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VIA E-MAIL ONLY

Robert Kasunic
Principal Legal Advisor
Office of General Counsel
U.S. Copyright Office
101 Independence Ave., S.E.
Washington, D.C. 20240

Re: Questions Relating to Authentication Servers

Dear Mr. Kasunic,

The Joint Creators and Copyright Owners[1] appreciate this opportunity to respond to the questions posed in your letter dated June 22, 2009 regarding proposed Exemption 10B.

The questions portion of your letter begins by instructing us to "[a]ssume that [the Register] will conclude that a case has been made for proposed Exemption 10B ..." Although we appreciate that, "[d]espite the nature of some of the questions, no final decision has yet been made on any issue[,]" we cannot accept this invitation to assume that the Register will recommend that the Librarian violate his statutory duty by recognizing Exemption 10B, either in its original form, or as modified in the manner your questions suggest.

It was clear in Mr. Soghoian's written submissions, and it became even more clear in the hearing, on May 6, 2009, that proposed exemption 10B is motivated, not by research interests, but by a desire to make circumvention tools and share them with third parties. As he stated on May 6:

> They are not – you know, very, very few people have this capacity, which is sort of leading me into ***my researcher exemption, which***

[1] This letter is filed on behalf of the Association of American Publishers ("AAP"), American Society of Media Photographers ("ASMP"), Alliance of Visual Artists ("AVA"), Business Software Alliance ("BSA"), the Entertainment Software Association ("ESA"), Motion Picture Association of America ("MPAA"), the Picture Archive Council of America ("PACA"), and Recording Industry Association of America ("RIAA").

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> ***is that we need to provide the ability for researchers to collect the information necessary to make these tools.*** And, you know, the DRM that surrounds these authentication server-based systems is unique, in that once it gets turned off, the information necessary to circumvent the DRM disappears, all right? So, once Apple turns off their servers, ***researchers lose the information necessary to tell people how to circumvent the DRM,*** right?

May 6, 2009 Transcript at pages 0017-0018 (statement of Mr. Soghoian) (emphasis added).

In effect, Mr. Soghoian, seeks an exemption to the prohibitions of 17 U.S.C. § 1201(a)(2). But such a result is outside the scope of this proceeding, which can only establish exemptions to 17 U.S.C. § 1201(a)(1). As the Register has repeatedly acknowledged, the Librarian does not have the power to grant an exemption such as the one Mr. Soghoian seeks in proposal 10B.[2]

It is evident from the statute that making circumvention tools for access controls, and providing others with the service of instructing them on how to use these tools, directly implicate section 1201(a)(2). Wherever the statute authorizes researchers to make or to make available to third parties the means to circumvent access controls, it generally does so in the context of an explicit exemption to section 1201(a)(2). *See, e.g.*, 17 U.S.C.§§ 1201(f)(2) ("Notwithstanding the provisions of section (a)(2) ... a person may develop ... technological means to circumvent a technological measure" under stated circumstances); 1201(g)(4)(A) and (B) ("Notwithstanding the provisions of subsection (a)(2), it is not a violation of that subsection for a person to .... develop and employ technological means to circumvent a technological measure... [or] provide the technological means to another person" under stated circumstances); 1201(j)(4) ("Notwithstanding the provisions of subsection (a)(2), it is not a violation of that subsection for a person to develop, produce, [or] distribute .. technological means..." under stated circumstances). This authorization, rather than simply an exemption from section 1201(a)(1)(A), is indisputably what Mr. Soghoian is seeking in proposal 10B.

The language floated in the Copyright Office question simply makes explicit what the exemption language crafted by the proponent is more coy about. The Office's text purports to spell out the circumstances under which a beneficiary of the proposed exemption would be able to "provide access to works protected by the technological measures" that the beneficiary has circumvented. This describes a circumvention service and a prima facie violation of section 1201(a)(2). The Librarian has no power to immunize such a violation, and the Register lacks any authority to recommend it. Indeed, Congress has decided that an exemption granted in this proceeding cannot even be offered as a defense in an action for violation of section 1201(a)(2). *See* 17 USC 1201(a)(1)(E).

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[2] *See* 73 Fed. Reg. 58,073, 58,074 (Oct. 6, 2008) ("The Librarian of Congress has no authority to limit either of the anti–trafficking provisions contained in subsections 1201(a)(2) or 1201(b).").

At another point in the hearings, it was suggested that if an action otherwise violated both sections 1201(a)(1)(A) and 1201(a)(2), it might be possible for the Register to recommend, and for the Librarian to recognize, an administrative exemption under the first statute, while leaving undisturbed liability for the second.[3] This approach strikes us as extraordinarily inappropriate and unwise. Congress could hardly have intended for the Librarian to grant administrative exemptions for activities which invariably are prima facie violations of other federal laws.

We thus must respectfully decline to offer "appropriate ways to properly tailor the scope of the exemption," since the exemption itself is beyond the scope of this proceeding.

The attempt to construct an exemption in this context itself illustrates the reasons why Congress decided not to allow such exemptions in this proceeding. This is particularly true in the typical situation in which the authentication server is operated, not by the copyright owner itself, but by a third party who is licensed to distribute content in this way. The exemption would penalize a copyright owner for a service's failure to continue operating (or to provide refunds).

Furthermore, the Office's language would be completely unworkable. It is not clear how a provider of circumvention tools under the exemption would be able to determine to whom access has been provided prior to the failure of the service, or on what terms. The provider of tools under the exemption would not be limited to providing unauthorized access at the same level at which authorized access had been provided. There would be no mechanism for evaluating whether any of the listed conditions precedent to creating tools had been satisfied. In practical terms, there would be no way to challenge abuse of the exemption until after a circumvention tool had been widely circulated in the marketplace. Clearly any such exemption would threaten to eviscerate all the protections for access controls envisaged by Congress.

Finally, we take this opportunity to highlight two points that arose during the hearings and to expand upon others relevant to either exemption 10A or 10B.

First, Mr. Soghoian clearly conceded that his exemption proposal should not apply to any class of works that includes anything other than copies of works that are lawfully owned by consumers. He specifically disclaimed any intention to cover streaming services or subscription arrangements.[4] Nothing in your question appears to recognize that even the proponent of the exemption has conceded this point.

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[3] *See* May 8, 2009 Transcript at pages 0146-0147 (statement of Mr. Carson) ("So let's just assume that we're persuaded by them, we know we can't do anything about 1201(a)(2), but we're persuaded they've made their case on 1201(a)(1). Isn't there something to be said for granting that exemption, knowing that we're at least removing one independent basis for liability for them, even though we can't do anything for them under 1201(a)(2)?").

[4] *See* May 6, 2009 Transcript at page 0049 (statement of Mr. Soghoian):

(...continued)

Second, we reject the view, which is implicit in proposed Exemptions 10A and 10B and appears to underlie your questions, that copyright owners and their licensees are required to provide consumers with perpetual access to creative works. No other product or service providers are held to such lofty standards. No one expects computers or other electronic devices to work properly in perpetuity, and there is no reason that any particular mode of distributing copyrighted works should be required to do so. To recognize the proposed exemption would surely discourage any content provider from entering the marketplace for online distribution or offering consumers the convenience of online authentication of disc-based content unless it was committed to do so – or to guarantee the ability of a third -party service to do so – forever. This would not be good for consumers, who would find a marketplace with less innovation and fewer choices and options. Any argument that such barriers to entry are needed to protect consumers in some way is more appropriately addressed to the Federal Trade Commission, rather than to the Register and the Librarian in this proceeding.

The proposed exemptions would also appear to encompass testing by researchers on live servers currently in use to deliver copyrighted works. There has been no showing why this is required, and why any legitimate research needs could not be met in a laboratory setting instead of by hacking into commercial systems that are being used to serve legal content to consumers. Ironically, allowing such hacking into operating commercial servers may well lead to disruption of a service's ability to deliver works to consumers – hence exacerbating the very problem the proponents say they seek to prevent.

Finally, although proponents base their arguments almost entirely on what they fear may occur in the future (since the problems they hypothesize have been fully dealt with thus far without resort to circumvention), in fact the need for any exemption like proposals 10A or 10B is likely to lessen, not increase, as time passes. Rightsholders are already announcing various programs that demonstrate their intent to help consumers reap the value of their investments in copyrighted works and to deal with unexpected changes in technology. For example, Warner Bros. recently announced an offer to help consumers switch from the moribund HD DVD format to Blu-ray (trade in the cover art and $5 and get a Blu-ray disc version in addition). Various

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(...continued)

> [W]e are only talking about works that people paid for; where they buy works. I don't know that cable TV sells content. They provide content; you know, you pay a monthly fee to Comcast, but Comcast doesn't sell you any works. And so, as we have said, we don't care about rentals; we don't care about leases; you know, we don't care about streaming services; we only care about services where people pay for the works. If the service is being advertised, as in buy this song, or buy this movie, we care. If they say, rent this song, or rent the movie for three days, turn the services off; we don't care; that's not our concern. So, I don't see why the cable TV example is valid at all. We don't care about rentals; we don't care about leases; you know, we don't care about streaming services; we only care about services where people pay for the works.

industry groups, including the Digital Entertainment Content Ecosystem ("DECE"), are also working to promote best practices and otherwise to improve interoperability. The DECE aims to enable consumers to create "rights lockers" that will enable persons who purchase access to works to access those works at a time and place of the consumers' choosing.[5]

For these reasons, as well as those spelled out in our previous written submission at pages 58-64, and in testimony at the hearing on May 6, 2009, we strongly urge you to reject proposed Exemptions 10A and 10B in their entirety. Indeed, we respectfully suggest that the statute compels you to do so.

Respectfully submitted,

Steven J. Metalitz
of
MITCHELL SILBERBERG & KNUPP LLP

cc: J. Matthew Williams
Joint Creators and Copyright Owners

[5] *See* Cliff Edwards, *Digital Content Whenever You Want It*, Bus. Wk., Sept. 15, 2008, *available at* http://www.businessweek.com/technology/content/sep2008/tc20080912_471690.htm?chan=top+news_top+news+index+-+temp_news+%2B+analysis.