



September 13, 2017

Sarang V. Damle
General Counsel and Associate Register of
Copyrights
United States Copyright Office
Library of Congress, James Madison Memorial
Building, 101 Independence Avenue, S.E.,
Washington, D.C. 20003

Re: Joint Creators and Copyright Owners' Comments Regarding Streamlined Renewal Process: Docket No. 2017-10, Exemptions to Permit Circumvention of Access Controls on Copyrighted Works

Dear Associate Register Damle:

I submit this letter on behalf of the Entertainment Software Association (“ESA”), the Motion Picture Association of America, Inc. (“MPAA”) and the Recording Industry Association of America, Inc. (“RIAA”), collectively referred to herein as the “Joint Creators and Copyright Owners.” The Joint Creators and Copyright Owners, who supported the creation of a “streamlined renewal” process, do not oppose any of the specific petitions submitted in this rulemaking requesting renewal of an existing regulatory exemption to the anti-circumvention prohibition of 17 U.S.C. § 1201(a)(1)(A). Instead, given that this rulemaking cycle is the first instance of the Librarian of Congress and the Register implementing the streamlined renewal process, we believe it is important to highlight several issues of concern raised by certain of the petitions, to ensure that the ground rules of the new process are clearly articulated and carefully followed.

As the Register concluded, after conducting an extensive review of the marketplace, “[t]he basic framework of section 1201 – including its treatment of circumvention as a standalone violation independent of copyright infringement and robust anti-trafficking provisions – remains sound ...” Report of the Register of Copyrights on Section 1201 of Title 17 (June 2017) (“1201 Study”) at 152. Indeed, “[t]he dramatic growth of streaming services like Netflix, Spotify, Hulu and many others suggests that for both copyright owners and consumers, the offering of access – whether through subscriptions, *à la carte* purchases, or ad-supported services – has become a preferred method of delivering copyrighted content.” *Id.* at 46. By ensuring that the streamlined renewal process stays true to its purpose and consistent with the rules of the road articulated in the Notice of Inquiry, the Register will help to ensure that “the law [will] continue to foster the development of such models.” *Id.* Thus, the Joint Creators and Copyright Owners include herein comments on issues raised by some of the July 31, 2017 petitions.

First, it is critical that the streamlined renewal process be available only to petitioners “seeking readoption of a current exemption, granted during the sixth rulemaking.” Notice of Inquiry, 82 Fed. Reg. 29,804, 29,805 (June 30, 2017) (“NOI”). Indeed, “[r]enewal may only be sought for current exemptions **as they are currently formulated, without modification.**” *Id.* at 29,806 (emphasis added). Any requests from petitioners to modify the scope of exemptions established in the sixth rulemaking in any way, whether large or small, including requests that the Office discard current formulations in favor of returning to prior formulations from earlier rulemaking cycles, should be rejected.¹

Second, where a current exemption covers uses by multiple classes of users but no petitioner requested renewal of the portion of the exemption that applies to one covered class of users, the Register should renew only the portion of the exemption applicable to the classes of users who requested renewal.² The fact that no petitioner attests that the exemption remains necessary for another covered class of users calls into question whether it is actually needed for the purpose originally intended.³

Third, petitions should be supported by attestations from petitioners with personal knowledge of facts that support streamlined renewal.⁴ As the Notice of Inquiry states, “[f]or the attestation to be trustworthy and reliable, it is important that the petitioner make it based on his or her own

¹ The Organization for Transformative Works argued in its July 31, 2017 petition, ID: COLC-2017-0007-0033, that “the exemption [for non-commercial videos using short portions of motion pictures] should be renewed using the relatively simple language defining the exempted class from the 2008 rulemaking...” That form of “renewal” – which is not really renewal at all – is incompatible with the NOI’s articulation of the standard for streamlined renewal of *current* exemptions.

² The petitions filed in support of renewing the current regulatory exemption related to circumvention to access videogames where authentication servers are no longer available, 37 C.F.R. § 201.40(b)(3), did not clearly request renewal of the portion of the exemption applicable to personal gameplay. Instead, the petitions focused on library and archival uses. *See* Electronic Frontier Foundation Petition ID: COLC-2017-0007-0012; University of Michigan Library Copyright Office Petition ID: COLC-2017-0007-0038; Library Copyright Alliance Petition ID: COLC-2017-0007-0036. However, the Joint Creators and Copyright Owners are not opposing renewal of any portion of this exemption given that the petitions appear to implicitly request renewal of the current exemption in its entirety.

³ Under the Office’s new policies, a petitioner can only ask for the renewal of a current exemption without modification, but it is incumbent upon that petitioner to affirm that each prong of an exemption is still necessary.

⁴ Many of the petitions filed on July 31, 2017 were based on what the petitioners attest they have been told by others, rather than on their own personal knowledge. *See, e.g.*, USC Intellectual Property Law Clinic Petition ID: COLC-2017-0007-0035; Center for Democracy and Technology Petition ID: COLC-2017-0007-0016; Electronic Frontier Foundation Petition ID: COLC-2017-0007-0014.

personal knowledge and experience.” NOI at 29,806. Petitions that “simply oppose the use of digital rights management tools as a matter of general principle” should be disregarded. *Id.*

Fourth, petitions that expressly base their justification for renewal on a need to provide circumvention assistance that would likely be prohibited by 17 U.S.C. §1201(a)(2) should not be considered supportive of actual renewal, as opposed to expansion, of an existing exemption unless the current exemption clearly immunizes – for section 1201(a)(1)(A) purposes – the provision of such assistance, such as the mobile device “unlocking” exemption.⁵ *See* 37 C.F.R. §201.40(c). As the 1201 Study concluded, “the anti-trafficking provisions provide critical enforcement tools against digital piracy.” 1201 Study at iv. This rulemaking should not dull any of these tools so long as the statute prohibits the issuance of regulatory exemptions applicable to trafficking. *See* 17 U.S.C. § 1201(a)(1)(B)-(E).

Fifth, if the Register concludes that meaningful opposition has been presented in response to any petition for renewal of a current exemption, it is important that “the petition to renew will automatically be treated as a petition for a new exemption, and will be considered pursuant to the more comprehensive rulemaking proceeding.” NOI at 29,806. Accordingly, after publication of the Notice of Proposed Rulemaking, a proponent of an exemption to which meaningful opposition has been raised should be expected to satisfy every requirement placed on petitioners by the statute. Exemption proponents should not be permitted to focus exclusively on rebutting evidence or arguments initially presented by opponents to establish that their opposition is “meaningful.”⁶

The Joint Creators and Copyright Owners appreciate this opportunity to submit their comments to the Copyright Office and to the Library of Congress.

Respectfully submitted,

/s/ J. Matthew Williams
A Professional Corporation of
MITCHELL SILBERBERG & KNUPP LLP

⁵ The petition filed by Auto Care Association, *et al.*, is an example of a petition that argues for an exemption on behalf of repair shops seeking to provide circumvention services to consumers. However, the current exemption for repair of motorized land vehicles, 37 C.F.R. § 201.40(b)(6), does not allow for the provision of such services. *See* Final Rule, 80 Fed. Reg. 65,944, 65,954 (Oct. 28, 2015) (“The exemption also excludes circumvention ‘on behalf of’ vehicle owners, as a broader exception allowing third parties to engage in circumvention activities on behalf of others is in tension with the anti-trafficking provisions of section 1201(a)(2) and (b).”).

⁶ The Institute for Scrap Recycling argues otherwise in Petition ID: COLC-2017-0007-0009.

cc: Regan Smith, Deputy General Counsel
Anna Chauvet, Assistant General Counsel
Jason Sloan, Attorney-Advisor