



POSITION PAPER

Anticircumvention of Technological Protection Measures

Section 1201 of Title 17 of the US Code protects technological protection measures (TPMs) used in connection with the dissemination of copyrighted works. Since it was enacted in 1998, it has contributed to an explosion of creativity and 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.

Section 1201 advances two interrelated goals:

- (1) Minimizing risks associated with infringement in a digital environment
- (2) Promoting the development of legitimate distribution platforms and technologies and encouraging broad digital distribution of high-value content

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.

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 authorized copies, 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.

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 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.



copyright alliance

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There is consensus for improving the rulemaking process for creating temporary exemptions

Section 1201 includes a fail-safe mechanism, a triennial rulemaking process to create exemptions to the anti-circumvention process based on demonstrable inhibition of legitimate, noninfringing uses. Based on nearly two decades of experience with this process, there is consensus on methods to reduce burdens on participants (and the Copyright Office) while remaining consistent with the goals and purpose of Section 1201, without the need for legislative action.

First, the Copyright Office could consider previously submitted evidence or other relevant portions of the record from previous rulemaking proceedings

Second, there are a number of ways the rulemaking process for previously granted or rejected exemptions that are proposed in subsequent rulemakings could be streamlined, 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,
- providing notice to potential opponents about the exemption under which streamlined proceedings would apply, and
- providing an opportunity for meaningful opposition.