, Avante Diagnostic Imaging, Avante Ultrasound Medical Device Repair Renewal Pet. at 8.

[20] Dkt. 776 at 4, *Philips Med Sys. Nederland B.V. v. TEC Holdings, Inc.*, No. 3:20-cv-00021-MOC-DCK (April 28, 2023 W.D.N.C.).

uses are not fair and decline to expand the Class 5 exemption to cover such plainly commercial uses.

II. CONCLUSION

Enactment of Proponents' expansive proposed class would shield for-profit, commercial entities from liability for engaging in conduct that the DMCA was explicitly created to prohibit. The proposed class arguably encompasses medical devices that are already subject to a separate exemption that is subject to a legal challenge, and is so broad as to frustrate the Register's ability to conduct the required fair use analysis. As the Librarian has recognized, exemptions should not be enacted for "those who use it as an excuse to violate other laws and regulations."[21] Accordingly, Philips respectfully urges the Librarian to decline the expanded Class 5 exemption.

[21] 2021 Recommendation at 218, citing U.S. COPYRIGHT OFFICE, SECTION 1201 OF TITLE 17: A REPORT OF THE REGISTER OF COPYRIGHTS at 126 (2017).