#### Long Comment Regarding a Proposed Exemption Under 17 U.S.C. 1201 (Proposed Class #19)

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#### 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 19: Jailbreaking—Videogames Consoles.

The December 12, 2014 Notice of Proposed Rulemaking ("NPRM") described this proposed class as permitting "the jailbreaking of home video game consoles. Asserted noninfringing uses include installing alternative operating systems, running lawfully acquired applications, preventing the reporting of personal usage information to the manufacturer, and removing region locks. The requested exemption would apply both to older and currently marketed game consoles." 79 Fed. Reg. 73,856, 73,867 (Dec. 12, 2014). None of the proponents of this exemption proffered any suggested language for the Copyright Office to use to craft the particular class of works at issue. This should weigh against granting an exemption.

#### Item 3. Overview

The Joint Creators and Copyright Owners oppose this exemption and endorse the arguments presented in the separately filed comments of the Entertainment Software Association ("ESA"). This proposed class of works should be rejected because circumvention related to videogame consoles inevitably increases piracy and is detrimental to the secure and trustworthy innovative platforms that videogame publishers and consumers demand, and that have flourished partly as a result of the protection that technological protection measures provide. Congress clearly intended to protect the right of consumers and developers to choose between competing styles of platforms.<sup>1</sup>

As the Register concluded in 2012, granting the proposed exemption would facilitate infringement and harm the market for and value of copyrighted works. During this proceeding, the proponents have parroted the same misguided arguments that were presented three years ago without presenting any new facts to justify a change in course by the Copyright Office. Thus, the proponents have not met their burden of persuasion. *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>&</sup>lt;sup>1</sup> See Staff of House Committee on the Judiciary, 105th Cong., Section-By-Section Analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4, 1998, at 6 (Comm. Print 1998), reprinted in 46 J. Copyright Soc'y U.S.A. 635 (1999) ("Manager's Report") (endorsing opportunity for access controls to enable "new ways of disseminating copyrighted materials to users").

<sup>&</sup>lt;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.

### Item 4. Technological Protection Measure(s) and Method(s) of Circumvention

The proponents do not attempt to identify the specific access controls that they wish to circumvent. However, as ESA explains in its separately filed comments, "to engage in the activities discussed in proponents' comments – and also to play pirated content or to use applications that enable unlawful copying – the user [of a videogame console] must not only circumvent the encryption on the firmware but also must modify the firmware in order to defeat the authentication check access control." ESA Class 19 Comment at 4.

#### Item 5. Asserted Noninfringing Use(s)

Although the proponents of the exemption mention several activities that they would like people to be able to engage in using hacked videogame consoles, their primary goal appears to be enabling play of unauthorized games though "jailbreaking." While they claim that such unauthorized games are sometimes noninfringing, they also concede that "jailbroken consoles can also be utilized to pirate games." iFixit Class 19 Comment at 3. The Register should not lose sight of the fact that "access controls on videogame consoles not only preserve the integrity of the consoles, but also ensure the legitimacy of the content that is played on those devices. ... [C]ircumvention of console restrictions – even when initially undertaken for salutary purposes – is inextricably linked to and tends to foster piracy." Recommendation of the Register of Copyrights, Section 1201 Rulemaking: Fifth Triennial Proceeding, at 43 (Oct. 12, 2012) ("2012 Recommendation"). Accordingly, the fair use analysis should be conducted with this backdrop in mind.

Regardless, none of the proponents of this exemption conducted any analysis of the four fair use factors.<sup>5</sup> Thus, there is no evidence in the record to support a conclusion that the conduct they seek to enable qualifies as noninfringing. Moreover, for the reasons stated in the separately filed comments of ESA, analyzing the uses at issue under the four statutory factors disfavors a finding of fair use. This conclusion is buttressed by the Register's prior conclusion in 2012, on a much more complete record, "that proponents have failed to fulfill their obligation to establish persuasively that fair use can serve as a basis for the exemption they seek." 2012 Recommendation at 44.

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<sup>&</sup>lt;sup>3</sup> One goal of the proponents is to defeat region coding on games. The Register has rejected similar efforts to break region codes on DVDs. *See*, *e.g.*, Recommendation of the Register of Copyrights, Section 1201 Rulemaking: Third Triennial Proceeding, at 75-76 (Nov. 17, 2006) ("Region coding imposes, at most, an inconvenience rather than actual or likely harm, because there are numerous options available to individuals seeking access to content from other regions.").

<sup>&</sup>lt;sup>4</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>&</sup>lt;sup>5</sup> Maneesh Pangasa proposed the exemption during the petition round. Only iFixit and a collection of individuals who submitted form comments responded to the NPRM.

Given the unique nature of videogame consoles, which are not mobile tools used for all sorts of daily activities but instead devices designed for in-home enjoyment of entertainment products, preserving the integrity of the access controls that publishers and others rely on to protect some of the most dynamic, creative content being disseminated today, including not only games but feature films and television shows, is essential. Because consoles are used to consume a variety of content beyond games, granting the proposed exemption would threaten multiple copyright-based industries. For example, hacked consoles could enable unauthorized recording of movies and television content being delivered by subscription or on-demand streaming services. It could also disable technologies used to provide time-limited access to such content. The serious threat of piracy undermines the proponents' unsubstantiated assertion that the uses at issue are noninfringing.

#### Item 6. Asserted Adverse Effects

As ESA explains in its separately filed comments, gamers who wish to play "homebrew" games have a variety of platform options to choose from. For example, such games can be played on personal computers and Android devices without circumvention. See 2012 Recommendation at 48 ("Homebrew activities ... may be pursued on myriad alternative devices and platforms without resorting to circumvention..."). There is no evidence in the record to the contrary. The proponents' preference for utilizing video game consoles rather than these reasonable alternatives is not a cognizable justification for an exemption, especially considering that console manufacturers actually enable independent publishers to design games for the consoles using approved, streamlined processes. See id. (relying on the availability of "manufacturer sanctioned development programs"). The proponents have not identified any substantial adverse effect that access controls are having on any noninfringing use.

#### Item 7. Statutory Factors

17 U.S.C. § 1201(a)(1)(C)(i) instructs the Register to consider "the availability for use of copyrighted works" broadly and in historical context. In the videogame market, access controls have undoubtedly increased, rather than decreased, the availability of "highly valuable expressive works." 2012 Recommendation at 41.

Similar to the use of Advanced Access Content System ("AACS") technology to protect the content on Blu-ray Discs, copyright owners use access controls to make copyrighted content available in digital format through video game consoles and to secure this content against the risk of piracy. These access controls enable platform providers to develop exciting and innovative means of distributing a wide variety of copyrighted video game content, feature films, and televisions shows to users. As the Register previously concluded, "[i]t is difficult to imagine that one would choose to make [an investment of millions of dollars] without some hope that it could be recouped by offering the resulting product through channels that provide some measure of protection against unauthorized copying and distribution." *Id.* at 48.

Although the proponents try to couch the proposed exemption as one that would benefit scholars and researchers, it is clear that their true goal is to legitimize hacking for the purpose of

enabling casual use of entertaining video games and other applications. See, e.g., Maneesh Pangasa Petition at 3 (Nov. 13, 2014) (advocating for "ability to run third party applications or software of the end user's choice"). Such use does not involve criticism or commentary. Accordingly, 17 U.S.C. § 1201(a)(1)(C)(iii) weighs against granting the proposed exemption.

Finally, undermining the integrity of access controls that protect games and other content used on consoles would also undermine the market for and value of that content. As the Register also concluded in 2012, "due to the particular characteristics of the videogame marketplace, the circumvention of access controls protecting a console computer program so that it can be copied and modified for the purpose of enabling unauthorized applications has the effect of decreasing the market for, and value of, that program, as it can no longer serve to facilitate a secure gaming platform." Thus, the fourth statutory factor weighs heavily against granting an exemption.

#### Item 8. Documentary Evidence

Please see the attached Exhibit.

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<sup>&</sup>lt;sup>6</sup> In 2012, the Register concluded that "it does not appear that the prohibition on circumvention is having a negative impact on scientific research efforts, and there is no showing with respect to the other favored activities referenced in the third statutory factor." 2012 Recommendation at 49. Given that the proponents in the current proceeding have simply reiterated the same arguments presented in the last cycle in less detail, reaching the same conclusion here is even more compelling.

<sup>&</sup>lt;sup>7</sup> See 17 U.S.C. § 1201(a)(1)(C)(i). A popular app for enabling infringing access to movies is called "Popcorn Time." If a jailbroken console could run such an application, it would render "BitTorrent piracy as easy as Netflix, but with far more content and none of those pesky monthly payments." Andy Greenberg, *Inside Popcorn Time, the Piracy Party Hollywood Can't Stop*, WIRED, Mar. 18, 2015, <a href="http://www.wired.com/2015/03/inside-popcorn-time-piracy-party-hollywood-cant-stop/">http://www.wired.com/2015/03/inside-popcorn-time-piracy-party-hollywood-cant-stop/</a>, Exhibit 1 attached hereto.

#### **Index of Exhibits to Joint Creators and Copyright Owners' Class 19 Comment**

Exhibit No.	Content	URL (if available)
1	Andy Greenberg, Inside Popcorn Time, the Piracy Party Hollywood Can't Stop, Wired	http://www.wired.com/2015/03/inside-popcorn-time-piracy-party-hollywood-cant-stop/

## Exhibit 1

ANDY GREENBERG SECURITY 03.18.15 7100 AM

# INSIDE THE POPCORN TIME, THE PIRACY PARTY HOLLYWOOD CAN'T STOP



Popcorn Time was an instant hit when it launched just over a year ago: The video streaming service made BitTorrent piracy as easy as Netflix, but with far more content and none of those pesky monthly payments. Hollywood quickly intervened, pressuring Popcorn Time's Argentinian developers to walk away from their creation. But anonymous coders soon relaunched the copyright-flouting software. Today, Popcorn Time is growing at a rate that has likely surpassed the on changes designed to make the service virtually

impervious to law enforcement.

As Popcorn Time celebrated the first anniversary of its rebirth, WIRED chatted via email and instant message with a software developer from Popcorn-Time.se, one of the most popular of several reincarnations of Popcorn Time. (The anonymous developer asked us to use Popcorn Time's smiling popcorn-box mascot "Pochoclin" as his or her pseudonym.) Popcorn Time's masked spokesperson says the streaming movie and TV app is flourishing—in defiance of many of the world's most powerful copyright holders and EURid, the domain registrar that seized the original site's web domain last year.

After everything we went through, this will be our sweetest revenge.

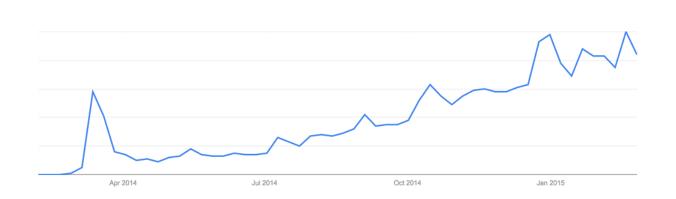
- ANONYMOUS POPCORN TIME SPOKESPERSON

Popcorn-Time.se, Pochoclin says, has millions of users and is growing at the mind-bending rate of 100,000 downloads per day. He or she also hinted that a forthcoming switch to a peer-to-peer

architecture will make the service far harder for copyright cops to attack. "We're at the threshold of one of the most exciting times since we started this project," Pochoclin writes. "Making all our data available via p2p will mean that Popcorn Time will no longer rely on domains and centralized servers but only on its user base."

"After everything we went through," Pochoclin said, "this will be our sweetest revenge and our biggest victory."

When Popcorn-Time.se started responding to WIRED's questions in November, Pochoclin said the reborn project already had 4 million users. But it had taken a serious hit a few months earlier, when Brussels-based domain registrar EURid revoked its website domain, Time4Popcorn.eu. At its new Swedish domain, it's only recently returned to that earlier adoption rate. (Pochoclin wouldn't reveal the size of its current user base for fear of drawing more attention from law enforcement or copyright holders.) "[EURid's domain seizure] was just a small setback ... a small but painful kick to the balls," the spokesperson says. "We've grown this project tremendously since we picked it up ... The numbers just keep rising."



A chart of Google searches for Popcorn Time over the last year, showing its quick growth since the shutdown of the original site in March of last year. (Source: Google Trends, which shows only relative search trends rather than absolute numbers of searches.)

For any other year-old startup, those numbers would seem ludicrous. But Popcorn Time is giving away Hollywood's most valuable content for free, and making that piracy easier than ever. Download Popcorn Time's app and in seconds you're offered a slick menu of streaming TV shows and movies at least as easy to navigate as Netflix or Hulu—but with higher-quality video and hundreds of recent movies and TV shows paid services don't offer.

Popcorn Time's BitTorrentfor-dummies approach has become the virtually undisputed future of video piracy. Popcorn Time isn't a new kind of piracy so much as an inviting new front-end interface for the BitTorrent underground. The software collects and organizes popular files from existing BitTorrent sources like the Pirate Bay, Kickass Torrents, Isohunt, and YTS. "We're like

Google," Pochoclin says, "scraping for new content all over the internet." By integrating its own video player and prioritizing its downloads from the first chunk of the video file to the last, it makes those sites' files immediately streamable. With Popcorn Time, the complexity of BitTorrent search engines, trackers, clients, seeds, decompression, playback, and storage is reduced to a single click. That's made this BitTorrent-for-dummies the virtually undisputed future of video piracy. Pochoclin says Popcorn-Time.se offers this streaming service pro bono. It doesn't charge for downloads, and neither its app nor its website display ads. "We just did it for the love of this project," Pochoclin writes. "It was something we believed in. And once it started taking off ... as it did from the start, all the love that we were getting from Popcorn Time users made us just keep on going without really stopping to think where this road is taking us."

That road, it seems, points toward a collision course with the Hollywood's copyright lawyers. Documents revealed in last year's Sony hack revealed that the Motion Picture Association of America boasted of a "major victory" in pressuring Popcorn Time's original developers to scupper the service. The MPAA declined to comment on any measures it's taking against the new Popcorn Time. In a January 20 letter to shareholders, Netflix CEO Reed Hastings wrote that "piracy continues to be one of our biggest competitors," and referred to Popcorn Time by name, calling a graph

showing its rising Google searches "sobering." Neither Netflix nor Hulu responded to WIRED's requests for comment.

Pochoclin says the service doesn't do anything illegal: It merely organizes preexisting BitTorrent files hosted on other sites. "It's all automated and all working on existing open source technologies and existing websites online. Therefore, it's legal. Or better ... not illegal," Pochoclin says. "We all live in a free society, where what is not forbidden is allowed."

That's not a defense that's likely to succeed in an American court. An MPAA spokesperson pointed out in an email to WIRED that previous software like Napster, Grokster, isoHunt, and Limewire didn't directly host content either, but courts ruled that all of them were infringing on copyrights. Even though it merely helps users stream video files made available elsewhere, Popcorn Time could be accused of "contributory liability," says University of Richmond intellectual property law professor Jim Gibson. A service whose primary, intended function is aiding copyright infringement doesn't need to host any files to be illegal. "If they know that they're actually facilitating the downloading or streaming of copyrighted movies and they continue to do it, they're in trouble," Gibson says.

With legal threats looming, Popcorn-Time.se is working on new defenses. In about a month, the group says it plans to launch a version of the app that will update its TV and movie content with the same peer-to-peer BitTorrent protocol that it uses to stream movies, pulling data from other users rather than a central server. That means that even if its domain or other central infrastructure is taken down, Popcorn Time would still function. In a second upcoming phase, Popcorn-Time.se says it will have the ability to update the app itself via peer-to-peer downloads, using cryptographic signatures to ensure no malicious code propagates through its network. When those updates are in place, Pochoclin says, "only our users will decide whether we live or die ... This way, Popcorn Time will be unstoppable."

But even if the service itself does develop an invincible peer-to-peer architecture, Popcorn Time's developers may be personally vulnerable to a lawsuit or even criminal charges. The Swedish founders of the Pirate Bay, for instance, were successfully prosecuted for running the massively popular BitTorrent website, and the United States is seeking the extradition of Megaupload founder Kim Dotcom from New Zealand to face criminal copyright infringement charges.

For now, Popcorn Time's developers depend on their unnamed web hosting company to ensure their anonymity, which is hardly a bulletproof strategy. "We're anonymous but not in hiding," Pochoclin says. "We guess our hosting company does know who we are. But they're not supposed to give our information out to anyone. And it's good enough for us."

With Popcorn Time's popularity skyrocketing, it may soon find out whether those defenses are good enough to hold off a horde of MPAA lawyers, too. Pochoclin may be cute. But he's made some powerful enemies.