

May 28, 2024

Steven R. Englund  
Tel +1 202 639 6006  
SEnglund@jenner.com

By Email Only

Ms. Suzy Wilson, General Counsel  
svwilson@copyright.gov  
Mr. Nick Bartelt, Assistant General Counsel  
niba@copyright.gov  
U.S. Copyright Office  
101 Independence Avenue SE  
Washington, DC 20559-6000

Re: Docket No. 2023-5 (Exemptions to Prohibition Against Circumvention) – Class 5

Dear Ms. Wilson and Mr. Bartelt:

I write on behalf of the Entertainment Software Association, Motion Picture Association and Recording Industry Association of America (“Joint Creators”) in response to your letter of May 20, 2024 with questions following up on the hearing related to Proposed Class 5 (Computer Programs – Repair) as part of the Copyright Office’s Section 1201 rulemaking proceeding.

As your letter indicates, the Class 5 proponents focused their written comments and hearing testimony significantly on Taylor soft serve ice cream machines (“Taylor machines”) to the exclusion of any other equipment used in commercial food preparation, and indeed, most other industrial and commercial equipment. Even with respect to Taylor machines, the record in this proceeding is quite thin as compared to the records the Register has relied upon in the past to recommend exemptions from the Copyright Act’s prohibition on circumvention of access controls. The proponents devote less than two pages of their initial comments to discussion of Taylor machines, and that discussion relies primarily on two articles the proponents found online.<sup>1</sup> Their reply comments contain no additional factual information. Yet, when Mr. Bartelt asked about Taylor machines at the Class 5 hearing, Ms. Rose pointed to the proponents’ written comments for “pretty significant detail.”<sup>2</sup>

The proponents’ primary complaint seems to be that Taylor machines require frequent maintenance and are often out of service.<sup>3</sup> More relevant to this proceeding, they say that Taylor machines have an on-device service menu to which access is locked with some kind of technological protection measure

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<sup>1</sup> See Public Knowledge & iFixit Class 5 Comment at 3-4, 11 (Dec. 22, 2023) (“Proponents’ Initial Comments”).

<sup>2</sup> Class 5 Hearing Transcript at 20:11-14; see also *id.* at 21:2-3 (“laid out pretty extensively in our comments”).

<sup>3</sup> See, e.g., *id.* at 8:24-9:5 (“we just really like ice cream and so, right now, six percent of [Taylor] ice cream machines in Washington, D.C., are not working and that feels problematic”).

("TPM").<sup>4</sup> However, they never explain what that TPM is, how it protects the service menu, or why circumvention of the alleged access control on the service menu is necessary to engage in the kinds of activities that Mr. Wiens said he would like to engage in – tinkering with a machine, reverse engineering it, re-enabling diagnostic screens, or creating a separate management interface.<sup>5</sup> It certainly isn't obvious that doing those things requires access to the assertedly-protected service menu or circumvention of TPMs to obtain necessary access.

The proponents do not even establish that circumvention is necessary to decode Taylor machines' allegedly unintuitive error codes, since Taylor has authorized a third-party device called Kytch to perform that function.<sup>6</sup> And while Mr. Wiens said that Kytch is off the market due to unrelated litigation,<sup>7</sup> it is still being marketed online as of the date of this letter.<sup>8</sup> Thus, and for example, Taylor machines may be similarly situated to supervisory control and data acquisition (SCADA) systems for which the Register recommended against an exemption in 2021 in part because "users had adequate alternatives to circumvention."<sup>9</sup>

In view of the foregoing, the Joint Creators do not believe that the proponents have met the Office's longstanding standards for recommending an exemption to enable circumvention of the TPM allegedly controlling access to the on-device service menu of a Taylor machine. Much less have the proponents provided a record permitting the Office to extrapolate from Taylor soft serve ice cream machines to other commercial food preparation equipment or, even further afield, to all industrial and commercial equipment.

As your letter notes, Proponents' Initial Comments passingly mention that Taylor also sells grills, frozen drink machines, and batch freezers (among other things).<sup>10</sup> But Taylor's line of products does not represent the full range of commercial food preparation equipment. Commercial kitchens use a wide variety of other equipment, including ranges, ovens, broilers, fryers, toasters, smokers, tilt pans and steam cooking equipment from numerous manufacturers.<sup>11</sup> Commercial food preparation also occurs in factory settings, where very different industrial-scale equipment is used, including automated equipment for food handling, portioning, continuous cooking and chilling, pasteurization and packaging that are purchased by sophisticated customers and sometimes customized to particular applications.<sup>12</sup> The

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<sup>4</sup> Proponents' Initial Comments at 3.

<sup>5</sup> Class 5 Hearing Transcript at 22:19-24.

<sup>6</sup> *Id.* at 22:2-6.

<sup>7</sup> *Id.* at 24:15-19.

<sup>8</sup> See <https://kytch.com/landing>.

<sup>9</sup> 2021 Register's Recommendation at 197 & n.1083.

<sup>10</sup> Proponents' Initial Comments at 3.

<sup>11</sup> See, e.g., <https://www.restaurantsupply.com/commercial-cooking-equipment>; <https://www.webstaurantstore.com/cooking-equipment.html>; <https://www.katom.com/cat/cooking-equipment.html>.

<sup>12</sup> See, e.g., <https://www.heatandcontrol.com/products>; <https://www.provisur.com/en/equipment/>; <https://marlen.com/food-processing-equipment/>; <https://www.americanfoodtech.com/products>.

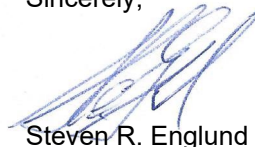
proponents have not made any showing that the Taylor soft serve ice cream machines, with their alleged maintenance issues and locked on-device service menu, are comparable to each of the devices in this wide range of commercial food preparation equipment, or for that matter that those devices are comparable to one another.

To adopt an exemption, the Librarian is required by statute to find that users “are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition . . . in their ability to make noninfringing uses.”<sup>13</sup> The Office has consistently interpreted that statutory language to require actual evidence of adverse effects. When that evidence has been sparse, the Register has not recommended exemptions.<sup>14</sup> Applying those standards to the current record, with no evidence suggesting that Taylor machines are similar to other equipment used in commercial kitchens and food-processing facilities in terms of the role of software in controlling such machines, TPMs that might affect access to such software, license terms and effects of the prohibition on circumvention, requires limiting any exemption to Taylor soft serve ice cream machines, if that.

The Joint Creators do agree with the proponents about one thing – the proposed class is “unusually broad.”<sup>15</sup> As most directly relevant to the Joint Creators, the proposed class includes industrial and commercial equipment processing creative works, such as arcade game machines, motion picture projection equipment, and systems for transmitting music and motion pictures, where the proposed circumvention could potentially expose creative works to unauthorized use.<sup>16</sup> The proposed class also includes things like computer networking and avionics equipment and systems controlling critical infrastructure like the internet, electrical grid, power plants and water purification systems.<sup>17</sup> The proponents have made no showing of commonalities between Taylor soft serve ice cream machines and any of that other industrial and commercial equipment that would justify an exemption of such breadth.<sup>18</sup>

Accordingly, the Joint Creators continue to believe that the Register should recommend denial of the proposed Class 5 exemption.

Sincerely,



Steven R. Englund

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<sup>13</sup> 17 U.S.C. § 1201(a)(1)(C).

<sup>14</sup> See 2021 Register’s Recommendation at 197-98; 2018 Register’s Recommendation at 191-94.

<sup>15</sup> Proponents’ Initial Comments at 7.

<sup>16</sup> Class 5 Hearing Transcript at 11:12-18.

<sup>17</sup> *Id.* at 11:20-12:8.

<sup>18</sup> See 2021 Register’s Recommendation at 197-98.