

**Submission on behalf of ESA, MPA, N/MA, and RIAA**  
**Class 4: Computer Programs – Generative AI Research**

UNITED STATES COPYRIGHT OFFICE



**Long Comment Regarding a Proposed  
Exemption Under 17 U.S.C. § 1201**

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

**ITEM A. COMMENTER INFORMATION**

**The Entertainment Software Association** (“ESA”) is the United States trade association serving companies that publish computer and video games for video game consoles, handheld video game devices, personal computers, and the internet. It represents nearly all of the major video game publishers and major video game platform providers in the United States.

**The Motion Picture Association, Inc.** (“MPA”) is a trade association representing some of the world’s largest producers and distributors of motion pictures and other audiovisual entertainment for viewing in theaters, on prerecorded media, over broadcast TV, cable and satellite services, and on the internet. The MPA’s members are: Netflix Studios, LLC, Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc.

**The News/Media Alliance** (“N/MA”) represents over 2,200 publishers in the U.S. and internationally, ranging from the largest news and magazine publishers to hyperlocal newspapers, and from digital-only outlets to papers who have printed news since before the Constitutional Convention. Its members produce quality journalistic and creative content that accounts for nearly 90 percent of daily newspaper circulation in the U.S., over 500 individual magazine brands, and dozens of digital-only properties.

**The Recording Industry Association of America, Inc.** (“RIAA”) is a nonprofit trade organization that supports and promotes the creative and financial vitality of recorded music and the people and companies that create it in the United States. RIAA’s several hundred members—ranging from major American music companies with global reach to artist-owned labels and small businesses—make up the world’s most vibrant and innovative music community. RIAA’s members create, manufacture, and/or distribute the majority of all legitimate recorded music produced and sold in the United States. In supporting its members, RIAA works to protect the intellectual property and First Amendment rights of artists and music labels.

**Privacy Act Advisory Statement:** Required by the Privacy Act of 1974 (P.L. 93-579)

The authority for requesting this information is 17 U.S.C. §§ 1201(a)(1) and 705. Furnishing the requested information is voluntary. The principal use of the requested information is publication on the Copyright Office website and use by Copyright Office staff for purposes of the rulemaking proceeding conducted under 17 U.S.C. § 1201(a)(1). NOTE: No other advisory statement will be given in connection with this submission. Please keep this statement and refer to it if we communicate with you regarding this submission.

Represented By:

Robert H. Rotstein (rhr@msk.com)  
James Berkley (jdb@msk.com)  
Stacey Chuvaieva (stc@msk.com)  
MITCHELL SILBERBERG & KNUPP LLP  
2049 Century Park East, 18<sup>th</sup> Floor  
Los Angeles, CA 90067  
301-312-2000

J. Matthew Williams (mxw@msk.com)  
Lucy Holmes Plovnick (lhp@msk.com)  
MITCHELL SILBERBERG & KNUPP LLP  
1818 N Street, NW, 7th Floor  
Washington, D.C. 20036  
202-355-7904

## **ITEM B. PROPOSED CLASS ADDRESSED**

Class 4: Computer Programs – Generative AI Research

## **ITEM C. OVERVIEW**

Petitioner Jonathan Weiss and several “hacker” organizations who filed comments, HackerOne, Inc., Hacking Policy Council (“HPC”), and OpenPolicy (collectively, “Commenters”), seek a new exemption for security research pertaining to generative artificial intelligence (“AI”) bias. Petitioner’s proposal would allow any “researcher” to circumvent access controls on generative AI models and systems for the purpose of researching biases and to share the results of research findings, as well as “techniques and methodologies that expose and address biases” in AI models.<sup>1</sup> Commenters also seek to expand the scope of the proposed new exemption to apply to “broader categories of AI systems or deployments that extend beyond generative AI”; and to cover, in addition to bias, research on “broad sets of undesirable social impacts” ranging “from discrimination to ‘untrustworthy’ behavior.” Finally, Commenters ask the Copyright Office to clarify that generative AI research is permitted under the security research exemption.<sup>2</sup>

Petitioner and Commenters (collectively, “Proponents”) bear the burden of proof to establish the need for the proposed exemption.<sup>3</sup> They have failed to meet their burden. As an initial matter, Proponents do not identify what technological protection measures (“TPMs”), if any, currently exist on generative AI tools or models. This failure alone leads to the conclusion that the request for the proposed exemption should be denied.

Moreover, AI is in its early stages, and there are ongoing efforts to adopt legislative requirements for AI governance and voluntary best practices. Indeed, the Copyright Office is currently

---

<sup>1</sup> Jonathan Weiss, Petition for New Exemption Under 17 U.S.C. § 1201 (Aug. 25, 2023), <https://www.copyright.gov/1201/2024/petitions/proposed/New-Pet-Jonathan-Weiss.pdf> (“Petition”). Petitioner did not submit a short or long form comment in support of the Petition.

<sup>2</sup> OpenPolicy, Class 4 Long Comment at 2 (Dec. 22, 2023), <https://www.copyright.gov/1201/2024/comments/Class%204%20-%20Initial%20Comments%20-%20OpenPolicy.pdf> (“OpenPolicy Long Comment”); Hacking Policy Council, Class 4 Long Comment at 2 (Dec. 21, 2023), <https://www.copyright.gov/1201/2024/comments/Class%204%20-%20Initial%20Comments%20-%20Hacking%20Policy%20Council.pdf> (“HPC Long Comment”).

<sup>3</sup> See SECTION 1201 RULEMAKING: EIGHTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION, RECOMMENDATION OF THE ACTING REGISTER OF COPYRIGHTS, 7-8 (2021), [https://cdn.loc.gov/copyright/1201/2021/2021\\_Section\\_1201\\_Registers\\_Recommendation.pdf](https://cdn.loc.gov/copyright/1201/2021/2021_Section_1201_Registers_Recommendation.pdf) (“2021 Rec.”).

conducting a separate AI Study concerning copyright and policy issues that generative AI raises. As a part of that study, the Copyright Office is conducting a separate Notice of Inquiry proceeding addressing AI and copyright.<sup>4</sup> Given the Copyright Office’s ongoing work in this area, considering a Section 1201 exemption related to generative AI is premature.

Proponents’ proposed exemption should be denied for the separate reason that it is overbroad and based on a sparse, undeveloped record. Finally, the Copyright Office should also reject Commenters’ belated attempts through this proposal to secure an expansion of the security research exemption to include generative AI models.<sup>5</sup>

#### **ITEM D. TECHNOLOGICAL PROTECTION MEASURE(S) AND METHOD(S) OF CIRCUMVENTION**

Petitioner seeks an abstract exemption covering “circumvention of technological measures that control access to copyrighted generative AI models, solely for the purpose of researching biases.”<sup>6</sup> Proponents would extend the proposed exemption to other non-generative AI systems; and to research not only related to bias, but also to “untrustworthy” behavior and “broad sets of undesirable social impacts.”<sup>7</sup> However, Proponents do not identify the specific TPMs (if any) that are currently in place protecting generative AI models, and do not explain what methods of circumvention they would seek to employ if the exemption were allowed.<sup>8</sup> Proponents bear the burden of proof and persuasion on these issues, and have simply not met those burdens.

Proponents also do not explain how TPMs impede legitimate private sector security research on generative AI models. It is not clear that Section 1201(a)(1) by its terms prohibits the research Petitioner proposes (for example, based on strict readings of 1201(a)(1)(A), and “circumvent a technological measure” and “effectively controls access to a work” in 1201(a)(3)(A)-(B)). Section 1201(a)(1) was not intended, and should not be interpreted or applied, to prohibit responsible research on AI systems or methods, especially for purposes related to the trustworthiness of AI systems.

---

<sup>4</sup> The Copyright Office’s separate Notice of Inquiry is designed to “study the copyright law and policy issues raised by artificial intelligence.” Artificial Intelligence and Copyright: Notice of Inquiry and Request for Comments, 88 Fed. Reg. 59,942 (Aug. 30, 2023), <https://www.govinfo.gov/content/pkg/FR-2023-08-30/pdf/2023-18624.pdf> (“AI Study NOI”).

<sup>5</sup> Petitions to request new or expanded exemptions were due no later than August 25, 2023. See 88 Fed. Reg. 42,891 (July 5, 2023), <https://www.govinfo.gov/content/pkg/FR-2023-07-05/pdf/2023-14133.pdf>. Commenters did not file a Petition seeking to expand the security research exemption to include generative AI research by that deadline.

<sup>6</sup> Petition at 2.

<sup>7</sup> OpenPolicy Long Comment at 2.

<sup>8</sup> See Petition at 2 (offering no description of TPMs currently in place or proposed circumvention methods); HPC Long Comment at 3 (stating that copyright owners of AI systems “may require a user account, the terms of which prohibit bypassing any protective measures or safety mitigations,” but not describing any TPMs or proposed circumvention methods).

## ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGING USES

In past rulemaking cycles, the Register has repeatedly rejected broad proposed categories for exemptions, requiring instead that categories be narrow and focused.<sup>9</sup> Proponents' broad, abstract, and undefined new proposed exemption does not satisfy this requirement. As the Copyright Office observed in its Notice of Proposed Rulemaking, the Petition "does not cabin the proposed exemption to a specific set of users, only describing them as 'researchers,' and does not discuss how TPMs prohibit, or are likely to prohibit, researchers from accessing software within the generative AI models."<sup>10</sup> Commenters (all of whom are self-described "hacker" organizations) similarly do not attempt to propose any limitations on the types of research or on the individuals to whom the proposed exemption would apply.

While the Petition references three supposed "guardrails" to prevent misuse of the proposed exemption, these are only related to the intentions of the "researcher," prioritizing data privacy, and engagement with AI developers and stakeholders regarding any discovered biases,<sup>11</sup> and do not address any copyright issues. For example, the Petition does not explain or address whether circumvention of access controls protecting generative AI models would allow access to copyrighted works ingested by an AI model (as distinct from accessing the model itself), and whether such works could be subject to copying, retention, distribution, or other uses by researchers (which would appear to include hackers) under the proposed exemption. Petitioner has not demonstrated that the proposed new exemption does not provide a pathway to piracy, and the proposed "guardrails," if adopted, would not address this issue. Proponents should also not be permitted to use this Section 1201 rulemaking as a back-door mechanism to create new law.<sup>12</sup> Furthermore, some of these issues are currently being explored in the Copyright Office's ongoing AI Study, including the AI Study NOI proceeding.<sup>13</sup> The Copyright Office should allow the record in that proceeding to develop more fully before considering an exemption with respect to this Petition.

Moreover, while making general references to third-party red-teaming as a typical industry practice among hackers,<sup>14</sup> Proponents have not demonstrated that security research regarding

---

<sup>9</sup> See, e.g., 2021 Rec. at 133.

<sup>10</sup> Exemptions To Permit Circumvention of Access Controls on Copyrighted Works: Notice of Proposed Rulemaking, 88 Fed. Reg. 72,013, 72,025 (Oct. 19, 2023), <https://www.govinfo.gov/content/pkg/FR-2023-10-19/pdf/2023-22949.pdf> ("NPRM").

<sup>11</sup> Petition at 2; NPRM at 72,025.

<sup>12</sup> As the Copyright Office found after conducting a comprehensive study of Section 1201, this rulemaking proceeding is not an appropriate venue for deciding unresolved questions of noninfringement. See U.S. COPYRIGHT OFFICE, REPORT ON SECTION 1201 OF TITLE 17 at 117 (2017), <https://www.copyright.gov/policy/1201/section-1201-full-report.pdf>.

<sup>13</sup> As a part of the Copyright Office's ongoing AI Study, the Copyright Office conducted four listening sessions in August 2023 that led to the issuance of the AI Study NOI seeking comments on thirty-four separate questions related to AI and copyright, some of which have multiple distinct sub-parts. Over 10,000 comments were submitted in that proceeding by different interested parties and stakeholders addressing a wide range of copyright and policy issues. See <https://www.regulations.gov/docket/COLC-2023-0006/comments>.

<sup>14</sup> HPC Long Comment at 2.

embedded bias in AI models requires circumvention of TPMs. Indeed, numerous research papers, scholarly articles, and analyses have been published within the last year that studied bias in generative AI models based on analysis of model output, without the need for circumvention.<sup>15</sup> Proponents suggest that terms of use agreements in place for AI systems may “prohibit bypassing any protective measures or safety mitigations,”<sup>16</sup> but any terms of use agreement that prevents such research is not governed by Section 1201(a)(1), and no evidence has been provided that Proponents are unable to engage with AI system owners to achieve their research goals. Proponents have simply not met their burdens of proof or persuasion for this proposed exemption on the current record.

Commenters suggest that the Biden Administration’s recent Executive Order 14110 endorses third-party red-teaming as a “key safeguard in AI development and monitoring.”<sup>17</sup> However, Executive Order 14110 does not address private sector third-party red-teaming, and it is expressly limited to developing recommendations for future external testing of AI within federal agencies.<sup>18</sup> Moreover, the National Institute of Standards and Technology (“NIST”) is actively studying issues related to red-teaming in connection with its assignments under Executive Order 14110 in a separate Request for Information (“RFI”) proceeding.<sup>19</sup> As with the ongoing Copyright Office Notice of Inquiry proceeding, it would be premature for the Copyright Office to overtake NIST’s efforts to study these issues through a new Section 1201 exemption. Commenters also reference the bias research described in the *Sandvig v. Barr* case as demonstrating a need for circumvention, but their reliance on that case is misplaced, as the court

---

<sup>15</sup> See Emilio Ferrara (University of Southern California), *Should ChatGPT be Biased? Challenges and Risks of Bias in Large Language Models*, arXiv:2304.03738 (arXiv preprint Nov. 13, 2023), <https://arxiv.org/pdf/2304.03738.pdf>; Mi Zhou (University of British Columbia) et al., *Bias in Generative AI (Work in Progress)*, [https://www.andrew.cmu.edu/user/ales/cib/bias\\_in\\_gen\\_ai.pdf](https://www.andrew.cmu.edu/user/ales/cib/bias_in_gen_ai.pdf) (last visited Feb. 19, 2024); Jialu Wang et al. (University of California at Santa Cruz), *T2AIT: Measuring Valence and Stereotypical Biases in Text-to-Image Generation*, arXiv:2306.00905 (arXiv preprint June 1, 2023), <https://arxiv.org/pdf/2306.00905.pdf>; Sheridan Wall & Hilke Schellmann, *We Tested AI Interview Tools. Here’s What We Found*, MIT TECHNOLOGY REVIEW (July 7, 2021), <https://www.technologyreview.com/2021/07/07/1027916/we-tested-ai-interview-tools/>; Victoria Turk, *How AI Reduces the World to Stereotypes*, REST OF WORLD (Oct. 10, 2023), <https://restofworld.org/2023/ai-image-stereotypes/>; Leonardo Nicoletti & Dina Bass, *Humans Are Biased. Generative AI Is Even Worse*, BLOOMBERG.COM (June 8, 2023), <https://www.bloomberg.com/graphics/2023-generative-ai-bias/>.

<sup>16</sup> HPC Long Comment at 4.

<sup>17</sup> See HackerOne, Inc., Comment at 1 (Dec. 22, 2023), <https://www.copyright.gov/1201/2024/comments/Class%20-%20Initial%20Comments%20-%20HackerOne.%20Inc.pdf> (“HackerOne Comment”).

<sup>18</sup> See EXECUTIVE ORDER ON THE SAFE, SECURE, AND TRUSTWORTHY DEVELOPMENT AND USE OF ARTIFICIAL INTELLIGENCE, 88 Fed. Reg. 75,191, 75,218-19 (Oct. 30, 2023) at §§10.1(a) and (b)(viii)(A), <https://www.govinfo.gov/content/pkg/FR-2023-11-01/pdf/2023-24283.pdf> (setting forth policies for coordinating the use of AI in the federal government and directing the heads of specific federal agencies to provide recommendations to federal agencies regarding “external testing for AI, including red-teaming for generative AI, to be developed in coordination with the Cybersecurity and Infrastructure Security Agency”).

<sup>19</sup> See NIST RFI, 88 Fed. Reg. 88,368 (Dec. 21, 2023), <https://www.govinfo.gov/content/pkg/FR-2023-12-21/pdf/2023-28232.pdf>.

found that the online research proposed would not constitute criminal conduct. The court did not address copyright issues.<sup>20</sup>

The Copyright Office should also reject Commenters' attempts through this proposal to seek an untimely expansion of the security research exemption to include generative AI models. Commenters missed the Copyright Office's August 25, 2023 deadline to submit a petition to propose such an expansion in this rulemaking cycle, and cannot raise it for the first time through comments on the Petition.<sup>21</sup>

## **DOCUMENTARY EVIDENCE**

We have included hyperlinks to webpages/documents within the body of this document. We are not submitting any other documentary evidence.

Respectfully submitted:

/s/ J. Matthew Williams  
J. Matthew Williams (mxw@msk.com)  
Lucy Holmes Plovnick (lhp@msk.com)  
MITCHELL SILBERBERG & KNUPP LLP  
1818 N Street, NW, 7th Floor  
Washington, D.C. 20036  
202-355-7904

Robert H. Rotstein (rhr@msk.com)  
James Berkley (jdb@msk.com)  
Stacey Chuvaieva (stc@msk.com)  
MITCHELL SILBERBERG & KNUPP LLP  
2049 Century Park East, 18<sup>th</sup> Floor  
Los Angeles, CA 90067  
301-312-2000

---

<sup>20</sup> See *Sandvig v. Barr*, 451 F. Supp. 3d 73, 76 (D.D.C. 2020).

<sup>21</sup> See 88 Fed. Reg. at 42,891 (establishing the August 25, 2023 deadline); see also 88 Fed. Reg. 37,486, 37,489 (June 8, 2023), <https://www.govinfo.gov/content/pkg/FR-2023-06-08/pdf/2023-12250.pdf> (requiring each request for a new or expanded exemption to be submitted via a separate petition for rulemaking by the Copyright Office deadline).