

**Submission on behalf of Joint Creators and Copyright Owners
Class 2: Audiovisual Works – Texting**

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 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 Alliance for Recorded Music (“ARM”) is a nonprofit coalition comprising the many artists and record labels who together perform, create, and/or distribute nearly all of the sound recordings commercially released in the United States. Members include the American Association of Independent Music (“A2IM”), the Music Artists Coalition (“MAC”), the Recording Industry Association of America, Inc. (“RIAA”), hundreds of recording artists, the major record companies, and more than 600 independently owned U.S. music labels.

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.

Represented By:

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

ITEM B. PROPOSED CLASS ADDRESSED

Proposed Class 2: Audiovisual Works – Texting

ITEM C. OVERVIEW

MPA, ARM and ESA (“Joint Creators and Copyright Owners”) oppose this petition, which was unsupported by any substantive comments. The proposed uses (i) in many circumstances are unlikely to qualify as noninfringing, especially since Petitioner is a commercial enterprise; (ii) could be covered by the “non-commercial” video exemption for comment and criticism if any is

provided (which it usually is not with GIFs); and (iii) can be accomplished using non-circumventing screen capture technology. Moreover, Petitioner does not represent the interests of the purported beneficiaries of the proposed exemption.

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

In its petition, SolaByte Corporation (“SolaByte”) requested an exemption to circumvent encrypted “A/V content stored on DVD and blu-ray disc [sic].”¹ Such encryption schemes are, therefore, the only access controls that the Copyright Office should consider when analyzing issues related to whether to recommend a texting exemption. SolaByte seeks an exemption to circumvent “movies, TV shows, music video[s], [and] other copyrighted works.”² Accordingly, SolaByte seeks to circumvent only motion pictures. Other audiovisual works, such as video games, are not at issue.

ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGING USES

SolaByte³ submitted only an initial petition to circumvent technological protection measures “for licensed audio/video works stored on optical disc media for the purpose of creating short (10 seconds or less) A/V clips that enhance communication effectiveness and understanding when using TEXTing messages.”⁴ The Copyright Office should reject the proposal for several reasons.

First, neither SolaByte, nor anyone else, offered any substantive comments to support the need for the requested exemption or its legitimacy.⁵ Given that the time for submitting supporting evidence has now expired, the Copyright Office should not consider any evidence submitted for the first time during the reply comment round.⁶

Second, at least some of the targeted uses are likely infringing in many instances. Clip licensing is an already developed market for motion pictures. For example, the Fandango [Movie Clips](#)

¹ SolaByte Corp., [Initial Petition](#) (Sep. 8, 2020) (“SolaByte 2020 Petition”).

² *Id.*

³ Petitioner claims to sell technology “to easily capture a group’s licenses from the movies and music they own on physical and electronic media, combine it with their digital creations and stream it on demand like the group’s private media channel.” [About](#), SOLABYTE (last visited Feb. 2, 2021). As described, SolaByte’s technology appears to be nothing more than a scheme to profit from disseminating copyrighted works created by members of MPA, ARM and others. Moreover, if unlicensed, SolaByte is likely trafficking in an impermissible circumventing technology and service under 1201(a) (2), outside the scope of this Rulemaking. *See* Joint Creators and Copyright Owners, Class 6: Opposition (Feb. 9, 2021).

⁴ SolaByte 2020 Petition.

⁵ Free Software Foundation (“FSF”) submitted supportive comments, which expressed general philosophical objections to copyright law and the use of access controls, rather than evidence or legal arguments. FSF attached a list of purported “signatures” in support of every proposed class of works. They offer no argument in support of the specific proposal here at issue, but at best marginal support for FSF’s general, well-worn, anti-copyright rhetoric.

⁶ *See* [Exemptions To Permit Circumvention of Access Controls on Copyrighted Works: Notice of Proposed Rulemaking](#), 85 Fed. Reg. 65293, 65302 (Oct. 15, 2020) (“NPRM”) (“Proponents of exemptions should present their complete affirmative case for an exemption during the initial round of public comment, including all legal and evidentiary support for the proposal.”).

[Website](#) and [Movie Clips YouTube Channel](#) offer a wide variety of clips and movie trailers, and each studio also offers clip licensing services.⁷ SolaByte’s commercial proposal to facilitate circumvention of discs to create GIFs for texting would interfere with the existing market for licensing motion picture clips. If SolaByte wants to sell GIFs to people, it should seek licenses. This rulemaking is not intended as a vehicle for obtaining commercially valuable licenses on a *gratis* basis.

Third, at least some of the proposed uses are potentially covered by the existing “non-commercial” video exemption for purposes of criticism or comment. While a GIF of a movie clip standing alone is not usually transformative, and usually does not include any criticism and commentary, GIFs that do include criticism or commentary may sometimes be noninfringing and fall under the existing exemption. In addition to relying on the erroneous notion that GIFs are categorically noninfringing, SolaByte’s problem is that it appears to want to circumvent for commercial purposes, or to provide a circumvention service to consumers in violation of Section 1201(a) (2). SolaByte cannot stand in the shoes of noncommercial video makers.

Fourth, consumers may obtain clips using non-circumventing alternatives such as screen capture technology. There is nothing in the record to support a finding that screen capture technologies cannot provide a sufficient level of quality.

F. 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)
Sofia Castillo (szc@msk.com)
MITCHELL SILBERBERG & KNUPP LLP
1818 N Street, NW, 7th Floor
Washington, D.C. 20036
202-355-7904

⁷ See, e.g., [FAQs](#), PARAMOUNT PICTURES (last visited Feb. 6, 2021) (“For clip licensing and still photo requests please email clip_licensing@paramount.com); [Film Clip and Still Licensing](#), SONY PICTURES (last visited Feb. 6, 2021) (“If you wish to license clips, stills, posters, dialogue, or any other thematic elements from the feature film libraries of Columbia Pictures, TriStar Pictures, Sony Pictures Animation, Screen Gems, Stage 6 Films, or Revolution Studios, please submit a request by email to FilmClips@spe.sony.com”); [Universal Studios Media Licensing](#), UNIVERSAL STUDIOS (last visited Feb 6, 2021) (“Your source for film and TV clip, still, and elements business to business media licensing from the iconic Universal Pictures, Focus Features, DreamWorks Animation, and MCA Television libraries.”); [Clip & Still Licensing Request Form](#), WALT DISNEY STUDIOS (last visited Feb. 6, 2021); [Clip & Still Licensing Info](#), WARNER BROTHERS ENTERTAINMENT (last visited Feb. 6, 2021) (“If you wish to use a clip, still or poster from the Warner Bros. Entertainment Inc., Turner Entertainment Co. (including pre-1986 MGM produced and RKO titles), Castle Rock Entertainment, New Line Cinema (including Picturehouse and Fine Line) or Hanna Barbera feature film, television or animation libraries, all requests must be submitted in writing by e-mail or fax.”).