

June 29, 2015

Jacqueline Charlesworth  
General Counsel and  
Associate Register of Copyrights  
United States Copyright Office  
Library of Congress  
101 Independence Ave. SE  
Washington, DC 20559-6000

Re: Docket No. 2014-7  
Exemptions to Prohibition Against Circumvention of Technological Measures  
Protecting Copyrighted Works

Dear Ms. Charlesworth:

The following represents my and Public Knowledge's response to your post-hearing question in Proposed Class 26: Software—3D printers.

I do not recommend creating a condition on the exemption based upon whether the proposed use is commercial or noncommercial.

To begin, if the reason for the distinction is due to safety concerns, the record on those safety concerns is poorly supported. None of the filed comments even raise the issue of potentially substandard parts; those issues were only mentioned at the hearing by one witness. The information provided at the hearing simply noted that 3D-printed parts are used in products such as drones and airplanes. The testimony at the hearing did not provide any evidence that third party feedstock would fail to meet FAA certification. Nor did the testimony indicate that any parts suppliers or manufacturers had a desire to use third party feedstock, or that third party feedstock was being used for such parts.

### **Conditions on TPM Circumvention Are a Poor Fit for Ensuring Product Safety**

Even if safety concerns were shown to be a valid concern with third party feedstock, conditions placed upon TPM exemptions are a poor fit for ensuring product safety.

First, any such conditions will be underinclusive, in that they will not actually prevent unsafe parts any more than existing laws and regulations do. Suppliers tempted to use substandard parts are not going to be deterred by the existence of section 1201(a)(1)'s prohibition on use. To the extent that they are willing to violate other, more directly applicable regulations governing their products, section 1201 is unlikely to provide much of an additional deterrent. Though penalties under chapter 12 of title 17 may be significant, they are insignificant compared to remedies that would result from product liability claims that lead to substantial harm to consumers, even apart from the

remedies available to consumers and the government for violation of any relevant manufacturing regulations specifically designed for the hypothetical parts at issue.

Second, any conditions that the Office might place upon circumvention of TPMs to allow the use of third party feedstock will likely be overinclusive, in that they will prevent uses that are perfectly safe. The record before the Office is insufficient for the Office to reliably create safety standards in any of the areas where 3D printed parts may be used. The existence of regulations promulgated by the Federal Aviation Administration and the Food and Drug Administration were mentioned, but not cited or discussed in any detail. The various ways in which such devices are regulated, and the rationales for various types of regulations, were never discussed. No representatives from those agencies, nor the industries they regulate, were present, and placed no information on the record in this class.

Even if the Office were to attempt to condition the grant of an exemption upon compliance with existing regulations, it is highly likely that the conditions would still prevent lawful uses. There is no evidence on the record as to how suppliers and manufacturers meet the regulations at issue, what sort of testing of the products or materials takes place, or whether existing regulations allow for flexibility in materials sourcing. Nor is there any discussion as to whether or not any applicable regulations apply *ex ante* or are left to later enforcement mechanisms, which may affect the applicability of any conditioned exemption differently across different parties. Again, the lack of knowledge as to what potential types of products and what relevant agencies and regulations may be affected puts any such condition on uncertain footing.

### **The Commercial/Noncommercial Distinction is Inapposite for Product Safety Determinations**

In trying to accommodate safety concerns, the Office asks whether or not it could or should differentiate between commercial and noncommercial types of uses. It should not. The TPM exemption process is already a poor fit for handling product safety; the commercial/noncommercial distinction only makes that fit with safety even poorer.

The distinction between what is and is not commercial is notably difficult to draw, and can differ in different areas of law. In particular, the uses to which the 3D printers may be put may not map well to commercial/noncommercial distinctions as they are typically drawn in copyright law. Even leaving that aside, it is easy to imagine many uses of 3D printers that could be classified as either commercial or noncommercial. Components for consumer electronic devices, simple splints, or basic prosthetics made on a mass scale by a nonprofit or a government agency might still be used on a widespread basis. Educational institutions, which may be for or nonprofit, public or private, may make use of 3D printers on a wide variety of scales.

Furthermore, as with safety considerations generally, attempting to accommodate safety through a commercial/noncommercial distinction will result in overinclusive rules.

Commercial use of 3D printing is hardly limited to the manufacture of airplane parts; the literature is full of examples of products made on a commercial scale that can be made or have components made via 3D printing. Conditions for exemption created in response to an incomplete discussion of airline safety would be inapposite for manufacturers of picture frames, vases, or other housewares; watchbands, jewelry or clothing; computer mice, file trays, or other office supplies, or any of the millions of other products that do not raise basic safety concerns. Even products associated with regulated businesses, like aircraft and automobiles, are frequently irrelevant to safety; a commercially-printed cupholder, phone mount, sun visor, or antenna topper is unlikely to require DOT certification; an aftermarket band for a fitness tracker or a clip to hold a glucose monitor to a belt should not fall under uncertain production requirements simply because they are associated with regulated devices.

In other words, the line between commercial and noncommercial is not only itself indistinct; it bears little resemblance to a criterion that can be used to distinguish between those products that can and cannot have an effect on consumer safety. Even the scale of production between commercial and noncommercial matters far less in the 3D printing context; one of the driving ideas behind 3D printing at the consumer level is to allow for the production of vast quantities of specialized goods in a distributed manner.

None of this is to suggest that consumer safety is not a concern; rather, it is simply that it is a concern beyond the scope of this inquiry. It is insufficient for an exemption opponent to simply state a hypothetical safety concern, with no additional evidence, to defeat the grant of an exemption to the Digital Millennium Copyright Act. If anything, attempts by the Office to condition potential liability for non-infringing uses on regulations it has inadequately investigated runs the risk of hindering businesses and consumers already operating within the regulated space.

In conclusion, if the Office is concerned with the product safety implications of this exemption request, any condition should be focused upon product safety, and not attempt to address safety issues by proxy through an unsupportable distinction between commercial and noncommercial uses of 3D printers. However, I would caution against attempting to use this process to create conditions even if they were more tailored to product safety. The record woefully inadequate to support the creation of such conditions, let alone properly determine the boundaries of those conditions to ensure that they do not restrict safe and legitimate uses, while actually effectively curbing any potential dangerous uses.

Sincerely,

/s/

Sherwin Siy  
Vice President of Legal Affairs  
Public Knowledge