UNITED STATES COPYRIGHT OFFICE

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

Comments of ACT | The App Association on Proposed Class 9: Computer Programs- Software Preservation

ITEM A. COMMENTER INFORMATION

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ACT | The App Association, representing more than 5,000 app companies and software firms that create and license digital content, submits the following comments to the United States Copyright Office ("Copyright Office") in response to its Notice of Proposed Rulemaking ("NPR") concerning possible temporary exemptions to the Digital Millennium Copyright Act's ("DMCA") prohibition against the circumvention of technological measures that control access to copyrighted works. The App Association is widely recognized as the foremost authority on the $143 billion app ecosystem and its intersection with governmental interests. As the only organization dedicated to the needs of small business app developers and tech innovators around the world, the App Association advocates for an environment that inspires and rewards innovation while providing the resources to help our members leverage their intellectual assets to raise capital, create jobs, and support innovation.

ITEM B. PROPOSED CLASS ADDRESSED

Proposed Class 9: Computer Programs- Software Preservation

ITEM C. OVERVIEW

The App Association does not oppose granting the proposed exemption for libraries, archives, museums, and other cultural heritage institutions to circumvent technological protection measures ("TPMs") on lawfully acquired computer programs and computer program-dependent materials for the purposes of preserving computer programs, if the exemption includes the obsolescence limitation used in previous rulemakings.

ITEM D. COMMENTS ON PROPOSED CLASS 9: COMPUTER PROGRAMS- SOFTWARE PRESERVATION

1. **Petitioners' requested exemption would allow infringing activity that violates section 108 of the Copyright Act, unless the class is limited to obsolete software.**

Section 108 of the Copyright Act is relevant as the Copyright Office considers the proposed exemption. This section limits the exclusive rights of copyright owners by allowing the reproduction of works by libraries and archives for specific purposes and under certain conditions. It is not considered infringement when libraries and archives make copies of works for the purposes of preservation, research, and replacement of damaged, deteriorating, lost, or stolen works, subject to limitations. The DMCA amended section 108 to permit the reproduction of digital copies into a new format only if the original format became obsolete. This means digital reproductions can be made if the machine or device used to render the work perceptible is no longer reasonably available in the commercial marketplace (Section 108 (c)). The legislative history of the DMCA emphasized that this limitation was intended to "ensure that the provision does not inadvertently result in the suppression of ongoing commercial offerings of works in still-usable formats." (S. Rep. No. 105-190 at 62 (1998)).

In granting exemptions for computer programs in past rulemakings, the Copyright Office has wisely followed the guidance of section 108 and included an obsolescence limitation. In both the 2003 and 2006 Triennial Rulemakings the computer program exemptions were limited to formats that have become obsolete and which require the original media or hardware to access. In those decisions, the Copyright Office acknowledged the rationale for enacting section 108 and the amendments to that section made by the DMCA were to address issues of reproduction by libraries and archives. Section 108 balances the interests of libraries to maintain and preserve copyrighted works with the interests of content owners to ensure strong copyright protections continue to incent the distribution of digital content. The Copyright Office should again follow the guidance of section 108 and limit the proposed exemption to obsolete software.

Therefore, without inclusion of an obsolescence limitation, the petitioners are not able to meet the requirement of demonstrating non-infringing uses of the proposed class of works. It is unlikely that the reproduction of software programs currently available, or for which lawful access can be achieved with available hardware, would fall under the fair use exemption to infringement. In addition, the examples cited by the petitioners' request focus on obsolete software. Petitioners refer to "older" and "vintage" software repeatedly in their Round 1 comment. Granting the exemption with an obsolescence limitation would ensure libraries and archives have the ability to access and preserve out-of-date software while also protecting the current marketplace for software products and services.

Copyright protections are foundational to rewarding the creativity and innovation that sustains and grows much of the U.S. economy. With the rise of the digital economy and the increasing internet connectivity of consumer products, these copyright protections have only become more important to those who utilize this global marketplace. For this reason, the App Association urges the Copyright Office to limit this exemption to software in formats that have become obsolete.

2. Petitioners have not established adverse effects in the ability to make non-infringing uses of the proposed class of works.

Petitioners' comments have focused on the difficulty of accessing obsolete software, but they do not provide specific examples of how they are adversely affected in their ability to access software programs currently available in the marketplace. That is likely because reproductions of such software programs would not fall under section 108 or fair use exemptions. Without a limitation to obsolete software, petitioners are unable to make the case in the proposed exemption that they are adversely affected in their ability to use the class of works in a non-infringing manner.

However, granting an exemption from circumvention prohibitions on the TPMs used by software developers in programs currently available in the marketplace would negatively impact this important and growing sector of the U.S. economy. The Copyright Office should consider the impact of these copyright protections on dynamic industries like those within the app ecosystem, as well as on the business models of the App Association software development member companies. The DMCA is not without its flaws, but it has proven effective and flexible enough to provide for and deal with consumer protection and continued innovation in the tech sector. The App Association urges the Copyright Office to follow the guidance from section 108 of the Copyright Act and include an obsolescence limitation should it grant this exemption petition.