MITCHELL SILBERBERG & KNUPP LLP
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MS&K

Steven J. Metalitz
Partner
(202) 355-7902 Phone
(202) 355-7892 Fax
met@msk.com

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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 Security Flaws**

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 Exemptions 8A and 8B.

You asked:

> If an exemption were crafted to allow testing of technological protection measures that protect access to copyrighted works in order to determine whether such measures created security risks or vulnerabilities, would it be appropriate to limit the persons who would be eligible to invoke the exemption? Why? If you believe it would be appropriate to limit the persons eligible for the exemption, what criteria could be used?
>
> Are there any other appropriate ways to properly tailor the scope of the exemption?

[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").

As you know, the Joint Creators and Copyright Owners oppose the proposed security related exemptions in their entirety, for the reasons stated on pages 47-54 of the comments we previously filed, and elaborated on during the hearing on May 7, 2009. In addition, as discussed on pages 6-7 of our comments, we are concerned that the new interpretation of the statutory phrase "particular classes of works" that the Register and the Librarian announced in 2006 creates a substantial risk that impermissible administrative exemptions that are primarily defined by the type of use and/or user involved will be recognized. This concern is reinforced by your question, and we continue to believe that the interpretation of this phrase applied in the first two triennial rulemakings was more consistent with the plain language of the statute as well as legislative intent.

That said, if the Register nevertheless recommends an exemption to the Librarian, the exemption should be limited, in order to reduce the risk of abuse. Three such limitations were discussed at the May 7 hearing. First, the exemption should be limited to an identifiable category of credentialed qualified experts engaged in verifiable security research. Second, any exemption should apply only after a good faith effort has been made to obtain authorization for the activities requiring circumvention from the proprietor of the access control measure in question and from the copyright owner in the work to which the measure controls access. Third, conditions should be imposed on the ways in which information obtained as a result of the circumvention could be disseminated.

Congress has seen fit to impose similar limitations upon statutory exemptions to the section 1201(a)(1)(A) prohibition for purposes such as encryption research and security testing. *See, e.g.*, 17 U.S.C. §§ 1201(g)(2)(C) (requirement for good faith effort to obtain authorization); 1201(g)(3)(A) and (C) (means of dissemination of information as factor in determining eligibility for statutory exemption); 1201(j)(3) (same); 1201(g)(3)(B) (training and experience of circumventor as factor in determining eligibility for statutory exemption). While the model presented by these statutory provisions buttresses our view that these closely related statutory exemptions ought to foreclose recognition of the administrative exemption sought by the proponents of exemptions 8A and 8B (*see* our previously submitted comments at pages 9-11 & 53-54), if the Office decides to reject that view, it should at least recognize that these statutory provisions offer a useful starting point for crafting an appropriately narrow administrative exemption. We do not mean to suggest by this that any administrative exemption should be as broadly available as either of these statutory exemptions. To the contrary, since the record strongly suggests that if section 1201(a)(1)(A) imposes any "chilling effect" on legitimate research, that effect is largely limited to academic researchers,[2] perhaps the first limitation listed above (credentialing) should be limited to "college or university computer science professors who identify such research to their institutions in writing, before engaging in circumvention."

Any exemption recognized should also be narrowly tailored, as we described in section II(A)(1) and on pages 54 and 55 of our prior submission. Specifically, any exemption in this

[2] *See* May 7 Transcript at page 0187 (describing the chilling effect of the tenure process on security researchers).

area should be limited to where circumvention is "necessary" to accomplish verifiable security research, and where circumvention has no purpose, and no foreseeable effect, other than the noninfringing activity identified in the exemption (including in particular any circumstance in which circumvention would give the circumventor access to any work in excess of his or her rights under an applicable license).

Please let us know if you have any further questions.

Respectfully submitted,

Steven J. Metalitz
of
MITCHELL SILBERBERG & KNUPP LLP

cc: J. Matthew Williams
Joint Creators and Copyright Owners