

UNITED STATES COPYRIGHT OFFICE



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

*Please submit a separate comment for each proposed class.*

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

### **ITEM A. COMMENTER INFORMATION**

#### **DVD Copy Control Association**

The DVD Copy Control Association (“DVD CCA”), a not-for-profit corporation with its principal office in Morgan Hill, California, licenses the Content Scramble System (“CSS”) for use in protecting against unauthorized access to or use of prerecorded video content distributed on DVD discs. Its licensees include the owners of such content and the related authoring and disc replicating companies; producers of encryption engines, hardware and software decrypters; and manufacturers of DVD players and DVD-ROM drives.

#### **Advanced Access Content System Licensing Administrator**

The Advanced Access Content System Licensing Administrator, LLC (“AACS LA”), is a cross-industry limited liability company with its principal offices in Beaverton, Oregon. The Founders of AACS LA are Warner Bros., Disney, Microsoft, Intel, Toshiba, Panasonic, Sony, and IBM. AACS LA licenses the Advanced Access Content System (“AACS”) technology that it developed for the protection of high definition audiovisual content distributed on optical media. That technology is associated with Blu-ray Discs. AACS LA’s licensees include the owners of such content and the related authoring and disc replicating companies; producers of encryption engines, hardware and software decrypters; and manufacturers of Blu-ray disc players and Blu-ray disc drives.

As ultra-high definition products are entering the marketplace, AACSLA has developed a separate technology for the distribution of audiovisual content in ultra-high-definition digital format. This technology is identified as AACSLA2 and not AACSLA 2.0. This distinction in nomenclature is significant as the latter would suggest that it replaced AACSLA distributed on Blu-ray. It has not. AACSLA2 is a distinct technology that protects audiovisual content distributed on Ultra HD (UHD) Blu-ray discs, a distinct optical disc format which will not play on legacy (HD) Blu-ray players. To the extent a proposal mentions CSS and/or AACSLA, but does not explicitly include AACSLA2, such mention should not be inferred to include AACSLA2. Indeed, AACSLA2 is not subject to the proposed exemptions put forward by any Class 17 proponents.

**REPRESENTATIVES**

*COUNSEL TO DVD CCA AND AACSLA:*

Michael B. Ayers  
Michael B. Ayers Technology Law  
5256 S. Mission Rd., Suite 703-2215  
Bonsall, CA 92003-3622  
michael@ayerstechlaw.com  
(760) 607-6434

Dean S. Marks  
13236 Weddington St  
Sherman Oaks, CA 91401-6036  
deansmarks@yahoo.com  
(818) 469-7185

David J. Taylor  
Right Size Law PLLC  
621 G ST SE  
Washington, DC 20003  
david.taylor@rightsize.com  
202-546-1536

**ITEM B. PROPOSED CLASS ADDRESSED**

*Class 17 – All Works—Accessibility Uses*

**ITEM C. OVERVIEW**

For the reasons stated below, DVD CCA and AACSLA agree with the Register that the rulemaking cannot approve the exemption requested by proponents.

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

The TPMs of concern to DVD CCA and AACS LA are the Content Scramble System (“CSS”) used to protect copyright motion picture content on DVDs and the Advanced Access Content System (“AACS”) used to protect copyrighted motion picture content on Blu-ray Discs.

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

##### **I. *Introduction***

While the proponents’ underlying policy concerns for the proposed class are of substantial significance,<sup>1</sup> the proposed class for all copyrighted works, as the NPRM noted, far exceeds the parameters of a permissible class.<sup>2</sup> In response to the NPRM, proponents argue that the Register should reconsider her current interpretation of the statute to permit the proposed broad class. First, the proponents suggest that the interpretation should not be viewed as static, as the Register’s interpretation of a class has significantly evolved once already, in the 2006 Recommendation. Next, they argue that the general purpose of the rulemaking would be served by creating an exemption for the proposed class. They further point to the Register’s treatment of video games and software-enabled devices as examples of the rulemaking deviating from the requirements of the interpretation and resulting in classes inconsistent with the interpretation. As explained below, proponents draw the wrong conclusions from the legislative history and the exemptions. Because the proponents have not provided a more reasoned alternative interpretation of the statute that the

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<sup>1</sup> DVD CCA and AACS LA historically have not objected to the creation of reasonable exemptions intended to make copies of motion pictures more accessible to people with disabilities. This exemption does not, however, identify any additional use of motion pictures that is outside the current exemption for people with disabilities to make use of motion pictures. Nevertheless, DVD CCA and AACS LA would welcome any new reasonable proposals, and would be willing to consider how to address accessibility concerns outside of this rulemaking.

<sup>2</sup> 85 Fed. Reg. 65,309 (Oct. 15, 2020) [hereinafter, “NPRM”].

Register could employ when it considers all requests, the proponents have not provided a basis for the Register to be able to recommend the proposed class.

## II. *2006 Recommendation's Class Evolution*

The 2006 Recommendation announcing an evolution in the Register's interpretation of "class", as provided in the statute, was premised on the record developed in that rulemaking. Specifically, the Register acknowledged the case made by the film professors "presented an occasion for examination of [the Register's prior interpretation of "class"]."<sup>3</sup> The Register explained

Based on the proposals made in the past rulemaking proceedings, proponents had failed to satisfy certain threshold requirements that would have necessitated consideration of whether a class that was primarily defined by reference to a section 102 category of works could be further narrowed by reference to the use or user.<sup>4</sup>

The previously rejected proposals sought to permit circumvention for "broad categories of works that were solely or primarily defined by reference to the use or users."<sup>5</sup>

More importantly, the scope of the class is to be determined from the record evidence developed in the rulemaking. The Register explained:

the legislative history instructs the Register to carefully consider the appropriateness of the scope of a "class" in the context of each rulemaking proceeding in light of the particular facts presented in each proceeding. Thus, even though a "class" must begin, as its starting point, by reference to one of the categories of authorship enumerated in section 102, or a subset thereof, the ways in which that primary classification should be further delineated depends on the specific facts demonstrated in the proceeding. A "class" must be properly tailored not only to address the harm demonstrated, but also to limit the adverse consequences that may result from the creation of an exempted class.<sup>6</sup>

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<sup>3</sup> 2006 Recommendation at 17.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

Thus, what the Register explained is that, in the prior proceedings, the proponents did not advance their proposals with the necessary specificity that would have enabled the Register to even consider whether her prior interpretation of “class” was inadequate for the rulemaking. In contrast, “the facts demonstrated by the film professors” in the 2006 proceeding provided the basis for the Register to conclude “a class [initially defined by the section 102 categories of works] may, in appropriate cases, be additionally refined by reference to the particular type of use and/or user.”<sup>7</sup> Thus, to the extent the 2006 Recommendation pronounced a change in the agency’s interpretation of its own rulemaking, that change was well reasoned under administrative law principles.<sup>8</sup>

### **III. *General Purpose of the Rulemaking***

The change in interpretation enabled the general purpose of this rulemaking to better serve as a safety mechanism to ensure that the prohibition against circumvention was not stifling noninfringing uses. The Register was then able to recommend exemptions when there is record evidence to support the exemption. Undoubtedly, many more exemptions have been promulgated since the interpretive change than would have been allowed under the prior interpretation.

In considering legislative intent and discerning the meaning of “class,” there is little ambiguity that suggests the specific discussion of what constitutes a “class” should be discarded in favor of the general purpose of the rulemaking.<sup>9</sup> Otherwise, such discussion is superfluous, and

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<sup>7</sup> 2006 Recommendation at 17.

<sup>8</sup> See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

<sup>9</sup> Statutory interpretation favors giving effect to specific provisions over the general purpose of a statute. See, e.g., *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228 (1957) (“However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment.”) (citation omitted).

would result in the rulemaking lacking sufficient standards for it to be a valid exercise of delegated legislative power.<sup>10</sup>

#### **IV. *Exemptions for Software-Enabled Devices and Video Games***

Defining the class by record evidence has served fair use advocates well. In fact, the Register's willingness to engage in a review of the record to ascertain whether a class could be refined has served as the basis for a number of exemptions to be recommended, including an exemption for software-enabled devices. The proponents point to this particular exemption as a case of permitting others (but not them) to constitute a permissible broad class. Their conclusion fails to account for the efforts the Register made to review the record and ultimately limit her recommendation to a class in which a sufficiently developed record supported the standards of the rulemaking.

In the 2018 rulemaking, which expanded the 2015 repair exemption for motor vehicles to several other categories of devices, the Acting Register searched the record evidence to come forward with unifying elements to establish the class. She explained:

it is not clear whether “devices,” generally, share enough commonalities for the Acting Register to evaluate whether access controls are, in practice, adversely affecting noninfringing uses. The rulemaking record lacks a minimum quantity of evidence for a broad panoply of the devices that proponents' reference, let alone those which are not introduced but would fall under the proposed exemption. Outside of the vehicle context, the information provided is sparse regarding specific types of devices where TPMs inhibit repair or modification activities, with initial comments providing only cursory notice of devices considered by proponents as “relevant” to the exemption. [Notwithstanding] lengthy lists of specific devices that “could be configured to include technological protection measures that would

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<sup>10</sup> *Yakus v. United States*, 321 U.S. 414, 426 (1944). The Court explained:

Only if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding [Congress's] choice of means for effecting [public policy].

prevent independent maintenance and repair,” for many categories, it is still unclear whether TPMs are typically applied to these devices.<sup>11</sup>

In light of the shortcomings in the record, the Register “refine[d] the class based on the types of devices for which there is a cognizable record.”<sup>12</sup> While proponents sought an exemption for “all types of software enabled devices,” the Register could only find record evidence to consider seven categories, and ultimately, the record supported expanding the repair exemption to only two of the seven categories: smart phones and home appliances and home systems, such as a refrigerator, thermostat, HVAC, or electrical system. Though proponents here argue that others have benefited from the creation of broad classes, few of the class proponents of the exemption for software-enabled devices would agree that this class is broad at all.

Exemptions concerning video games reflect the principle that the class is defined by the evidence adduced from the rulemaking, and does not run counter to that fundamental principle. Proponents argue that, because video games are not explicitly set out in the list of Section 102 categories of works, an inconsistency is created. That, however, is not the case. Whether a video game is evaluated as a literary work or an audiovisual work, it is, in either case, a category of works under Section 102. More importantly, the record referred to the works as video games. Thus, these exemptions flowing from the record are for video games. Referring to the work solely as it may be categorized under section 102 (i.e., literary work or audiovisual work as opposed to videogames) would render the exemption less useful and not provide any additional benefit.

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<sup>11</sup> 2018 Recommendation at 191.

<sup>12</sup> *Id.* at 192.

In light of the foregoing, proponents have not provided any persuasive basis for the Register to alter her interpretation of the rulemaking or upon which she can grant the proposed exemption. The proposed exemption is simply impermissibly broad. The NPRM noted as much,

As presently [argued], this proposed exemption is beyond the Librarian's authority to adopt because it does not meet the statutory requirement to describe a particular class of copyrighted works.

...

While the Office recognizes the vital importance of ensuring accessibility persons with disabilities, and indeed has recommended legislation to make permanent the current exemption regarding assistive technologies for electronically-distributed literary works, its authority in this proceeding is bound by the provisions of the statute.<sup>13</sup>

Therefore, the Register cannot grant the proposed exemption.

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<sup>13</sup> NPRM, *supra* note 2 at 65309.