



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

Section 1201 Study

Docket No. 2015-8

COMMENTS OF THE COPYRIGHT ALLIANCE

The Copyright Alliance appreciates the opportunity to respond to the Copyright Office's request for additional comments regarding its ongoing inquiry on Section 1201.¹

The Copyright Alliance is a non-profit, non-partisan public interest and educational organization representing the copyright interests of over 1.8 million individual creators and over 13,000 organizations in the United States, across the spectrum of copyright disciplines. The Copyright Alliance is dedicated to advocating policies that promote and preserve the value of copyright, and to protecting the rights of creators and innovators. The individual creators and organizations that we represent rely on copyright law to protect their creativity, efforts, and investments in the creation and distribution of new copyrighted works for the public to enjoy.

At the outset, we reiterate the critical importance Section 1201 has played in creating a legal foundation that facilitates an environment for creativity and innovation to flourish in a digital, online world. The anti-circumvention and anti-trafficking provisions work together to minimize the risk of infringement, promote the development of legitimate distribution channels, and make the process of obtaining permissions easier. At the same time, the triennial rulemaking process acts as a “fail-safe” that enables the Copyright Office to tweak the scope of Section 1201 to keep it up to date and effective without the need for legislative intervention.²

¹ Section 1201 Study: Request for Additional Comments, 81 Fed. Reg. 66,296 (Sept. 27, 2016).

² TOM BLILEY, REPORT OF THE HOUSE COMMITTEE ON COMMERCE ON THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998, H.R. REP. NO. 105-551, pt. 2, at 36 (“This [fail-safe] mechanism would monitor developments in the marketplace for copyrighted materials, and allow the enforceability of the prohibition against the act of circumvention to be selectively waived, for limited

To date, the record established through the initial comment period and subsequent public roundtables has failed to demonstrate that legislative changes are warranted. There may be tweaks to the triennial process that could improve its efficiency and efficacy without the need for Congressional attention. However, as the Copyright Office notes, those issues are outside the intended scope of this Notice of Inquiry so we will not address the triennial rulemaking in these comments other than to say that the rulemaking process is an integral part of Section 1201 and must be considered in any consideration of the effectiveness of Section 1201 and whether to make any changes to it.

1. Proposals for New Permanent Exemptions

In our initial comments, we said, “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.” We do not believe the record developed through the written comments and public roundtables has established a need for statutory changes, including the addition of new permanent exemptions to Section 1201. The legislative process should be driven by evidence, not speculation.

The fact, discussed in the following section, that some commenters are calling for amendments to *existing* permanent exemptions is persuasive evidence that new permanent exemptions should not be created. Permanent exemptions, particularly exemptions targeted at specific technologies and granular uses, go out of date as technologies, business models and non-infringing and infringing uses evolve. This is one of the key reasons the triennial rulemaking process was created: to allow for temporary exemptions that account for such changes.

The proposal for an exemption to allow device unlocking illustrates this point well. Previous triennial rulemakings exempted circumvention of technological measures for the purpose of device unlocking, but the exemption only applied to wireless telephone handsets. The unlocking exemptions in the most recent triennial rulemaking, by contrast, covered not only wireless telephone handsets, but also all-purpose tablet computers, portable mobile connectivity devices, and wearable wireless devices. The expansion is no doubt due to advances in technology and marketplace developments, both of which will likely continue. It is difficult, if not impossible, to imagine a permanent exemption that is neither overinclusive or underinclusive in light of these ongoing developments.

2. Proposed Amendments to Existing Permanent Exemptions

As above, the record does not establish evidentiary support for amending existing permanent exemptions. The existing permanent exemptions were heavily negotiated complex provisions that are the result of balancing of many competing interests and compromise;

time periods, if necessary to prevent a diminution in the availability to individual users of a particular category of copyrighted materials.”).

proposals to amend them should not be made without sufficient evidence or not without all interested parties being consulted in a similarly intensive consensus-driven process.

Currently, the only permanent exemption that has been the subject of study is the exemption for encryption research in Section 1201(g). That study was undertaken in 2000, shortly after the DMCA was enacted and prior to its provisions going in effect. The study did not identify any “current, discernable impact on encryption research and the development of encryption technology; the adequacy and effectiveness of technological protection for copyrighted works; or protection of copyright owners against the unauthorized access to their encrypted copyrighted works.” The Copyright Office consequently concluded that it would be “premature to suggest alternative language or legislative recommendations with regard to Section 1201(g) of the DMCA at this time.”

Given that the record still does not identify any current, discernable impacts, it remains premature to suggest amending existing permanent exemptions.

3. Anti-Trafficking Provisions

We reiterate our position that Sections 1201(a)(2) and 1201(b) play an essential role in minimizing copyright infringement, the original goal of the DMCA. The Sections have contributed immensely to the success of the creative industries in the United States, and tinkering with the anti-trafficking provisions is likely to render them ineffective, and consequently threaten the income security of millions of copyright owners. Increased piracy combined with the costs associated with the need to continually develop new technologies to mitigate the effects of piracy could prove fatal to many businesses and individual creators who rely on continued, predictable, and effective copyright protection. While no technological measure can be fully effective, Sections 1201(a)(2) and 1201(b) achieve the goal of encouraging and promoting the “Progress of Science” by minimizing the effect circumvention technologies and their proliferation have on the creative industries. Renegotiating these provisions risks discouraging creators from sharing their works online, consequently reducing the general public’s access to new creative works.

Similarly, as noted in our initial comments, we do not believe that there is any justification for amending Section 1201 to allow the adoption of exemptions to the prohibition on circumvention that can extend to exemptions to the anti-trafficking provisions. As tools ostensibly meant for legal purposes can almost always be used for unlawful purposes, any changes would threaten the vitality and success of the creative industries and millions of individual creators. Congress had good reasons to prohibit the extension of anti-circumvention exemptions to the anti-trafficking provisions. There is no reason to second-guess Congress’ preferred compromise, and to modify these provisions.

In this Request for Additional Comments, the Copyright Office asks for views about an interpretation of Section 1201 advanced by some commenters who argue that a beneficiary of a statutory or administrative exemption has an implied right “to make a tool for his or her own use in engaging in the permitted circumvention.” That implied right would seem to be expressly foreclosed by Section 1201(a)(1)(E), which provides “Neither the exception under subparagraph (B) from the applicability of the prohibition contained in subparagraph (A), nor any

determination made in a rulemaking conducted under subparagraph (C), may be used as a defense in any action to enforce any provision of this title other than this paragraph.”

If Congress intended such a right, it would have included it expressly as it did in the provisions for permanent exemptions for reverse engineering,³ encryption research,⁴ and security testing.⁵

The Copyright Office also asked for views regarding an interpretation suggested by some parties that “in certain circumstances, third-party assistance may fall outside the scope of the anti-trafficking provisions.” We agree with the position the Copyright Office advanced in the most recent rulemaking proceeding, which suggested third-party assistance is foreclosed by Section 1201. There, the Office noted that the EFF—who advanced the above interpretation in its initial comments for this proceeding—expressly acknowledged that 1201(a)(1) “does not grant authority to adopt exemptions that permit trafficking in circumvention tools or services.” The Office further noted that:

A similar issue was present in the exemption for the unlocking of cellphones, which the Librarian granted in a manner consistent with section 1201(a)(1), expressly allowing only circumvention initiated by the owners of computer programs on the phones. In order to broaden the exemption to allow circumvention “by another person at the direction of the owner,” Congress intervened, passing the Unlocking Consumer Choice and Wireless Competition Act (“Unlocking Act”). The fact that Congress felt compelled to take this action in connection with unlocking indicates that Congress believed it was necessary to amend the law to permit circumvention “at the direction of” an owner.

As we said in our initial comments, “Congress affirmatively denied extension of the anti-circumvention prohibitions to the anti-trafficking prohibitions, and we have not seen any evidence or justification that would warrant the unraveling of Congress’s actions.”

³ 17 U.S.C. §1201(f)(2) (1998) (“Notwithstanding the provisions of subsections (a)(2) and (b), a person may develop and employ technological means to circumvent a technological measure, or to circumvent protection afforded by a technological measure, in order to enable the identification and analysis under paragraph (1), or for the purpose of enabling interoperability of an independently created computer program with other programs, if such means are necessary to achieve such interoperability, to the extent that doing so does not constitute infringement under this title.”).

⁴ §1201(g)(4) (“Notwithstanding the provisions of subsection (a)(2), it is not a violation of that subsection for a person to— (A) develop and employ technological means to circumvent a technological measure for the sole purpose of that person performing the acts of good faith encryption research described in paragraph (2); and (B) provide the technological means to another person with whom he or she is working collaboratively for the purpose of conducting the acts of good faith encryption research described in paragraph (2) or for the purpose of having that other person verify his or her acts of good faith encryption research described in paragraph (2).”).

⁵ §1201(j)(4) (“Notwithstanding the provisions of subsection (a)(2), it is not a violation of that subsection for a person to develop, produce, distribute or employ technological means for the sole purpose of performing the acts of security testing described in subsection (2), provided such technological means does not otherwise violate section [2] (a)(2).”).

Conclusion

We thank the Copyright Office for providing this opportunity to publicly weigh in on these issues. We look forward to reviewing comments from other parties.

Respectfully submitted,

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