

Submission on behalf of ESA, MPA, and RIAA  
Class 5: Computer Programs – Repair

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 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.

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 5: Computer Programs – Repair

**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.

## **ITEM C. OVERVIEW**

Petitioners Public Knowledge and iFixit seek to expand the repair exemption for circumventing access controls on consumer electronic devices to include industrial and commercial equipment. Petitioners' proposed expanded exemption would allow circumvention of access controls that protect computer programs and other content for the purpose of repairing, maintaining, and diagnosing devices and machines across a broad, abstract, and undefined class. The Librarian of Congress has denied similar requests in past cycles based on substantially the same information and evidence contained in the comments. They should do so again here.

ESA, MPA, and RIAA once again have not opposed renewal of the existing exemptions applicable to circumvention for purposes of repairing motorized land vehicles, smartphones, home appliances, or home systems, however they oppose this proposed expansion of the repair exemption, which is essentially Petitioners' attempt to re-litigate the same proposed expansion of the repair exemption that was previously rejected in the last rulemaking cycle, absent new evidence. Recurring requests without new evidence, unduly burden the Copyright Office's rulemaking process and should be rejected at the earliest opportunity.

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

Public Knowledge and iFixit seek a broad expanded exemption covering circumvention of *all* access controls protecting software in *all* industrial and commercial devices and machines. Indeed, Public Knowledge and iFixit admit that the proposed class for the expanded exemption is "unusually broad."<sup>1</sup> The Copyright Office declined to include commercial and industrial devices and systems within the scope of the proposed repair class in the prior rulemaking cycle, and should do so again now.

## **ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGING USES**

In the 2021 proceeding, the Copyright Office declined to extend the exemption for consumer electronic devices to commercial and industrial devices, finding that the record did not demonstrate that commercial and industrial devices shared the same common characteristics or that users of those devices were similarly situated to users of consumer products.<sup>2</sup> The Copyright Office also found that some of the users of commercial and industrial equipment had adequate alternatives to circumvention, and it was concerned that the proposed circumvention would "contravene negotiated licensing terms between commercial actors, which might affect

---

<sup>1</sup> Public Knowledge and iFixit, Class 5 Long Comment at 7 (Dec. 22, 2023), <https://www.copyright.gov/1201/2024/comments/Class%205%20-%20Initial%20Comments%20-%20Public%20Knowledge.pdf> ("Public Knowledge/iFixit Long Comment").

<sup>2</sup> See SECTION 1201 RULEMAKING: EIGHTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION, RECOMMENDATION OF THE ACTING REGISTER OF COPYRIGHTS, 197-98 (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.") (citing FTC, NIXING THE FIX: AN FTC REPORT TO CONGRESS ON REPAIR RESTRICTIONS at 51 (May 2021), [https://www.ftc.gov/system/files/documents/reports/nixing-fix-ftc-report-congress-repairrestrictions/nixing\\_the\\_fix\\_report\\_final\\_5521\\_630pm-508\\_002.pdf](https://www.ftc.gov/system/files/documents/reports/nixing-fix-ftc-report-congress-repairrestrictions/nixing_the_fix_report_final_5521_630pm-508_002.pdf) ("FTC Report")) ("When deciding the scope of expanded repair rights, policymakers should think about whether the rights should be limited to consumer goods or include capital items. Given the complexity and variation among products, it seems unlikely that there is a one-size fits all approach that will adequately address this issue.").

the analysis of potential market harm.”<sup>3</sup> Petitioners bear the burden of proof and persuasion,<sup>4</sup> and have not demonstrated that circumstances have changed – legally or factually – since the last rulemaking cycle. Moreover, in past rulemaking cycles, the Copyright Office has recommended against a broadly worded expansion of the repair exemption when the evidence presented in support of the expansion was limited to a few index examples that did not clearly define the proposed category.<sup>5</sup> The same situation exists here. The Copyright Office should recommend that the current proposals – which once again seek an exemption to circumvent an extremely broad category of access controls – be denied.

(i) Lawful Use Analysis

Petitioners argue that “accessing and utilizing” copyrighted software is necessary for diagnosis, maintenance, and repair of commercial devices, and that “modification, optimizing, and ‘tinkering’ fall outside the scope of the proposed exemption.”<sup>6</sup> However, because the scope of the proposed class is broad and undefined, and the type of access controls to be circumvented is also broad and undefined, it is unclear exactly what type of activities would ultimately fall within the proposed exemption. Moreover, given the broad, undefined scope of the class for which the proposed exemption would apply, it is unclear if the proposed exemption would apply to devices and circumvention techniques that the Copyright Office has excluded in the past.

Public Knowledge and iFixit selected four “index” examples of commercial devices that would fall within the proposed exemption, including commercial soft serve ice cream machines, construction equipment, programmable logic controllers (“PLCs”), and enterprise IT equipment. In each case, the types of access controls that Petitioners described and seek to circumvent are too dissimilar to constitute a meaningful class, and the repair functions that Petitioners seek can be accessed by licensed technicians or using licensed tools, without the need for circumvention.<sup>7</sup> As in the prior rulemaking cycle, Petitioners have failed to demonstrate that these devices share

---

<sup>3</sup> See 2021 Rec. at 197-98.

<sup>4</sup> See 2021 Rec. at 7-8.

<sup>5</sup> See SECTION 1201 RULEMAKING: SEVENTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION, RECOMMENDATION OF THE ACTING REGISTER OF COPYRIGHTS, 220 (2018), [https://cdn.loc.gov/copyright/1201/2018/2018\\_Section\\_1201\\_Acting\\_Registers\\_Recommendation.pdf](https://cdn.loc.gov/copyright/1201/2018/2018_Section_1201_Acting_Registers_Recommendation.pdf) (“2018 Rec.”) (“Proponents offer specific examples of modification of a few other devices, including a robotic dog, a camera gimbal, and handheld two-way radios. But as discussed above, as an overall matter, the Acting Register cannot conclude that ‘modification’ is likely to be noninfringing. Moreover, proponents fail to address whether the asserted adverse effects concerning these devices apply to the broader category of devices of which they are a part, or instead represent ‘individual cases,’ in which case they are outside the scope of the rulemaking. Thus, the Acting Register finds that the evidence relating to these devices is insufficient at this time to adequately identify and evaluate any asserted adverse effects on noninfringing uses.”).

<sup>6</sup> Public Knowledge/iFixit Long Comment at 10.

<sup>7</sup> See *id.* at 3 (soft serve ice cream error codes are “unintuitive” and require an authorized technician or TPM circumvention to interpret); *id.* at 4 (construction equipment diagnostic and error information requires using “authorized, licensed, and branded tools” or TPM circumvention); *id.* at 6 (PLCs require a security password set by the user or the licensed PLC vendor); *id.* at 6-7 (enterprise IT diagnostics must be performed by licensed technicians or employees of the enterprise IT provider).

common characteristics that would apply to a broader category of devices of which they are a part,<sup>8</sup> or that there are not adequate alternatives to circumvention available.

Several times, the Copyright Office has asserted that “[t]hose who seek an exemption from the prohibition on circumvention bear the burden of establishing that the requirements for granting an exemption have been satisfied,”<sup>9</sup> and it has made clear that the so-called “burden of production”—*i.e.*, “the burden to come forward with evidence at different points in the proceeding”—“will effectively be on exemption proponents.”<sup>10</sup> Petitioners have failed to meet this burden. The record in this proceeding is too sparse to support the broad proposed expansion of the existing repair exemption.<sup>11</sup>

## (ii) 1201(a)(1)(C) Factors Analysis

In order to qualify for an expanded exemption, Petitioners must demonstrate that they are “either adversely affected, or are likely to be adversely affected, in their ability to make noninfringing uses during the next three years, and “must show a need for circumvention to avoid any alleged adverse effects.”<sup>12</sup> The Copyright Office analyzes this element utilizing the statutory factors in Section 1201(a)(1)(C) of the Copyright Act. Petitioners have not demonstrated that these statutory factors favor their proposed expansion of the repair exemption to include industrial and commercial equipment. The index examples Petitioners utilize for this analysis in their comments are insufficient,<sup>13</sup> as they do not demonstrate that the proposed expanded exemption would advance the availability of works; further any significant nonprofit goals; result in commentary concerning works; or avoid harming copyright owners’ markets for authorized derivative works.

Because this proposal is abstract and undefined, and the proposed class is unduly broad, expanding the existing exemption for repair of consumer devices to include industrial and commercial equipment would be inappropriate.

## DOCUMENTARY EVIDENCE

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

---

<sup>8</sup> See 2018 Rec. at 220.

<sup>9</sup> 2021 Rec. at 7 (quoting SECTION 1201 RULEMAKING: SIXTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION, RECOMMENDATION OF THE REGISTER OF COPYRIGHTS 13 (2015), <https://cdn.loc.gov/copyright/1201/2015/registers-recommendation.pdf>).

<sup>10</sup> *Id.* at 7-8 (quoting U.S. COPYRIGHT OFFICE, SECTION 1201 OF TITLE 17 at 110 (2017), <https://www.copyright.gov/policy/1201/section-1201-full-report.pdf>).

<sup>11</sup> See 2018 Rec. at 219 (“[T]o recommend an exemption, there must be a record that shows distinct, verifiable, and measurable adverse effects, or that such effects are likely to occur.”).

<sup>12</sup> 2021 Rec. at 11.

<sup>13</sup> Public Knowledge/iFixit Long Comment at 11-18.

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