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VIA E-MAIL ONLY (2015ADMAT@LOC.GOV)

Jacqueline C. Charlesworth
General Counsel and Associate Register of
Copyrights
U.S. 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 Protection Measures Protecting Copyrighted Works, Class 7**

Dear Ms. Charlesworth:

On behalf of the Joint Creators and Copyright Owners, I am pleased to provide this response to your letter of June 3, 2015 regarding Proposed Class 7 – Audiovisual works – derivative uses – noncommercial remix videos.

1. Scope of the Exemption

Question: “At the hearing, participants discussed the scope of the current exemption for ‘noncommercial videos,’ including whether this category should be more specifically delineated than it is in the current exemption and, in that regard, whether it should be understood to encompass videos made for educational purposes. In light of this discussion, please provide your proposed interpretation and definition of ‘noncommercial video’ and address any concerns with respect to amending or maintaining the language of the current exemption.”

Response: We appreciate the Copyright Office’s attention to this issue. As we expressed during the hearings, we are concerned that the language of the current exemption is insufficiently specific, such that it may result in confusion regarding the parameters of the exemption. Although we are not asking the Register to recommend a narrower exemption, and we do not oppose renewal of an exemption in this space that preserves the limitations of the current exemption, we would strongly prefer an exemption that more precisely describes the types of videos that the exemption is intended to cover. We believe that this is especially important given that other Proposed Classes, such as Proposed Class 4, also involve uses of short portions of motion pictures by “noncommercial” organizations.

In our view, the Register of Copyrights and the Librarian of Congress always intended for the “noncommercial videos” exemption to apply to uses of short portions of motion pictures

in the types of videos that have been the focus of discussion in the comments of the primary proponents of this class, the Electronic Frontier Foundation and the Organization for Transformative Works. As the Register's 2010 Recommendation explained at pages 37-38, the proponents of the exemption originally focused on "remix" videos or "vids":

As a general matter, vids involve the remixing and/or modification of a preexisting work or works in order to criticize or comment upon some aspect of the underlying works, such as a parody or a review, or to make a broader societal statement, perhaps in the form of a satire. "Vids are commentaries; executed in a visual medium rather than in text, on the original source material—sometimes celebrating or criticizing political, sexual, or cultural elements that were obvious in the original, sometimes uncovering meanings that were latent in the original; and sometimes creating entirely new meanings with the characters and plotlines of the original." (Quoting Professor Francesca Coppa)

The proponents' focus remained on remix videos throughout the 2012 proceedings as well. At times, however, discussion of this Class expanded beyond remix videos to include mention of videos that involve use of others' works to make a political point. In the Register's 2012 Recommendation, at page 106, she described the type of videos covered by the exemption as follows:

As a general matter, the proposed class for noncommercial videos involves the remixing and/or modification of a preexisting work or works to criticize or comment on some aspect of the underlying works (e.g., a film criticism or analysis) or to make a broader societal statement (e.g., a political commentary).

During the 2015 proceedings, the proponents have also focused on remix videos and political speech. *See* EFF/OTW February 6, 2015 Comments at 23-24. The proponents have likewise discussed art museum exhibitions/displays. *Id.* at 20, 24 (citing <http://nmwa.org/exhibitions/sodajerk-after-rainbow>). Thus, any definitional terms recommended by the Register should be broad enough to encompass those uses of motion pictures, to the extent that they qualify as fair uses.

Accordingly, the Joint Creators and Copyright Owners would not oppose the issuance of a regulation that defined the Proposed Class using the following language:

Lawfully made and acquired motion pictures, as defined in 17 U.S.C. § 101, on DVDs protected by the Content Scrambling System or acquired via online distribution services protected by various technological protection measures, where the person engaging in circumvention believes and has reasonable grounds to believe that circumvention is necessary because reasonably available alternatives, such as noncircumventing methods or using screen capture software as provided for in alternative exemptions, are not able to produce the level of high-quality content required to achieve the desired criticism or comment, and where circumvention is undertaken solely in order to make use of short portions of the motion pictures for the non-commercial purpose of criticism or comment

on such motion pictures, (i) in remix videos or mash-up videos involving parody or satire, (ii) in videos with overtly political messages, (iii) or in non-profit art museum installations or exhibitions.

Any other exemptions involving the use of short portions of motion pictures in educational settings or by documentary filmmakers or e-book authors should be separately stated and defined in the regulations.

2. Comments on Hearing Exhibits

A. Exhibits Submitted by DVD CCA

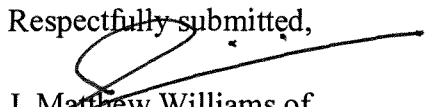
The Joint Creators and Copyright Owners believe that the quality of the images captured by DVD CCA and presented during the hearings was impressive, and certainly sufficient to achieve nearly all of the proponents' purposes. In our view, screen capture technology appears to be capable of achieving a level of quality that would offer a viable alternative to circumvention for the vast majority of remix video creators. However, we are not prepared to state whether any particular screen capture technology involves circumvention within the meaning of Section 1201, as we have not independently tested the technologies.

B. Exhibits Submitted by Professor Rebecca Tushnet

The Joint Creators and Copyright Owners have reviewed the videos submitted by Professor Tushnet and made available on the Copyright Office website. They have comments only with respect to one of the videos: the "Worthy" video involving uses of portions of episodes of the Warner Bros. television series "Supernatural."

In our view, it is far from clear that this video is a fair use within the meaning of Section 107. Indeed, it is likely more accurately characterized as an unauthorized derivative work. *See* 17 U.S.C. § 106(2). Although the technical skill required to edit the video to add words and special effects are impressive, the video resembles a promotional trailer for the series, set to unlicensed, commercial music from the soundtrack to the critically acclaimed film "Black Hawk Down." On a YouTube page where the video is available for viewing, someone claiming to be the creator of the video explained that the music was selected because "it sounded similar to what was used in the show." *See* <https://www.youtube.com/watch?v=tcC01yJivmU>. Thus, there is no commentary on the music used whatsoever. While a full consideration of the objects of the video's creator and a more thorough understanding of the series and the scenes selected would be required to complete a fair use analysis of the video, we do not agree that the "Worthy" video constitutes a clear example of a fair use to which the existing exemption would apply.

Respectfully submitted,


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MITCHELL SILBERBERG & KNUPP LLP