



**BEFORE THE
FEDERAL TRADE COMMISSION**

Petition for Rulemaking of PIRG and iFixit

Docket No. 2023–0077

COMMENTS OF THE COPYRIGHT ALLIANCE

The Copyright Alliance appreciates the opportunity to submit the following comments in response to the [request for comments](#) published by the Federal Trade Commission (FTC) on January 3, 2024, regarding the Commission’s receipt of a petition (“the Petition”) from the U.S. Public Interest Research Group Education Fund (PIRG) and iFixit requesting the Commission “initiate a rulemaking to protect consumers' right to repair products they have purchased.”

The Copyright Alliance is a non-profit, non-partisan public interest and educational organization representing the copyright interests of over 2 million individual creators and over 15,000 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 copyrighted works for the public to enjoy.

I. The Importance of Technological Protection Measures and Section 1201

Copyright Alliance members rely on technological protection measures (TPMs) to protect copyrighted materials and identify infringement. TPMs are digital management tools that include a wide variety of content identification/verification tools, web crawling and filtering technologies, watermarking and fingerprinting, and encryption and password protections.¹ TPMs are critical components to combatting infringement in the digital age, and they are utilized by a wide range of copyright owners. Visual artists and owners of copyright in literary works use image and text recognition tools and watermarking technologies to track unauthorized use of their works online, while copyright owners in music, motion pictures, and video games employ combinations of digital rights management tools, including encryption and “matching” technologies to identify and address infringement. There is not a single TPM that all copyright owners use, rather, different copyright owners mix and match TPMs that best protect their specific types of works. What’s universal is the fact that without strong TPMs, copyright owners would be helpless in the fight against the mass infringement of digital works and would be far less willing to distribute digital versions of works to consumers.

Copyright owners also rely heavily on the protections against circumvention of TPMs provided in section 1201 of the Digital Millennium Copyright Act (DMCA). Section 1201 includes provisions, commonly referred to as the “anti-circumvention” and “anti-trafficking” provisions, that make it illegal to hack or bypass TPMs that copyright owners use to protect their works against infringement. The provisions of section 1201 (and 512) of the DMCA were enacted in 1998 in a response to the threat of mass proliferation of unauthorized digital works over the internet, as Congress recognized that TPMs and anti-circumvention measures were essential to protecting copyright owners against digital piracy and thereby incentivizing the digital dissemination of copyrighted materials to the public. As discussed more below, the incentives

¹ See Copyright Alliance, Comments Submitted in Response to U.S. Copyright Office’s April 27, 2022, Notice of Inquiry at 2–4 (May 27, 2022), <https://copyrightalliance.org/wp-content/uploads/2022/06/Copyright-Alliance-STM-Comments.pdf>.

bolstered by section 1201 have worked as intended to the considerable benefit of consumers in the years since the DMCA's enactment.

Integral to section 1201 is a triennial rulemaking process through which the U.S. Copyright Office considers and adopts exemptions to the section 1201 protections. During this process, various parties, including copyright owners and users of copyrighted works, submit evidence and arguments for the Librarian to consider when evaluating whether to grant a proposed exemption. The triennial rulemaking has come to play a pivotal role in balancing the interests of different stakeholders, granting lawful access for certain non-infringing uses of copyrighted works while ensuring that copyright owners are protected from piracy. The rulemaking has been described as a “fail safe”² process and safety valve that not only permits users to petition for exemptions but also gives copyright owners the opportunity to present new evidence regarding ongoing risks presented by digital piracy and the ways in which section 1201 has facilitated the launch of successful business models that have increased the availability of means of access to creative content. The successful operation of the triennial system is an example of the DMCA working as intended, but its continued viability depends on users not sidestepping the process and undermining copyright law.

The use of TPMs and section 1201's anti-circumvention provisions have played a vital role in copyright owners' willingness to distribute their works on new platforms and services and ultimately offer the consuming public broad access to creative works. The anti-circumvention provisions of section 1201 and the triennial rulemaking process have proven successful in safeguarding against piracy by making it unlawful to circumvent technological measures—or traffic in circumvention tools or services—used to prevent unauthorized access to copyrighted works. Over the years since section 1201 was enacted, it has also successfully enabled copyright owners to design innovative business models that benefit consumers by enabling lower-cost access to a more diverse variety of offerings, including subscription-based access to high-quality, digital entertainment content, on-demand viewing, cloud-based storage and sharing, and secure, authenticated video game play.

² H.R. Rep. No. 105-551, pt. 2, at 36.

Thus, Copyright Alliance members have a strong interest in ensuring that any new laws or rules, including “right-to-repair” efforts, do not weaken copyright protections or sidestep the section 1201 rulemaking process. To be clear, we take no issue with rules that are narrowly targeted to repairs that do not directly or indirectly implicate copyright law protections. However, we are concerned with dangerous overbroad mandates, intended or not, that could result from laws or agency actions that disregard copyright law and open the door to widespread piracy of copyrighted materials. While the Petition does not directly address copyright law or section 1201, we submit these comments to caution against any right-to-repair proposals that would directly, indirectly, or inadvertently override copyright law in a way that would threaten copyright owners’ ability to enforce their exclusive rights set forth in section 106 of the Copyright Act or their rights to prevent circumvention of TPMs that are delineated in section 1201 of the Act.

Throughout the Petition, the FTC’s 2021 report *Nixing the Fix: An FTC Report to Congress on Repair Restrictions* is referenced to support the Petitioners’ argument that a rulemaking is needed.³ It should be noted that, in the same report, the FTC repeatedly speaks to the importance of the protection of intellectual property rights and explains that “the assertion of IP rights does not appear to be a significant impediment to independent repair.”⁴ The report also acknowledges that the Copyright Act provides exemptions for repair in certain circumstances and notes that the triennial 1201 rulemaking has allowed for circumvention of TPMs to diagnose, maintain, or repair a variety products and devices.⁵ Coming to a similar conclusion, the Copyright Office published a comprehensive report on software-enabled consumer products in 2016 that concluded that “faithful application of existing copyright law doctrines should provide no barrier to legitimate uses,” including those related to independent repair.⁶

³ Federal Trade Commission, *Nixing the Fix: An FTC Report to Congress on Repair Restrictions*, (May 2021), https://www.ftc.gov/system/files/documents/reports/nixing-fix-ftc-reportcongress-repair-restrictions/nixing_the_fix_report_final_5521_630pm-508_002.pdf.

⁴ *Id.* at 24.

⁵ *Id.* at 26.

⁶ U.S. Copyright Office, *Software-Enabled Consumer Products: A Report of the Register of Copyrights* (2016) at ii, <https://www.copyright.gov/policy/software/software-full-report.pdf>.

While the FTC is empowered by statute under Section 18(a)(1)(B) of the Federal Trade Commission Act to initiate trade rule regulation proceedings on its own initiative or pursuant to written petition, we urge the Commission to reject any proposals that would result in exemptions to or otherwise be at odds with the carefully crafted provisions of the Copyright Act. In the *Nixing the Fix* report, the FTC explains that it is the role of expert governmental intellectual property (IP) agencies, including the U.S. Copyright Office, to grant and regulate IP rights, and it makes clear that “any action taken by industry or regulators to enable independent repair should seek input from such entities and other stakeholders and be mindful of existing law and policy supporting IP protection.”⁷ Keeping in line with that position, before granting the Petition the FTC should consult with the U.S. Copyright Office and other stakeholders regarding any issues that might affect copyright law, including the protections afforded by section 1201 of the Copyright Act.

II. Overbroad Right-to-Repair Mandates Would Open the Door to Widespread Piracy of Copyrighted Materials

While the effectiveness of section 1201 is widely recognized, including in a Copyright Office report to Congress in 2017,⁸ there have been recent right-to-repair legislative efforts that seek to amend the law in a way that would allow for broad exemptions to section 1201.⁹ However, right-to-repair advocates often disregard the substantial economic and social benefits of copyright protection and the consequences that would flow from weakening such protections. While such mandates purport to make it easier for users of equipment and devices with digital access controls to bypass those controls and make repairs, the reality is that, if those mandates are not narrowly tailored, they could override section 1201 and effectively allow for the circumvention

⁷ *Id.* at 53-54.

⁸ U.S. Copyright Office, Section 1201 of Title 17: A Report of the Register of Copyrights (2017).

⁹ *See* Is There a Right to Repair?: Hearing before the House Committee on the Judiciary Subcommittee on Courts, Intellectual Property, and the Internet, 118th Congress (2023) (written statement of Devlin Hartline).

of TPMs that protect movies, music, video games, software, and other copyright materials which these right-to-repair mandates were not intended to cover.

Put simply, the rights of copyright owners must not be compromised by laws or agency actions that result in the widespread availability of tools that would enable mass piracy and threaten the creation and dissemination of copyrighted works for the public to enjoy. There is already a safety valve in place. That safety valve is the section 1201 triennial rulemaking. To the extent exemptions to section 1201 are warranted, stakeholders who seek those exemptions should use the existing triennial rulemaking process to pursue them. Attempts to sidestep that congressionally mandated rulemaking process, which provides a much more flexible approach to the issue than static rules, should be rejected.

III. Right-to-Repair Issues are Best Addressed by Market Solutions

Consumers' desires to repair equipment and devices they purchase can and are being addressed by market solutions that require no legislative or agency action or amendments to copyright law. Few would argue that a farmer in need of equipment repairs should be forbidden from seeking repairs outside of a specific, manufacturer-licensed service that may be impractical to use due to time and cost constraints. However, manufacturers should also not be compelled to disclose valuable intellectual property or lose copyright protections that incentivize them to distribute products in the first place. Recognizing these complications, many manufacturers have begun to respond to pressure from consumers and offer middle-ground, market-based solutions.

Most notably, in 2023, John Deere agreed to a memorandum of understanding (MOU) with the American Farm Bureau Federation (AFBF) in which Deere agreed to AFBF's terms related to farmers repairing Deere equipment.¹⁰ Commentors have noted that Deere may receive a "first-mover" advantage, creating new revenue streams related to third-party repair and attracting

¹⁰ Mike Tomco, *AFBF Signs Right to Repair Memorandum of Understanding with John Deere*, FARBUREAU.ORG (Jan. 8, 2023), <https://www.fb.org/news-release/afbf-signs-right-to-repair-memorandum-of-understanding-with-john-deere>.

customers from other tractor companies that do not have similar agreements.¹¹ A similar strategic move was made by Apple in 2021 when it launched its Self Service Repair program to empower consumers and provide iPhone repair options outside of visiting the Genius Bar or sending your device back.¹² These are just two examples. There are many others. What's clear is that when faced with consumer demand for a product or service, companies will adjust, and the market will respond with solutions that negate the need for legislative or agency compulsion.

IV. Section 1201 Access Controls Must be Protected to Preserve Intellectual Property Rights and to Continue to Ensure Widespread Public Access to Copyrighted Works

Section 1201 strikes a carefully calibrated balance between providing access to works and ensuring copyright owners can effectively prevent piracy, and it has allowed innovative companies to provide consumers with a wide array of content delivery systems at a variety of price points. If broad exceptions to section 1201's anti-circumvention provisions are enacted—or Section 1201 is otherwise undermined—through right-to-repair trade regulation rules, the careful balance established by Congress in section 1201 would be undermined and piracy of copyrighted works would proliferate.

To be clear, we take no issue with rules that are narrowly targeted to the repair of devices, like tractors and phone batteries, that do not implicate copyright protections. But rules that are not narrowly targeted have the potential to inadvertently undo the carefully crafted balance in section 1201 and would have a significant negative impact on the creative industries and professional creators who rely on section 1201 for their livelihoods.

¹¹ Kelly Lester, *The Market Is Responding to Right-to-Repair Needs Without Legislation*, JOHNLOCKE.ORG (March 1, 2023). <https://www.johnlocke.org/the-market-is-responding-to-right-to-repair-needs-without-legislation/>.

¹² *Apple announces Self Service Repair*, APPLE.COM (Nov. 17, 2021). <https://www.apple.com/newsroom/2021/11/apple-announces-self-service-repair/>

It is critical that any agency actions on right to repair be narrowly tailored and reflect the following principles:

- Any right-to-repair rulemaking implicating copyrighted works and section 1201 should recognize that the anti-circumvention and anti-trafficking prohibitions contained in section 1201 have been fundamental to the development of today’s vibrant digital marketplace in entertainment content, which has evolved to the great benefit of American consumers.
- The protections afforded by section 1201—which allow copyright industries to make their works widely available to the public while also preventing the growth of illicit enterprises designed to profit from enabling unauthorized access to copyright protected works—must not be negated by rules that would allow for broad exceptions to section 1201 and result in the widespread availability of tools that would enable mass infringement.
- To the extent exemptions to section 1201 are warranted, stakeholders who support those exemptions should use the existing triennial rulemaking process to enact them.
- Right-to-repair rulemaking, or any other agency actions that directly or indirectly affect copyright law, should seek input from expert governmental IP agencies, like the U.S. Copyright Office and the U.S. Patent and Trademark Office, and all stakeholders.
- The FTC should not promulgate any rules that would open the door to widespread piracy and would dramatically alter how the public gets—or does not get—access to copyrighted works in the future.

Conclusion

We thank the FTC for the opportunity to comment on the Petition for rulemaking. As the Commission considers the Petition or any other future issues that intersect with copyright law, we welcome the opportunity to be a resource for any questions that may arise.

Respectfully submitted,



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