



copyright alliance

Connecting creators · Protecting creative work

**BEFORE THE
U.S. COPYRIGHT OFFICE**

Section 1201 Study

Docket No. 2015-8

COMMENTS OF THE COPYRIGHT ALLIANCE

Introduction

The Copyright Alliance appreciates the opportunity to respond to the Notice of Inquiry seeking input on a study of Section 1201 published by the U.S. Copyright Office in the Federal Register on December 29, 2015.

The Copyright Alliance is a non-profit, public interest and educational organization that counts as its members over 15,000 individual creators and organizations across the spectrum of copyright disciplines. The Copyright Alliance represents the interests of authors, photographers, performers, artists, software developers, musicians, journalists, directors, songwriters, game designers and many other independent creators. The Copyright Alliance also represents the interests of book publishers, motion picture studios, software companies, music publishers, sound recording companies, sports leagues, broadcasters, guilds, unions, newspaper and magazine publishers, and many more organizations.

What unites these individuals and organizations is their reliance on the copyright law to protect their freedom to pursue a livelihood and career based on creativity and innovation and to protect their investment in the creation and dissemination of copyrighted works for the public to enjoy. The copyright law is critical not only to their

success and prosperity, but also the short and long-term success of the U.S. economy.

Since Congress enacted the DMCA in 1998, consumers in the United States and abroad have benefited from an explosion of innovation. Consumers today have a wealth of ways to access and enjoy all sorts of copyrighted works, and creators have many new platforms to reach their audiences.

This access to so many new works in new ways is in part possible because of the DMCA's protection of technological protection measures (TPMs). The prohibitions on circumventing TPMs found in Section 1201 of Title 17 advance two interrelated goals: first, they help minimize the risk of infringement in a digital environment, and second, they promote the development of legitimate distribution channels and make the process of obtaining permissions easier.

We thank the Copyright Office for initiating this study to examine Section 1201. Section 1201 has played a pivotal and sustaining role in the lives, businesses, and creative accomplishments of the Copyright Alliance's members. We welcome the opportunity to express the vital link between protection against circumvention of TPMs and the growth of the digital marketplace. We understand that a number of concerns have been raised about the application of Section 1201 to changing technologies as well as efficacy of the triennial rulemaking process for granting limited exceptions to Section 1201 and caution against consideration of any measures that may weaken that protection at the expense of innovation and the livelihood of individual creators and copyright owners.

1. Please provide any insights or observations regarding the role and effectiveness of the prohibition on circumvention of technological measures in Section 1201(a).

The prohibitions on circumvention of technological measures in Section 1201(a) were passed at a time when the digital economy was still nascent. As Congress recognized, the technological measures protected under Section 1201(a) can be used “not only to prevent piracy and other economically harmful unauthorized uses of copyrighted materials, but also to support new ways of disseminating copyrighted materials to users,

and to safeguard the availability of legitimate uses of those materials by individuals.”¹ Vital to this protection is the fact, based on the structure of the DMCA and the legislative history,² that Section 1201(a) does not require any sort of nexus between circumvention and infringement. As the Ninth Circuit has explained, “In § 1201(a), Congress was particularly concerned with encouraging copyright owners to make their works available in digital formats such as ‘on-demand’ or ‘pay-per-view,’ which allow consumers effectively to ‘borrow’ a copy of the work for a limited time or a limited number of uses.”³ The circumvention of technological measures protecting access to such formats would not on its own implicate the copyright owner’s exclusive rights, so an independent right of action is needed.

Our members use TPMs to offer audiences new experiences such as the opportunity to:

- play video games on new types of consoles and handheld devices as well as online,
- acquire updates, add new features and interact with other users of entertainment products,
- share and experience creative works with others,
- convert works purchased in earlier formats to state of the art formats, and
- license clips for new uses, create custom content and playlists.

We additionally highlight two examples of TPM-enabled distribution models identified as being of particular benefit to independent and individual creators:

- a TPM-enabled distribution service launched by an independent film distributor that allows fans of the films to share in the revenues of sales/streams of films the fan refers to the distributor, and
- a TPM-enabled music service that many independent bands enjoy working with due to the flexibility it affords them in offering work to their audiences.

The protection of technological measures under Section 1201 must remain strong so that the marketplace can continue to enjoy this type of innovation. These provisions

¹ 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).

² MDY Indus., LLC v. Blizzard Entm’t, Inc., 629 F. 3d 928, 944-48 (9th Cir. 2010).

³ *Id.*

have served authors and audiences of copyrighted works well by ushering in a vast variety of both new work and innumerable new technology platforms for distributing copyrighted works in innovative ways.

How Independent Artists are Using TPM-Enabled Platforms

The use of TPM-enabled platforms to deliver copyrighted works to audiences by new and mainstream media companies is well documented. Less well described are the many innovative ways independent artists employ TPM-enabled platforms to engage with and reward their fans, reach new audiences, and experiment with new business models. We highlight two such approaches here.

Using TPM-Enabled Platforms To Reward Fans

Indie filmmakers and distributors are using TPM-enabled platforms not just to distribute films to audiences in a variety of new offerings, but to reward fans who spread news about the films through their social networks resulting in referrals and purchases of films. Wolfe Video is a small, independent film distribution company that has adopted a unique two-pronged approach to combatting the challenges of online infringement. In addition to employing TPMs to protect the films the company distributes, Wolfe began an affiliate program that allows users to share links to Wolfe-distributed films via social networks and earn commissions on resulting sales. Fans who wish to participate in the program sign up as “affiliates.” Each affiliate is assigned a unique identifying code, which is automatically included when a link to a film is embedded or shared by the fan via social media or otherwise. The affiliate receives a 10% commission for any resulting purchases of the films. Deployed in this manner, TPM-enabled platforms facilitate not just new engagement and new social interaction among fans of films, but the return of financial rewards to fans who refer customers to the legal distribution sources.

Using TPMs to Manage an Indie Band Catalog

Independent artists, like other artists, make decisions about how to manage the distribution of their work to maximize exposure, improve revenue, support causes and organizations they believe in, reward fans, and achieve a variety of other goals.

Platforms and services that flexibly employ TPMs and allow artists to determine when to use them and when not to use them facilitate the effective management of catalogs of copyrighted works for these purposes. Our independent creator members in the music industry report that several music licensing and distribution services including CD Baby, ReverbNation and TuneCore allow artists to pick and choose among the platforms on which an artist wishes to distribute his or her work. Artists may choose to distribute to TPM-enabled download platforms, or choose MP3 and streaming platforms that do not apply TPMs. Different decisions can be made for different albums, depending on the artist's goals for the release. Services such as download cards & codes are also offered.

Other Examples of TPM-Enabled Innovations from Members of The Copyright Alliance

A. Entertainment Software

In the case of video games, TPMs enable the distribution of digital content through physical media, digital storefronts, and live streaming, while preventing individuals from making and distributing unauthorized copies or using gaming consoles to play pirated copies of the games. In addition, access controls have also facilitated the transformation of game consoles into general-purpose entertainment portals. TPMs ensure an environment in which only authorized copies of video games are playable on the console and, in so doing, cut off incentives to infringe the copyrights in those games. TPMs are also essential to maintaining brand names as they ensure both system security and quality control.⁴

PlayStation Network & Consoles – TPMs enable consumers to play genuine Blu-ray and DVD games and movies on their PlayStation consoles. TPMs also enable consumers to access, through PlayStation Network, a variety of copyrighted content including downloadable game content, thousands of HD movies and television shows through PlayStation Video, and features, including online multiplayer gaming.

⁴ For a further discussion on the importance of Section 1201 to the video game industry, see *Chapter 12 of Title 17 Before the Subcomm. on Courts, Intellectual Property, and the Internet, H. Comm. on the Judiciary*, 113th Cong. (2014) (statement of Christian Genetski, SVP & GC, ESA).

Nintendo Wii U – The Wii U also enables users to access online content. It comes with an Internet browser, video chat, access to Miiverse (a service that lets players communicate with other players from around the world), and access to the Nintendo eShop, a digital storefront featuring a variety of downloadable games, applications and information about digital and retail games. A variety of Wii U games allow for online play or interaction. Wii U also supports streaming services such as YouTube, Hulu Plus, and Amazon Instant Video.

Valve Corp.’s Steam – Steam offers consumers online access to over 6,000 game titles with instant software updates. Gamers can even enjoy pre-release titles and periods of promotional play at no cost.⁵

B. Literary Works

The marketplace for ebooks and audiobooks has expanded quickly as a result of the proliferation of devices such as e-readers, mobile devices, tablets, and a variety of other devices.

Random House’s Insight & Harper Collins’ Browse – These services enable web developers to interoperate with Random House’s and Harper Collins’ libraries to enable the public to browse books before buying them or search for text or audio content based on terms or subjects.

International Non-Commercial Document Supply Service – Since January 2012, publishers and the British Library began offering a cross-border service to improve access. The framework enables publishers and libraries to cooperatively provide copyrighted journal articles to the libraries’ users, such as students, faculty and researchers, for non-commercial research or private study.

⁵ Eddie Makuch, *Steam reaches 6,000 games*, GameStop (August 27, 2015), <http://www.gamespot.com/articles/steam-reaches-6000-games/1100-6430089/>.

C. Motion Pictures and Television Programs

UltraViolet – Developed by the Digital Entertainment Content Ecosystem, a consortium of more than seventy companies, UltraViolet is a cloud-based service designed to allow consumers to purchase, acquire, and reacquire content from participating retailers and then watch it on a wide array of compatible devices. Currently there are over 23,000 titles available via UltraViolet. Because UltraViolet is designed with families in mind, the service allows accounts with multiple users. Once an account is created, any authenticated user can go to a participating retailer and obtain UltraViolet-enabled content; once in the account, multiple copies of that UltraViolet-enabled content are available (subject to certain restrictions, e.g., parental controls) to any authenticated user to view on multiple platforms and displays, including on television screens (with or without a DVD or Blu-ray player), desktop computers, laptop computers, tablets, and smartphones. A further benefit is that UltraViolet enables multiple methods of content delivery: streaming, download, and physical formats (e.g., DVD or Blu-ray). UltraViolet also enables consumers to convert titles they previously purchased on DVD and Blu-ray into UltraViolet-enabled content.

Disney Movies Anywhere – This service, provided through an app, allows consumers to browse and watch their collection of Disney, Pixar, and Marvel movies along with bonus material and exclusive videos. Consumers can also download and stream movies across their devices.

“TV Everywhere” Initiatives – Broadcast and cable programmers, member companies of the Motion Picture Association of America and other content owners, in conjunction with multichannel video programming distributors (“MVPDs”), offer unprecedented online on-demand access to movies and television programs as part of cable/satellite television subscriptions. Centered around the ability to authenticate subscribers, these services provide users with the ability to access televised content on their Internet connected devices. In addition, some MVPDs allow their customers to view certain live television channels within the home via applications for mobile devices. This complements the existing access by subscribers to significant numbers of shows and

movies, often in high-definition, on their television sets at a time of their choosing via video on demand. In addition to access offered by portals managed by MVPDs as described above, a growing number of cable networks, including HBO, CNN, Cartoon Network, TBS, Cinemax, Showtime, ESPN, The Disney Channel and the Big Ten Network provide access directly to subscribers via branded content portals. Many broadcast television networks also allow the general public to view popular television programming online on the networks' websites at no cost. Over the last several years, the number of programmers offering on-demand and linear access to subscribers via the Internet on an authenticated basis has grown exponentially—by our count, there are 64 major programmers doing so, across a variety of platforms.

Kindle Fire – This service makes available thousands of movie and television titles to Fire owners. The content is also available for use on other devices through applications.

Apps – Android devices also have networks of content available, both through the Android Market and through use of applications that give consumers access to content on a variety of other distribution networks.

Anyclip.com – On this site, users are able to search an online library, which as of December 2011 included access to over 12,000 films and over 50,000 clips. The site allows users to compile clips into playlists (as a professor might wish to do for classroom use) and access the library with any API to incorporate clips into an application that the user is developing.

Online clip licensing – For uses where licensing from the content owner is appropriate, motion picture companies have moved much of their clip licensing to an online system. This is intended to simplify and shorten the licensing process. In some cases, the entire transaction can be completed online, including searching the studio's movies for the clip that is desired, putting clips into an online cart along with details of the proposed use of the clips. After the prospective user checks out using the site, the

studio reviews the request and, if the studio agrees to the license, responds with a link to the desired clip.⁶

Other services facilitated by TPMs include: Flixter, Amazon (Instant Video and Prime), Hulu and Hulu Plus, Netflix, Android Market, Vudu, Redbox, Blu-ray Disc sales, and DVD sales. In addition to authenticated “TV Everywhere” services, most popular movie and television content is available on mobile phones and tablet computers through subscription models and one-time payments. Services include Hulu Plus, Amazon Prime, and AT&T U-verse Live TV, and others.

D. Music

Spotify. Since 2011, Spotify offers users a vast library of recorded music, available for on-demand streaming. Spotify also enables creative methods of sharing music with friends. The service is offered in free advertising supported form, or by multiple subscription models. In 2014, Spotify reported 3 million paid subscribers in the U.S.⁷

Muve Music. This service allows users to download millions of songs directly to a mobile handset from anywhere, with unlimited music downloads included in the user’s rate plan. The service includes songs from Universal Music Group, Warner Music Group, Sony Music Entertainment and EMI Music. Muve also allows users to create their own ringtones, ringback tones and playlists.

E. Operating Systems and Software Distribution Platforms

App stores – Numerous app stores, marketplaces, and platforms provide users with a centralized place to locate and acquire software applications for their device. Developers—professional and amateur alike—have created over a million different apps

⁶ See www.universalclips.com for an example of this type of service.

⁷ See Yinka Adegoke, *Spotify Now Has 10 Million Paid Subscribers, 3 Million In U.S. (Exclusive)*, BILLBOARD (May 21, 2014), <http://www.billboard.com/biz/articles/news/digital-and-mobile/6092226/spotify-now-has-10-million-paid-subscribers-3-million>.

for mobile devices in less than four years. App stores cover both mobile and desktop operating systems.

Security upgrades— Thanks to access controls, virtually all commercial software applications can be accessed, downloaded and/or updated online, whether directly from the developer or through third parties.

Cloud computing—As software is increasingly downloaded for use or delivered as online services in the future, the importance of keys, IDs and passwords in enabling these services while protecting software copyright holders’ rights increases accordingly.

2. How should Section 1201 accommodate interests that are outside of core copyright concerns, for example, in cases where circumvention of access controls protecting computer programs implicates issues of product interoperability or public safety?

The Copyright Alliance stresses that phrases like “core copyright concerns” may be associated with efforts to undermine protection for copyrighted works by casting certain forms of access controls as falling outside the realm of what Section 1201 was designed to protect. In addition, they may be used as part of efforts to narrow the scope of protection for software—computer programs are unquestionably subject to copyright protection, and using access controls to protect them is an intended and legitimate exercise of the rights afforded copyright owners under Section 1201. It is an unfortunate development that some critics of copyright have tried to undermine the scope of a copyright owner’s interest—by, for example, trying to increase the threshold of copyrightability⁸ or by trying to narrow the exclusive rights of a copyright owner. Their idea of a “core copyright concern” diverges from the shared understanding of the phrase by participants and practitioners in the copyright industries. We thus caution the Copyright Office that phrases like this may serve as a vehicle for introducing substantive changes to copyright law beyond the issues addressed in this study.

⁸ See, for example, Christopher Buccafusco, Zachary C. Burns, Jeanne C. Fromer & Christopher Jon Sprigman, *Experimental Tests of Intellectual Property Laws’ Creativity Thresholds*, 92 TEX. L. REV. 1921 (2014) (asking “whether the copyright threshold should be raised to further stimulate creativity”).

At the same time, we recognize, as Congress did when it drafted the law, that Section 1201 may implicate entirely non-copyright interests. Currently, Section 1201 accommodates such interests through both permanent and temporary exemptions. For example, Section 1201(f) permits circumvention of access controls to achieve interoperability. The Copyright Office has previously stated that the exemption addresses the concerns of third-party remanufacturers such as companies that manufacture laser printer toner cartridges without the authorization of printer manufacturers.⁹ Other permanent exceptions exist to allow, for example, certain acts of encryption research.¹⁰ Along with these permanent exceptions, Congress established the triennial rulemaking procedure to promulgate temporary exceptions based on a *de novo* review of market conditions, which would allow those adversely affected by the prohibition under Section 1201(a) to make noninfringing uses of particular classes of copyrighted works.¹¹

To the extent proposed exemptions raise issues outside the Copyright Office's own expertise, for example, environmental, safety, or consumer protection issues, we would suggest, as the Copyright Office did in the latest triennial rulemaking, inviting experts from agencies that do work on those issues to participate.

Rulemaking Process

3. Should section 1201 be adjusted to provide for presumptive renewal of previously granted exemptions—for example, when there is no meaningful opposition to renewal—or otherwise be modified to streamline the process of continuing an existing exemption? If so, how?

The Copyright Alliance is willing to consider supporting an appropriately focused solution to reduce administrative burdens on the Copyright Office, such as those which may facilitate the renewal of exemptions for which there is no meaningful opposition (a standard which would have to be discussed further and articulated more fully). But we note that, as the Copyright Office has previously explained, “Congress made clear in enacting the DMCA that the basis for an exemption must be established *de novo* in each

⁹ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 68 Fed. Reg. 62011, 62017 (Oct. 31, 2003).

¹⁰ 17 U.S.C. § 1201(g).

¹¹ 17 U.S.C. § 1201(c).

triennial proceeding.”¹² Moreover, “the fact that an exemption has been previously adopted creates no presumption that readoption is appropriate.”¹³ Thus, we believe that any “renewal” should, at a minimum, require that a proponent file an assertion that the need for a particular exemption persists and that there has been no material change to the facts and circumstances surrounding the exemption since the previous triennial rulemaking. Only after such a filing, and provided the assertion receives no meaningful opposition (a standard which would have to be more fully articulated), would the Copyright Office be empowered to recommend to the Librarian that the exemption be extended for another three-year period.

5. Please provide additional suggestions to improve the rulemaking process.

The rulemaking process was designed as a “fail-safe” to account for changes in marketplace realities as technology evolves over time. Clearly, the pace of change in the digital era is rapid, and such a process serves a useful purpose. But at the same time, the rulemaking process as currently structured imposes significant burdens on both the Copyright Office and participants in the rulemaking. The Copyright Alliance is open to considering proposals for steps that can be taken short of amending the statute that could help alleviate these burdens without adversely affecting the objectives of the process or the statute, which remain sound.

Anti-Trafficking Provisions

6. Please assess the role of the antitrafficking provisions of Sections 1201(a)(2) and 1201(b) in deterring copyright infringement, and address whether any amendments may be advisable.

The antitrafficking provisions of Sections 1201(a)(2) and 1201(b) are essential provisions that advance the DMCA’s goal of minimizing infringement. Without them, copyright owners would either face far greater piracy or have to continually develop new

¹² U.S. Copyright Office, Sixth Triennial Proceeding, Recommendation of the Register of Copyrights at 14 (2015).

¹³ *Id.*

technological measures every time an existing one is circumvented.¹⁴ While no one technological measure is 100% effective, the antitrafficking provisions prevent the organization of businesses around the distribution of circumvention technologies. In addition to greatly increasing piracy, the lack of antitrafficking provisions would cause an “arms race” of encryption and circumvention technologies, diverting resources away from more beneficial uses like the creation and dissemination of copyrighted works. It would also increase the risk of infringement, which could cause creators to refrain from distributing their work online. For these reasons, the Copyright Alliance believes that no relaxation of anti-trafficking provisions is currently advisable.

7. Should Section 1201 be amended to allow the adoption of exemptions to the prohibition on circumvention that can extend to exemptions to the antitrafficking prohibitions, and if so, in what way? For example, should the Register be able to recommend, and the Librarian able to adopt, exemptions that permit third-party assistance when justified by the record?

There is no justification for amending Section 1201 to allow the adoption of exemptions to the prohibition on circumvention that can extend to exemptions to the antitrafficking prohibitions. Indeed, permitting such exemptions could have a significant negative impact on the production and dissemination of copyrighted works. Once antitrafficking tools are available in the marketplace, even for ostensibly lawful purposes, they will inevitably become useful for unlawful purposes, making them virtually impossible to police, and very likely leading to an even more aggressive “arms race” as described above. Congress affirmatively denied extension of the anticircumvention prohibitions to the antitrafficking prohibitions and we have not seen any evidence or justification that would warrant the unraveling of Congress’s actions.

Permanent Exemptions

8. Please assess whether the existing categories of permanent exemptions are necessary, relevant, and/or sufficient. How do the permanent exemptions affect the current state of reverse engineering, encryption research, and security testing? How

¹⁴ See *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 315 (SDNY 2000) (saying the distribution of circumvention tools “is analogous to the publication of a bank vault combination in a national newspaper. Even if no one uses the combination to open the vault, its mere publication has the effect of defeating the bank’s security system, forcing the bank to reprogram the lock.”).

do the permanent exemptions affect the activities of libraries, archives, and educational institutions? How might the existing permanent exemptions be amended to better facilitate such activities?

To the best of our knowledge the existing categories of permanent exemptions are sufficient. We have heard some commentators suggest that some of these exemptions may need to be updated but have not seen any evidence to justify a change at this time. We look forward to reviewing the comments submitted and will respond to this question more completely in our reply comments after we have had a chance to review any evidence submitted by those who support amending the current permanent exemptions.

Other

10. To what extent and how might any proposed amendments to Section 1201 implicate the United States’ trade and treaty obligations?

Technological measures are protected under the WIPO Copyright Treaty as well as Free Trade Agreements,¹⁵ including the recently signed Trans-Pacific Partnership.¹⁶ Having uniform rules for the protection of technological measures is critical in a globally networked world.¹⁷ The Copyright Alliance is thus keenly interested in ensuring that Section 1201 remains consistent with the United States’ trade and treaty obligations.

Conclusion

The breadth and variety of services enabled by TPMs and unique experiences offered to consumers as a result demonstrate the beneficial effect the anti-circumvention provisions in Section 1201 have had on the development of the digital market for

¹⁵ U.S.-Korea Free Trade Agreement, art. 18.4(7), June 30, 2007; U.S.-Panama Trade Promotion Agreement, art. 15.5(7), June 28, 2007; U.S.-Colombia Trade Promotion Agreement, art. 16.7(4), Nov. 22, 2006; U.S.-Peru Trade Promotion Agreement, art. 16.7(4), Apr. 12, 2006; U.S.-Oman Free Trade Agreement, art. 15.4(7), Jan. 19, 2006; U.S.-Bahrain Free Trade Agreement, art. 14.4(7), Sept. 14, 2004; U.S.-Morocco Free Trade Agreement, art. 15.5(8), June 15, 2004; Dominican Republic-Central America Free Trade Agreement (CAFTA), art. 15.5(7), May 28, 2004; U.S.-Australia Free Trade Agreement, art. 17.4(7), May 18, 2004; U.S.-Chile Free Trade Agreement, art. 17.5(5), June 6, 2003; U.S.-Singapore Free Trade Agreement, art. 16.4(7), May 6, 2003.

¹⁶ Trans-Pacific Partnership, art. 18.68, Feb. 4, 2016.

¹⁷ *Accord* WIPO Copyright Treaty, Preamble, Dec. 20, 1996, indicating Contracting Parties’ desire “to develop and maintain the protection of the rights of authors in their literary and artistic works in a manner as effective and uniform as possible.”

entertainment products both among independent creators and major copyright owners and distributors.

To the extent the record establishes that adjustments to Section 1201 or the rulemaking process may be warranted, we look forward to contributing to that discussion. Let us know if we can provide any additional information or answer any questions regarding our views in this submission.

Respectfully submitted,

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