

**Before the
United States Copyright Office
101 Independence Ave. S.E.
Washington, D.C. 20559-6000**

Section 1201 Study

| Docket No. 2015–8

ADDITIONAL COMMENTS OF PUBLIC KNOWLEDGE

Raza Panjwani
Policy Counsel
PUBLIC KNOWLEDGE
1818 N St. NW, Suite 410
Washington, DC 20036

I. Initial Comments

We thank the Copyright Office for the opportunity to offer additional comments in response to its ongoing study of the anti-circumvention provisions of the Digital Millennium Copyright Act. Public Knowledge offers these comments in response to the Office's Request for Additional Comments with respect to the Section 1201 Study dated September 27, 2016.¹

The bulk of the Office's current inquiry is directed towards proposals for new permanent exemptions to Section 1201 to supplement the existing exemptions codified at Section 1201(d)-(j), as well as proposals for amending the existing permanent exemptions. While we believe that permanent exemptions, if designed correctly, can help ameliorate some of the worst excesses of Section 1201,² we believe that they are a sub-optimal solution. Exemptions to Section 1201, both of the permanent variety codified in the statute, and those granted in the course of the triennial exemption proceedings, are surface level treatments that target the symptoms of Section 1201, rather than addressing the fundamental problem – that Section 1201 is too broad, and imposes far too great of a cost on society for little gain to rights holders.³

As such, we continue to endorse a more substantive revision of Section 1201 that permits circumvention except where it is undertaken with the intent to infringe one of the Section 106 rights of the copyright owner. While the Office focused primarily on the Breaking Down Barriers to Innovation Act⁴ during the public roundtables held in May 2016, our preferred solution is the Unlocking Technology Act.⁵ By categorically permitting non-infringing activities, the Unlocking Technology Act would eliminate the need for exemptions of any variety to engage in lawful uses of technology and media, whether for repair, for security research, for fair uses, or for accessibility.

By considering a suite of new permanent exemptions, the Office appears to recognize, sub silentio, that the anti-circumvention restrictions currently imposed by Section 1201 are too broad. We note that the Office is seeking comments in this Request on a proposal that would explicitly tie a permanent exemption to statutory exceptions in Section 117. Having begun down this path, we urge the Office to follow it to its conclusion: why should statutory exemptions exist for only some statutory limits and exceptions to copyright? In particular we note the absence of a

¹ Section 1201 Study: Request for Additional Comments, 81 Fed. Reg. 187 (September 27, 2016), *available at* <https://www.gpo.gov/fdsys/pkg/FR-2016-09-27/pdf/2016-23167.pdf>.

² See Comments of Public Knowledge, March 3, 2016, at 8, *available at* <https://www.regulations.gov/document?D=COLC-2015-0012-0068>.

³ See Comments of Public Knowledge; Reply Comments of Public Knowledge, April 1, 2016, *available at* <https://www.regulations.gov/document?D=COLC-2015-0012-0087>; Comments of Raza Panjwani, Transcript of Section 1201 Study Public Roundtable, May 19, 2016, *available at* http://www.copyright.gov/policy/1201/public-roundtable/transcript_05-19-2016.pdf.

⁴ Breaking Down Barriers to Innovation Act of 2015, S. 990, 114th Cong. (2015), *available at* <https://www.congress.gov/bill/114th-congress/senate-bill/990>.

⁵ Unlocking Technology Act of 2015, H.R. 1587, 114th Cong. (2015), *available at* <https://www.congress.gov/bill/114th-congress/house-bill/1587>.

proposal to permanently exempt fair uses made under Section 107, although exemptions grounded in that exception are routinely granted to filmmakers and educators.

We have additional concerns about pursuing reform of Section 1201 through periodic consideration of permanent statutory exemptions. The first 18 years of Section 1201 have demonstrated at least two problems with this approach. The first is that it takes too long to respond to the shortcomings of the law as applied to particular technologies. For example, we are only now considering codification of the assistive technologies exemption, when it has gone unopposed for years. The second is that even when the need for a particular permanent exemption is quickly and widely recognized, as in the case of the repair and computer exemption, it is ultimately meaningless until Congress is able to take action. Rather than take a piecemeal approach that would require never-ending legislative revisions to Section 1201, a systemic solution—such as the Unlocking Technology Act—makes far more sense.

Nevertheless, in the interest of thorough investigation, it is appropriate for the Office to consider new permanent exemptions, while recognizing it as a second-best approach to reforming Section 1201. In addition, if the general prohibition on circumvention for non-infringing purposes is to remain intact, then the addition of permanent exemptions must be paired with reforms to the triennial process through which the Librarian of Congress grants temporary exemptions. We urge the Office to consider the approach offered in the Harvard Cyberlaw Clinic’s initial comments for this study.⁶

In considering the language of any new permanent exemption, the Office should err on the side of breadth rather than narrowness. Exemptions crafted too narrowly are ultimately useless to their intended beneficiaries, as evidenced by comments at the public roundtables, and by the Office’s consideration of amendments to the existing permanent exemptions in this Request for Comments. A too narrow exemption would result in the intended beneficiaries having to avail themselves of the triennial exemption process anyway, rendering pointless the entire exercise of implementing new permanent exemptions. On this point, the Office should take heed of the shortcomings in the existing permanent exemptions. We note that because an exemption to Section 1201 does not create an independent exception to Section 106, the potential harms of an “overbroad” exemption are limited, as rightsholders will continue to have recourse for any infringing activity occurring under the color of an exemption.

II. New Permanent Exemptions

A. Assistive Technologies for Use by Persons Who Are, Visually Impaired, or Print Disabled

We support a permanent exemption for assistive technologies. However, we believe that the permanent exemption language should be broader than the language of the exemption granted by the Librarian of Congress in 2015. Specifically, that exemption is limited to “nondramatic literary works.” We understand that this is intended to conform with the existing

⁶ Comment of the Cyberlaw Clinic at Harvard Law School, March 3, 2016, *available at* <https://www.regulations.gov/document?D=COLC-2015-0012-0052>.

Section 121 exception, but we note that the United States is a signatory to the Marrakesh Treaty.⁷ Earlier this year the Obama Administration recommended implementing the Treaty by expanding Section 121 to cover literary works generally, and musical works fixed in the form of text or notation.⁸ Codifying the 2015 exemption is a clear example of how any permanent exemption—let alone one that is overly narrow—can rapidly become obsolete and require serial revisions. We urge the Office to be forward looking in recommending an exemption that would track the Treaty requirements.

In addition, we believe that the limiting clause in section (i) of the 2015 exemption, (beginning with “provided, however, that the rights owner is remunerated...”) is redundant and unnecessary. Because the exemption is conditioned on a copy of the work being “lawfully obtained,” it need not further specify that the upstream rights holder must have been compensated. Furthermore, it is unreasonable to condition a user’s lawful activity (i.e., reliance on an exemption) on confirming the provenance and sales history of the copy in their possession—knowledge which the user is unlikely to have and is poorly positioned to acquire.

B. Device Unlocking

We support a permanent exemption for unlocking devices for the purpose of connecting to a wireless telecommunications network of the device user’s choice. We believe that it is inappropriate to limit such an exemption to an enumerated list of device classes, but should be generally applicable. We would support a permanent exemption that covered computer programs that enable devices to connect to a telecommunications network, when circumvention is undertaken in order to connect to a telecommunications network and such connection is authorized by the operator of such network. By limiting the exemption to a specific list of devices, rapid technological change will likely render it under-inclusive, especially as internet connectivity continues to expand to a greater variety of devices every day.

C. Computer Programs

We support a permanent exemption for all lawful modifications of a computer program, and for any circumvention for the purposes of diagnosis, maintenance, modification and repair. It is self-evident that permitting diagnosis, maintenance and repair will not result in economically harmful uses of the accessed work, as copyright contemplates no such exclusive rights for copyright owners. While modification may raise concerns about infringing uses, by tying the exemption to the existing Section 117 exceptions, rights holders will still have recourse in enforcing their copyrights under existing case law. We believe that an exemption limited strictly

⁷ Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, *adopted June 27, 2013, available at* <http://www.wipo.int/treaties/en/ip/marrakesh/>.

⁸ Marrakesh Treaty Implementation Act of 2016, Legislative Implementation Documents, United States Patent and Trademark Office, *available at* <https://www.uspto.gov/learning-and-resources/ip-policy/copyright/legislative-implementation-documents>.

to Section 117 would be inadequate, as the Office itself has granted related exemptions on the basis of both Section 117 and fair use.⁹

We do not think it is appropriate to look to patent, trademark, or state law in determining the contours of an exemption from circumvention liability. Similarly, we do not think it is necessary to condition the exemption on not engaging in infringing uses of the work. If a use is infringing, rightsholders will necessarily have an independent cause of action as to that use.

The Office asks which formulation of an exemption would facilitate permissible use of software while preserving the intent of the law to encourage dissemination of copyrighted works in digital formats. We note that many rightsholders have claimed that the abundance of digital content available on the internet through lawful channels is a direct result of Section 1201's enactment. However, they have not actually produced evidence supporting the causal link between these two events, instead relying on a post hoc ergo propter hoc argument. As we have noted, there are many examples of rightsholders willing to distribute copyrighted materials without restrictive technological protection measures and achieving commercial success, from ebooks published by Macmillan's Tor Books imprint,¹⁰ to wildly popular video games like *The Witcher 3*,¹¹ to MP3s. As such, the Office should not presume that an exemption, of whatever scope, will discourage the continued digital distribution of copyrighted materials.

III. Anti-Trafficking

A. *Implied Exception to Anti-trafficking Provisions*

In our view, when a circumvention activity is exempted from the prohibition in Section 1201(a)(1)(A), it is also lawful to create and distribute circumvention tools that are necessary for the exempted activity. Congress expressly granted a number of permanent exemptions in the statute,¹² and directed the Librarian of Congress to grant further exemptions where warranted.¹³ To suggest that exemptions come with no right to create or acquire tools to effectuate those exemptions would render them superfluous, a flatly illogical outcome to be avoided as a matter

⁹ Section 1201 Rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyright, October 2015, at 234-239, available at <http://www.copyright.gov/1201/2015/registers-recommendation.pdf>.

¹⁰ *Buy Tor ebooks*, <http://www.torbooks.co.uk/buy-tor-ebooks/> (last visited October 27, 2016). (“All Tor ebooks are free of Digital Rights Management (DRM). Once you purchase one of our ebooks, you can download it as many times as you like, on any of your devices. We believe that making our Tor ebooks DRM-free is the best for our readers, allowing you to use legitimately-purchased ebooks in perfectly legal ways, like moving your library from one ereader to another. We understand that DRM can make your ebooks less easy to read.”)

¹¹ Matthew Humphries, *CD Projekt proves that games DRM is a complete waste of time*, Geek, (July 20, 2016), <http://www.geek.com/tech/cd-projekt-proves-that-games-drm-is-a-complete-waste-of-time-1662434/>. (“*The Witcher 3* has no DRM and yet it has sold 10 million copies.”)

¹² 17 U.S.C. § 1201(d)-(j)

¹³ 17 U.S.C. § 1201(a)(1)(C)

of statutory construction.¹⁴ In reconciling the anti-trafficking provisions and the exemption provisions, it is not necessary for the implied right to be limited to only the beneficiary of the exemption. Just as Congress undoubtedly intended beneficiaries of exemptions to actually be able to use them, Congress could not have expected each exemption user to independently develop circumvention tools in isolation, rather than expecting that exemption users would be able to acquire them from others possessing the required skills, knowledge, and expertise to create them.

To the extent that any changes should be made to the anti-trafficking provisions, it should be to limit their application to tools that do not have substantial non-infringing purposes, as is proposed in the Unlocking Technology Act. This standard is well-grounded in law, having been enunciated in the landmark *Betamax* decision.¹⁵ As is now well accepted, permitting the sale and distribution of home video recording devices led to the birth of the lucrative home video marketplace.¹⁶ Similar innovation and economic opportunities could be unlocked by amending the anti-trafficking provisions in conformance with that standard.

B. Third Party Assistance

Similarly, we continue to believe that a third party acting at the direction of an exemption beneficiary to carry out the exempted circumvention is not liable under section 1201, and that no legislative changes are necessary. There is nothing in the legislative text or history that suggests that Congress intended only self-reliant users to be able to benefit from exemptions.

IV. Conclusion

In conclusion, we ask that the Copyright Office gives serious consideration to the concerns and calls for reform raised herein.

Respectfully submitted,
/s Raza Panjwani
Policy Counsel
PUBLIC KNOWLEDGE
1818 N St. NW, Suite 410
Washington, DC 20036
(202) 861-0020
raza@publicknowledge.org

¹⁴ See, e.g., Katharine Clark and Matthew Connolly, *A Guide to Reading, Interpreting, and Applying Statutes*, The Writing Center at Georgetown University Law Center, April 2006, at 6, available at <https://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/statutoryinterpretation.pdf>. (“[A]n interpretation that would render a word or phrase redundant or meaningless should be rejected.”)

¹⁵ *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

¹⁶ *Today in 1984: The Supreme Court Decides the Sony “Betamax Case”*, Legal Solutions Blog, (January 17, 2014), <http://blog.legalsolutions.thomsonreuters.com/legal-research/today-1984-supreme-court-decides-sony-betamax-case/>. (“Thus, the Supreme Court protected video-recording technologies, enabling the boom of the home video market[.]”)