BEFORE THE
U.S. COPYRIGHT OFFICE

Section 1201 Study	**Docket No. 2015-8**

REPLY COMMENTS OF THE COPYRIGHT ALLIANCE

Introduction

The Copyright Alliance appreciates the opportunity to submit the following comments responding to the initial comments filed with the U.S. Copyright Office relating to its study of Section 1201.

Goals and Purpose of Section 1201

As we discussed in our initial comments, the prohibitions on circumventing technological protection measures 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. Many of the initial comments filed with the Office that criticized the scope of Section 1201 or supported broader exemptions focused exclusively on the first of these goals.[1] But ignoring the second interrelated goal can lead—as many of these comments did—to an erroneous conclusion that Section 1201 is

[1] *See, e.g.*, comments of Authors Alliance; Center for Democracy and Technology; Consumers Union; Electronic Frontier Foundation; Joint Comments of International Documentary Filmmakers, Film Independent, and Kartemquin Educational Films; Joint Comments of Libertarian Organizations; Library Copyright Alliance; New America's Open Technology Institute; and Organization for Transformative Works.

ineffective, overly broad, or both. In any evaluation of Section 1201, it is essential that the Copyright Office consider not just Section 1201's ability to reduce infringement but all the purposes and elements of Section 1201:

- It is vital to the ultimate purposes of Section 1201 that access controls are protected even in the absence of any nexus to infringing conduct, which is established by the text and structure of the Section and clear from legislative history and subsequent Congressional action.[2] Access controls have facilitated the development of a diverse array of business and distribution models by providing the protection that encourages copyright owners to make their work available online and in new and different formats. Prohibiting the circumvention of access controls is necessary since, in many cases, circumventing access controls like encryption or password protection may not amount to copyright infringement itself, yet can lead to the same type of harm as infringement, and open the floodgates to further infringement as unauthorized digital copies of works, which are generally indistinguishable from their lawful counterparts, are added to distribution channels.
- The anti-trafficking provisions of Section 1201 are also just as vital to advancing the goals of the copyright law, for reasons discussed in a number of initial comments.[3] Namely, an exception to permit use of circumvention tools under certain circumstances would effectively swallow the rule, because it would be virtually impossible to police the market for such tools to identify unlawful uses. Most importantly, while it is usually larger companies that use the enforcement of the anti-trafficking provisions, the benefits of anti-trafficking provisions, as discussed above, are enjoyed equally by all copyright owners, including small and medium sized enterprises and independent creators—entities that generally lack the resources to pursue individual infringers.

Rulemaking Process

[2] *See, e.g.*, BALANCE Act of 2003, H.R.1066, Sec. 5, 108th Congress (2003), which would have, in part, permitted circumvention of access controls if "such act is necessary to make a noninfringing use of the work under this title." The Act did not pass.
[3] *See, e.g.*, Joint Comments of AAP, MPAA, and RIAA; Entertainment Software Association; and SIIA.

The initial round of comments reveal points of consensus for tweaking the rulemaking process to reduce burdens on participants (and the Copyright Office) while remaining consistent with the goals and purpose of Section 1201—and without the need for legislative action. We highlight two such points of consensus.

First, we reiterate that the basis for an exemption must be established *de novo* and agree with comments that describe the appropriateness of the current legal burdens in the rulemaking process.[4] At the same time, a number of comments recommended that there should be a mechanism by which the Copyright Office could consider previously submitted evidence or other relevant portions of the record from previous rulemaking proceedings (or relevant portions of the record from similar proposed exemptions during the same rulemaking proceeding, as suggested in joint comments from AAP, MPAA, and RIAA) in order to streamline the rulemaking process.[5] We support the Copyright Office exploring this idea further.

While we do not suggest a presumption of renewal for previously granted exemptions and do not believe such a framework would be consistent with the Office's obligations to undertake a *de novo* review, we do believe there is sufficient consensus for exploring ways in which the Copyright Office can streamline the rulemaking process for previously granted or rejected exemptions that are proposed in subsequent rulemakings. Commenters suggested a number of ways this could be accomplished, but it is important that any such streamlining include, in principle:

- limiting the application of a streamlined process to the exact same exemption,
- including a mechanism for avoiding unused and outdated exemptions cluttering the Code of Federal Regulations,[6]
- providing notice to potential opponents about the exemption under which streamlined proceedings would apply, and

[4] *See, e.g.,* Joint Comments of AAP, MPAA, and RIAA; Alliance of Automobile Manufacturers.
[5] *See, e.g.*, comments from Authors Alliance; Alliance of Automobile Manufacturers; Center for Democratic Technology; Joint Comments of AAP, MPAA, and RIAA; Joint Comments of International Documentary Filmmakers, Film Independent, and Kartemquin Educational Films; Knowledge Ecology International; Organization for Transformative Works; and Public Knowledge.
[6] A number of comments criticized the permanent exemption for nonprofit libraries, archives, and educational institutions (1201(d)) as unnecessary, demonstrating that this is not a hypothetical concern.

- providing an opportunity for meaningful opposition.

Permanent Exemptions

The record needs to be further developed regarding the efficacy of existing permanent exemptions before any action should be taken on (a) proposed changes to current permanent exemptions, (b) proposals to address other noncopyright concerns or add new permanent exemptions.

Although a number of commenters expressed concerns about the existing permanent exemptions under Section 1201, there were very few specifics about why current exemptions do not adequately address the concerns at which they are targeted.[7] As the Joint Comment from AAP, MPAA, and RIAA observes, there has been very little litigation addressing the scope and interpretation of existing permanent exemptions—if there weren't serving their purpose, such litigation would likely be more common. Further study would be needed regarding the permanent exemptions currently found in Section 1201 before any changes to these exemptions should be considered,

The same is true for proposals to add new permanent exemptions. Additionally, we reiterate a point made in our initial comments. As we suggested there, distinguishing between copyright (or "core" copyright) concerns and noncopyright concerns can be problematic. A number of comments, for example, identified a purported need to ensure Section 1201 adequately ensures "interoperability." However, not all acts undertaken for purposes of achieving interoperability are noninfringing or fair use.[8]

Other Points

In its comment, the Organization for Transformative Work made the statement that when the Trans-Pacific Partnership (TPP) comes into effect, it "will supersede various other treaties such as the Australia-US FTA [free trade agreement]" (pg. 10). This

[7] The sole exception was the joint comment from Rapid7, Bugcrowd, and HackerOne, who proposed three specific changes to the permanent exemption for security research in Section 1201(j).
[8] *See, e.g.*, Oracle America, Inc. v. Google Inc., 750 F. 3d 1339 (Fed. Cir. 2014) (rejecting Google's argument that "its use of the 'Java class and method names and declarations was "the only and essential means" of achieving a degree of interoperability with existing programs written in the [Java language]'.").

is incorrect as a matter of law. It is a principle of international law that earlier agreements remain in effect to the extent their provisions are compatible with successive agreements.[9] The TPP does not expressly supersede the Australia-US FTA (nor any other FTA for that matter), and its provisions on technological measures do not conflict with those in existing FTAs.

We thank the Copyright Office for the opportunity to express our views on Section 1201. Please let us know if we can provide any additional information or answer any questions regarding our views in this submission.

Respectfully submitted,

Keith Kupferschmid
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[9] *See, e.g.*, Vienna Convention on the Law of Treaties, Article 30. Although the U.S. has not ratified the Vienna Convention, Article 30 reflects a bedrock principle of international law that treaties remain in effect unless expressly superseded or conflicted by a later treaty.