

**Long Comment Regarding a Proposed Exemption
Under 17 U.S.C. 1201
(Proposed Class #4)**

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

Item 1. Commenter Information

This Comment is submitted on behalf of Entertainment Software Association; Motion Picture Association of America, Inc.; and Recording Industry Association of America (collectively the “Joint Creators and Copyright Owners”). The Joint Creators and Copyright Owners may be contacted through their counsel, Steven J. Metalitz, J. Matthew Williams and Naomi Straus, Mitchell Silberberg & Knupp LLP, 1818 N St., NW, 8th Fl., Washington, D.C., 20036, Telephone (202) 355-7900.

The Joint Creators and Copyright Owners are trade associations representing some of the most creative and innovative companies in the United States.

The Entertainment Software Association (“ESA”) represents all of the major platform providers and nearly all of the major video game publishers in the United States. ESA is the U.S. association exclusively dedicated to serving the business and public affairs needs of companies that publish computer and video games for video game consoles, handheld devices, personal computers, and the Internet. ESA offers a range of services to interactive entertainment software publishers, including but not limited to: a global content protection program; business and consumer research; government relations; and intellectual property protection efforts.

The Motion Picture Association of America, Inc. (“MPAA”) is the voice of one of the country’s strongest and most vibrant industries – the American motion picture, home video and television industry. MPAA works to advance the business and the art of filmmaking and to celebrate its enjoyment around the world. MPAA members include: Walt Disney Studios Motion Pictures; Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Twentieth Century Fox Film Corporation; Universal City Studios LLC; and Warner Bros. Entertainment Inc.

The Recording Industry Association of America (“RIAA”) is the trade organization that supports and promotes the creative and financial vitality of the major music companies. Its members comprise the most vibrant record industry in the world. RIAA members create, manufacture and/or distribute approximately 85% of all legitimate recorded music produced and sold in the United States. In support of its mission, the RIAA works to protect the intellectual property and First Amendment rights of artists and music labels; conduct consumer, industry and technical research; and monitor and review state and federal laws, regulations and policies.

Item 2. Proposed Class Addressed

Proposed Class 4: Audiovisual Works—Educational Uses—Educational Programs Operated By Museums, Libraries, Or Nonprofits.

The December 12, 2014 Notice of Proposed Rulemaking (“NPRM”) described this proposed class as allowing “educators and learners in libraries, museums and nonprofit organizations to circumvent access controls on lawfully made and acquired motion pictures and other audiovisual works for educational purposes.” 79 Fed. Reg. 73,856, 73,860 (Dec. 12, 2014). This requested exemption would be for “audiovisual material made available in all formats, including DVDs protected by the Content Scramble System (“CSS”), Blu-ray discs protected by the Advanced Access Content System (“AACS”), and TPM-protected online distribution services.” Proponents Renee Hobbs (Media Information Laboratory at University of Rhode Island), Library Copyright Alliance, Sherri Hope Culver, Philly CAM, Media Literacy Now, and The LAMP NYC (“Joint Nonprofits”) submitted the only long-form comment in support of this exemption. The Music Library Association submitted a short-form comment in support of the exemption.

Item 3. Overview

The Joint Creators and Copyright Owners oppose this proposed exemption. As proposed, it is a sweeping exemption that would allow for circumvention by millions of people for any “educational purpose.” The proponents have not even addressed the questions presented in the NPRM regarding possible definitions or limitations that could tailor the scope of the exemption. *See* NPRM at 73,861. Nor have they provided any concrete examples of noninfringing uses or adverse effects caused by the TPMs at issue. “It is not sufficient to demonstrate that a use could conceivably be noninfringing, or that the absence of an exemption could result in an adverse impact.” Recommendation of the Register of Copyrights, Section 1201 Rulemaking: Fifth Triennial Proceeding, at 6 (Oct. 12, 2012) (“2012 Recommendation”).

The main focus of this proceeding, bearing in mind the benefits of access controls, is to identify any particular class of works for which the prohibition on circumventing access controls has diminished in a substantial manner the ability to make noninfringing uses. Proponents of each exemption bear the burden of demonstrating such diminution for a defined class, and showing that it outweighs the need for continuing the prohibitions set forth by the statute. *See* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies; Notice of Inquiry and Request for Petitions, 79 Fed. Reg. 55,687, 55,689 (Sept. 17, 2014) (“2014 NOI”).¹ The proponents have entirely failed to satisfy their burden to show that this broad and ill-defined exemption is warranted.

¹ The burden of coming forward with evidence in support of the proposed exemption, as well as the burden of persuasion that the exemption should be recognized on the narrow grounds authorized by the statute, must always remain with the proponent of an exemption. 2014 NOI at 55,689. This burden applies to both factual and legal issues. It also applies without regard to

Item 4. Technological Protection Measure(s) and Method(s) of Circumvention

The CSS technology used to protect DVDs, the AACS technology used to protect Blu-ray Discs, and many of the assorted technologies used to protect motion pictures available from online distribution and streaming services are TPMs that effectively control access to copyrighted works.

As discussed further below, these access controls have increased the availability of works and have allowed for a vast proliferation of platforms on which consumers can enjoy authorized access to an increasing variety of content. It is easier than ever to access a broad selection of films and television shows, and on many different devices. The confidence afforded by the security of TPMs, and the flexibility in business models that such TPMs enable, are essential marketplace pillars which have led creators of motion pictures to expand their streaming and downloading options and to experiment with a broad range of business models to increase access to their works, such that some films can now be purchased and digitally downloaded before they are made available on physical discs.

Item 5. Asserted Noninfringing Use(s)

It is the proponents' burden to show that the access controls sought to be circumvented are prohibiting noninfringing uses. 2014 NOI at 55,690 (“[T]here is no ‘rule of doubt’ favoring an exemption when it is unclear that a particular use is a fair use.”). However, the Joint Nonprofits provide no specific and clear examples of any particular uses that they wish to make of audiovisual works. Instead, they provide brief and vague descriptions of some projects operated by “youth media educators” without identifying any actual uses of audiovisual works protected by access controls. Joint Nonprofits’ Class 4 Comment at 4.² Not all uses of audiovisual works for educational purposes are necessarily noninfringing. Without more details from the proponents, it is impossible to evaluate whether the uses they wish to enable are substantially noninfringing.³ The proponents’ comments are devoid of “detailed evidence of actual noninfringing uses that are precluded by the TPM,” and provide only insufficient, “conclusory declarations.” See NPRM at 73,857 (setting forth guidelines for written comments).

The Copyright Office, in the NPRM, asked commenters to address “who would be entitled to use the exemption,” including who would be the category of “educators” and

how closely (or not) a proposed exemption resembles one granted in the previous rulemaking cycle.

² Also, the Joint Nonprofits claim that their submission for proposed class 2 is relevant to class 4. *Id.* at 2. However, the examples provided in the comments regarding proposed class 2 were all in formal classroom settings, and thus not applicable to this proposed class, which is specifically for educational purposes outside of the classroom.

³ See *Princeton Univ. Press v. Mich. Document Servs.*, 99 F.3d 1381, 1385 (6th Cir. 1996) (“[W]hether a use referred to in the first sentence of Section 107 is a fair use in a particular case . . . depends upon the application of the determinative factors.”).

“learners.” The proponents’ comments do not address this or provide any definition of “educators” or “learners.” “Learners,” without further limitation, would potentially include anyone who believed him or herself to be learning or developing a skill. In addition to these vague categories, which proponents have not defined, the inclusion of “non-profit organizations” opens up this proposed exemption to a number of organizations that may have no connection to education. It is not the case that all non-profit organizations have educational missions.⁴ The term “educational purposes” is likewise completely undefined and overly broad, as this proposed exemption is not limited even to “criticism and commentary,” as in the existing educational exemptions.⁵ Nor is it limited to the use of short portions of motion pictures, as the current exemptions are.⁶

The proponents also failed to address any of the other possible limitations proffered by the Copyright Office, including: “[i] whether the exemption can be limited to video production, film, and media studies and/or other close analysis of copyrighted works, [ii] whether it can be limited to lower-resolution media, ... [iii] whether the exemption can be limited to prepared presentations by museums, libraries and non-profit entities, and [iv] whether the exemption can be limited to use and display within physical spaces as opposed to online use and display.” NPRM at 73,861. Any exemption adopted “must be defined based on a ‘*particular class* of works, which is supposed to be a ‘*narrow and focused subset* of the broad categories of [copyrighted] works.’”⁷ Instead of providing any narrowing or particularity, the proponents of this proposed exemption essentially request that the Copyright Office grant a limitless exemption

⁴ A variety of organizational types are described as non-profit institutions in the U.S. Code. Qualifying organizations include, among others: non-profit corporations with missions that are “religious, charitable, scientific, testing for public safety, literary, or educational ... , or to foster national or international amateur sports competition ... or for the prevention of cruelty to children or animals[;]” (26 U.S.C. § 501(c)(3)) organizations constituting “[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees ... [;]” (26 U.S.C. § 501(c)(4)) “[b]usiness leagues, chambers of commerce, real-estate boards, boards of trade, or professional football leagues ... [;]” (26 U.S.C. § 501(c)(6)) and “[c]lubs organized for pleasure, recreation, and other non-profitable purposes ...” (26 U.S.C. § 510(c)(7)). According to the National Center for Charitable Statistics, there are over 1.5 million registered non-profit organizations in the United States. See Quick Facts About Nonprofits, National Center for Charitable Statistics, <http://nccs.urban.org/statistics/quickfacts.cfm>, Exhibit 1 attached hereto.

⁵ See 37 C.F.R. § 201.40(b)(4)-(6). In 2012, the Register stated that she “considers the desire to engage in criticism or commentary to be a critical factor in establishing fair use in these contexts.” 2012 Recommendation at 139.

⁶ In 2012, the Register stated that “the use of only short segments is critical to the Register’s determination that a significant number of the desired uses are fair.” 2012 Recommendation at 138.

⁷ NPRM at 73,859 (quoting 17 U.S.C. § 1201(a)(1)(B) and Report of House Commerce Committee on H.R. 2281, the Digital Millennium Copyright Act, H.R. Rep. No. 105-551, pt. 2, at 38 (1998) (“Commerce Rep.”)).

that would cover any use of an audiovisual work believed to be “educational,” if made by anyone with any connection to a library, museum, or non-profit organization. Such an unbounded exemption is not appropriate. As the Register has previously concluded, “tailoring a class solely by reference to the use and/or user would be beyond the scope of what a ‘particular class of works’ is intended to be,” 2012 Recommendation at 10, and is not the intended purpose of this rulemaking proceeding.

Item 6. Asserted Adverse Effects

“Under this requirement [to show a substantial adverse effect on a noninfringing use], a proponent of an exemption must show ‘distinct, verifiable, and measurable impacts,’ and more than ‘*de minimis* impacts.’” 2012 Recommendation at 7 (*quoting* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 68 Fed. Reg. 62,011, 62,013 (Oct. 31, 2003) (“2003 Final Rule”). Because the proponents of this exemption have failed to provide any concrete examples of the uses they seek to enable, they have likewise failed to show any verifiable or measureable impact caused by the access controls at issue.

Item 7. Statutory Factors

The statutory factors set forth in § 1201(a)(1)(C) need only be analyzed “[i]f a proponent satisfies the threshold showing” that “(1) uses affected by the prohibition on circumvention are or are likely to be noninfringing; and (2) as a result of a [TPM], the prohibition is causing or in the next three years is likely to cause, a substantial adverse impact on those uses.” NPRM at 7, 9. Because the proponents have failed to make even a *prima facie* showing here, the statutory factors are not at issue. Nor do the Joint Nonprofits even address the statutory factors relevant to this proceeding, but rather devote their “statutory factors” discussion to the Section 107 fair use factors. *See* Joint Nonprofits’ Class 4 Comment at 4-5 (making conclusory determination that “this exemption is recognized as a fair use”).

Regardless, when considering the availability for use of copyrighted works, § 1201(a)(1)(C)(i), it is important to recognize that more works than ever are more readily available than ever, in particular through streaming and downloadable online content. This growth in content availability has been underwritten by the legislative promise of secure and robust protection for such content.⁸ The Digital Millennium Copyright Act (“DMCA”) was intended to encourage digital business models – “new ways of disseminating copyrighted

⁸ The legislative history is clear that this rulemaking was not intended to ensure that every new service enables copying, manipulation, and other uses of every existing work in every new format. To the contrary, the legislative history instructs the Register to take into account increases in the availability of works that are due to access controls, and to grant exemptions only where the existence of access controls and the prohibitions of § 1201(a)(1)(A) have “diminished” the availability of works for lawful uses. *See* Commerce Rep. at 36.

materials to users”⁹ – that depend upon strong access control measures in order to increase consumer options and promote the flow of copyrighted materials to the public. Thus, the Joint Creators and Copyright Owners urge the Register to consider how the DMCA and access controls have supported a vast increase in the public’s access to works when considering the propriety of any exemption that applies to everyone even tangentially associated with any non-profit organization. Widespread hacking by every person who is learning something for any associated use of content from any type of audiovisual work would also negatively impact “the market for or value of” copyrighted works. *See* 17 U.S.C. § 1201(a)(1)(C)(iv).

Item 8. Documentary Evidence

Please see the attached Exhibits.

⁹ Staff of House Committee on the Judiciary, 105th Cong., Section-By-Section Analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4, 1998, at 6 (Comm. Print 1998), *reprinted in* 46 J. COPYRIGHT SOC’Y U.S.A. 635 (1999).

Index of Exhibits to Joint Creators and Copyright Owners' Class 4 Comment

Exhibit No.	Content	URL (if available)
1	Quick Facts About Nonprofits, National Center for Charitable Statistics	http://nccs.urban.org/statistics/quickfacts.cfm

Exhibit 1



The national clearinghouse of data on the nonprofit sector in the United States

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NCCS > Quick Facts About Nonprofits

Quick Facts About Nonprofits

For the most recent data on the philanthropic sector please refer to [The Nonprofit Almanac 2012](#). For the first time, this resource will be available as both an e-book and a softcover book, and by chapter.

For the latest figures and quick facts please also refer to [The Nonprofit Sector in Brief: 2012, 2013, 2014](#)

Nonprofit Organizations

- **1,507,231 tax-exempt organizations**, including:
 - 1,036,255 public charities
 - 100,796 private foundations
 - 370,180 other types of nonprofit organizations, including chambers of commerce, fraternal organizations and civic leagues.

(Source: NCCS [Business Master File 2/2015](#))

- In 2010, nonprofits accounted for **9.2% of all wages and salaries** paid in the United States. (Source: *The Nonprofit Almanac, 2012*)
- Nonprofit Share of **GDP was 5.3%** in 2014. (Source: *US Bureau of Economic Analysis*)
- There are an estimated **322,913 congregations** in the United States in March 2015. (Source: [American Church Lists](#))

Quick Links

- Largest Public Charities: [Top 10 Lists](#)
- Largest Public Charities: [By State](#)
- Largest Organizations: [By IRS Subsection Code](#)
- Build your own report: [Custom Report Builder](#)
- Request data and browse the [NCCS Web](#).

Public Charity Finances

- In 2012, public charities reported over **\$1.65 trillion in total revenues** and **\$1.57 trillion in total expenses**. Of the revenue:
 - 21% came from contributions, gifts and government grants.
 - 73% came from program service revenues, which include government fees and contracts.
 - 6% came from "other" sources including dues, rental income, special event income, and gains or losses from goods sold.

(Source: [NCCS Core Files 2012](#))

- Public charities reported over **\$3 trillion in total assets** in 2012. (Source: [NCCS Core Files 2012](#))

Volunteering and Charitable Giving

Charitable Giving in America: [Some Facts and Figures](#)

- Approximately **25.4% of Americans** over the age of 16 volunteered through or for an organization between September 2009 and September 2013. This proportion has remained relatively constant since 2003 after a slight increase from 27.4% to 28.8% in 2003. (Source: [Current Population Survey](#), September 2013)
- **Charitable contributions by individuals, foundations, bequests, and corporations reached \$316.23 billion** in 2012, an increase of 0.6% from the revised 2011 estimates and after adjusting for inflation. Of these charitable contributions:
 - Religious organizations received the largest share, with 32% of total estimated contributions.
 - Educational institutions received the second largest percentage, with 13% of total estimated contributions.
 - Human service organizations accounted for 13% of total estimated contributions in 2012, the third largest share.

(Source: [Giving USA 2013](#))

- **Individuals gave \$228.93 billion** in 2012, an increase of 3.9 percent from 2011. (Source: [Giving USA 2013](#))

Foundation Giving

- **Foundations gave \$50.9 billion** in 2012, up just less than one percent from 2011. (Source: [The Foundation Center](#), 2013)
- Of total giving in 2012:

- 72% came from individual (living donors)
- 4% came from corporations (excludes corporate foundations)
- 8% came from individuals (bequest)
- 16% came from foundations.

(Source: [The Foundation Center](#), 2013)

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