

**Short Comment Regarding a Proposed Exemption  
Under 17 U.S.C. 1201  
(Proposed Class #10)**

**Check here if multimedia evidence is being provided in connection with this comment**

**Item 1. Commenter Information**

This Comment is submitted on behalf of Entertainment Software Association; Motion Picture Association of America, Inc.; and Recording Industry Association of America (collectively the “Joint Creators and Copyright Owners”). The Joint Creators and Copyright Owners may be contacted through their counsel, Steven J. Metalitz, J. Matthew Williams and Naomi Straus, Mitchell Silberberg & Knupp LLP, 1818 N St., NW, 8th Fl., Washington, D.C., 20036, Telephone (202) 355-7900.

The Joint Creators and Copyright Owners are trade associations representing some of the most creative and innovative companies in the United States.

**The Entertainment Software Association (“ESA”)** represents all of the major platform providers and nearly all of the major video game publishers in the United States. ESA is the U.S. association exclusively dedicated to serving the business and public affairs needs of companies that publish computer and video games for video game consoles, handheld devices, personal computers, and the Internet. ESA offers a range of services to interactive entertainment software publishers, including but not limited to: a global content protection program; business and consumer research; government relations; and intellectual property protection efforts.

**The Motion Picture Association of America, Inc. (“MPAA”)** is the voice of one of the country’s strongest and most vibrant industries – the American motion picture, home video and television industry. MPAA works to advance the business and the art of filmmaking and to celebrate its enjoyment around the world. MPAA members include: Walt Disney Studios Motion Pictures; Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Twentieth Century Fox Film Corporation; Universal City Studios LLC; and Warner Bros. Entertainment Inc.

**The Recording Industry Association of America (“RIAA”)** is the trade organization that supports and promotes the creative and financial vitality of the major music companies. Its members comprise the most vibrant record industry in the world. RIAA members create, manufacture and/or distribute approximately 85% of all legitimate recorded music produced and sold in the United States. In support of its mission, the RIAA works to protect the intellectual property and First Amendment rights of artists and music labels; conduct consumer, industry and technical research; and monitor and review state and federal laws, regulations and policies.

## **Item 2. Proposed Class Addressed**

Proposed Class 10: Literary Works Distributed Electronically—Space Shifting and Format Shifting.

The December 12, 2014 Notice of Proposed Rulemaking (“NPRM”) described this proposed class as allowing “circumvention of access controls on lawfully made and acquired literary works distributed electronically for the purpose of noncommercial space-shifting or format-shifting. This exemption has been requested for literary works distributed electronically in e-books.” 79 Fed. Reg. 73,856, 73,863 (Dec. 12, 2014). Given that the exemption targets e-books, we assume that software would be excluded from the proposed class of literary works at issue.

## **Item 3. Statement Regarding Proposed Exemption**

The Joint Creators and Copyright Owners oppose this exemption in its entirety. As the Register and the Librarian have concluded in the past, there is no basis under the law to conclude that back-up copying, format-shifting and space-shifting are fair uses. *See* Section 1201 Rulemaking: Fifth Triennial Proceeding, Recommendation of the Register of Copyrights, 162-65 (Oct. 12, 2012) (“2012 Recommendation”); Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies; Final Rule, 77 Fed. Reg. 65,250, 65,276 (Oct. 26, 2012) (“2012 Rule”).<sup>1</sup> For the reasons articulated by the Register and the Librarian in the past, as well as the reasons articulated by the Joint Creators and Copyright Owners in their opposition comments filed today on Proposed Class 8, the request should be denied because it does not relate to a noninfringing use. In addition, the proponents have not met – and cannot meet – their burden of showing that access controls are resulting in decreased access to copyrighted works such that access controls are adversely impacting consumers’ ability to access literary works on a variety of devices and platforms. *See* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies; Notice of Inquiry and Request for Petitions, 79 Fed. Reg. 55,687, 55,689 (Sept. 17, 2014) (“2014 NOI”).<sup>2</sup>

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<sup>1</sup> All cited materials from previous rulemaking cycles can be accessed via the Copyright Office website at <http://www.copyright.gov/1201/> under “Past Proceedings.”

<sup>2</sup> The burden of coming forward with evidence in support of the proposed exemption, as well as the burden of persuasion that the exemption should be recognized on the narrow grounds authorized by the statute, must always remain with the proponent of an exemption. 2014 NOI at 55,689. This burden applies to both factual and legal issues.