



**BEFORE THE UNITED STATES COPYRIGHT OFFICE, LIBRARY OF CONGRESS
SECTION 1201 STUDY, DOCKET NO. 2015-8**

COMMENTS OF THE CENTER FOR DEMOCRACY & TECHNOLOGY

The Center for Democracy & Technology (CDT) thanks the Copyright Office for initiating this inquiry into possible amendments and procedural modifications to section 1201 to improve the effectiveness of permanent exemptions and the triennial review process. The time is ripe for a hard look at section 1201's potential adverse effects on legitimate activities that do not implicate copyright concerns of rightsholders. As access-controlled software and firmware increasingly pervade and interface with nearly every facet of our lives, so, too, do copyright issues and the ability to leverage section 1201 to further interests wholly unrelated to copyright.

Leveraging the prohibition on circumvention of access controls to further non-copyright interests, such as market foreclosure strategies or consumer lock-in, is perhaps the greatest public concern with section 1201. While CDT shares this concern, we are also mindful of section 1201's potential chilling effect on the independent research necessary to make the software, firmware, devices, and networks we interact with more secure. CDT appreciates the Register and Librarian's work in granting an exemption for security research in the most recent triennial review proceeding. However, this is a temporary fix to a problem in need of a long-term solution.

The following comments propose changes to section 1201 that would move us closer to that long-term solution. They also focus on the precise questions raised in the Notice of Inquiry and propose changes to the triennial rulemaking process to make it more efficient and predictable for the Copyright Office and all participating parties. Many of the potential obstacles to making these improvements are largely imaginary or self-imposed, premised on readings of section 1201 and its legislative history that are neither required nor fully consistent with the statute's purpose. We look forward to working with the Copyright Office, Congress, and all parties to overcome those obstacles and arrive at a more predictable application of section 1201 to noninfringing and beneficial uses of copyright works that require circumvention of access controls.

1. General Observations

a. Section 1201's Focus on Deterring Copyright Infringement

Section 1201 should focus on copyright concerns in order to protect the rights granted to authors in section 106¹ without unduly restricting access to copies of works for legitimate purposes. Congress

¹ 17 U.S.C. § 106.

intended section 1201's prohibition on circumvention to fulfill the United States' obligations under the World Intellectual Property Organization (WIPO) copyright treaties by preventing unauthorized access to copyrighted works.² As Congress explained, circumventing access controls was akin to "breaking into a locked room in order to obtain a copy of a book[.]"³ Section 1201(a) sought to deter infringement of copyrighted works by banning unauthorized lock picking.⁴

Today, access controls can be found on an increasingly wide variety of products that do not involve the types of creative content stored on the access-controlled digital media of the 1990s.⁵ That ubiquity heightens the need to focus section 1201 on copyright-related interests, and the need for flexibility in the triennial review process. As the Register has noted, the prohibition on circumvention "impacts a wide range of consumer activities that have little to do with the consumption of creative content or the core concerns of copyright."⁶ Garage door openers, cell phones, and tractors are now almost as likely to be the subject of threats of anti-circumvention liability or requests for exemptions as e-books, DVDs, or end-user software.

As the Office has pointed out, access controls have been used for purposes other than copyright protection.⁷ Makers of mobile phones, printer cartridges, and coffee makers have used access controls as a means to control market entry and competition.⁸ Others have used access controls as a security

² Section-by-Section Analysis of H.R. 2281 As Passed by the United States House of Representative on August 8, 1998, Committee on the Judiciary, House of Rep., 105th Cong., 2d Sess. at 3, 5-6 (Comm. Print, Serial No. 6, Sept. 1998) (House Manager's Report).

³ *Id.* at 5.

⁴ *Id.* ("Subsection (a)... thus amends title 17 to establish this new chapter 12 of the Copyright Act to protect against certain acts of circumvention of technological measure employed by copyright owners to defend against unauthorized access to or copying of their works.")

⁵ See e.g. Initial Comments of Dr. Matthew Green, 5-10, Sixth Triennial Rulemaking, Proposed Class 25: Security Research (explaining a variety of technological protection measures and kinds of devices and systems in which they are used), available at http://copyright.gov/1201/2015/comments-020615/InitialComments_LongForm_Green_Class25.pdf.

⁶ Section 1201 Rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights, 2 (Oct. 2015) (2015 Register's Recommendations), available at <http://copyright.gov/1201/2015/registers-recommendation.pdf>.

⁷ Recommendation of the Register of Copyrights (2006 Register's Recommendation) at 51 n. 148, (Nov. 2006) ("The purpose of the software lock appears to be limited to restricting the owner's use of the mobile handset to support a business model, rather than to protect access to a copyrighted work itself.... the record relating to this proposed class of works does not demonstrate any copyright-based rationale for enforcing the prohibition on circumvention of technological measures that control access to works protected by copyright."), available at http://www.copyright.gov/1201/docs/1201_recommendation.pdf.

⁸ Librarian of Congress, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Wireless Telephone Handsets, Final Rule, 79 Fed. Reg. 50552, 50552-53 (Aug. 25, 2014); *Lexmark Intern. v. Static Control Components*, 387 F. 3d 522, 549 (6th Cir. 2004); Casey Johnston, *How do you*

feature.⁹ These uses are far afield from “access controls implemented to deter copyright infringement in the digital environment”¹⁰ and should not enjoy protection under section 1201. CDT agrees with the National Telecommunications and Information Administration (NTIA) that evidence demonstrating that a rightsholder or other party is deploying access controls for motivations other than copyright protection should weigh strongly in favor of granting an exemption.¹¹

While federal circuit courts are not in agreement as to whether a violation of section 1201’s prohibition on circumvention requires some nexus with infringement,¹² exemption proposals should not be denied absent evidence of harm to an interest protected by copyright. When the Register finds the uses described in proposed exemptions are noninfringing, denying the exemption would seem to run counter to the core purpose of the triennial review process: mitigating the adverse effects of the anti-circumvention provision on users’ “ability to make noninfringing uses under this title of a particular class of copyrighted works.”¹³ Standing alone, concerns unrelated to copyright are an inadequate basis for denying a proposed exemption.

Further guidance and uniformity as to how the Office accounts for concerns unrelated to copyright would benefit both rightsholders and users seeking to make noninfringing uses of works that require circumventing access controls. In its consideration of the proposed Class 22 Vehicle Software Security and Safety Research exemption, the Office concluded that erosion of the “public’s confidence in the safety and security of products found to be flawed” was “not truly a copyright concern” and therefore irrelevant to the Office’s consideration of the effect of an exemption on the market for or value of copyrighted works.¹⁴ By contrast, the Office stated that it “must take seriously” the “significant issues

DRM a Coffee Pod?, ARS TECHNICA (Mar. 23, 2014) <http://arstechnica.com/tech-policy/2014/03/how-do-you-drm-a-thing-like-a-coffee-pod/>.

⁹ See *Chamberlain Group v. Skylink Tech., Inc.*, 381 F. 3d 1178, 1185 (Fed. Cir. 2004) (using access controls to prevent unauthorized persons from activating garage door openers); Class 22 Comments of General Motors, Mar. 27, 2015, at 28 (use of access controls to prevent tampering with vehicle electronic control units (ECUs)), available at http://copyright.gov/1201/2015/comments-032715/class%2022/General_Motors_Class22_1201_2014.pdf.

¹⁰ Recommendations of the National Telecommunications and Information Administration to the Register of Copyrights, Sixth Triennial Section 1201 Rulemaking, Sept. 8, 2015 (NTIA Recommendations) at 80, http://copyright.gov/1201/2015/2015_NTIA_Letter.pdf.

¹¹ NTIA Recommendations at 7 (“First, a record showing that a technological measure was not deployed with copyright protection in mind should weigh heavily in favor of a proposed exemption. Such a standard is entirely consistent with the statutory factors to be considered in this rulemaking.”).

¹² Compare *Chamberlain Group*, 381 F. 3d at 1202 (concluding that 17 U.S.C. § 1201 prohibits only forms of access that bear a reasonable relationship to the protections that the Copyright Act otherwise affords copyright owners) with *MDY Ind., LLC v. Blizzard Entertainment, Inc.*, 629 F. 3d 928, 945 (9th Cir. 2010) (finding that 1201(a) grants an independent anti-circumvention right to copyright owners).

¹³ 17 U.S.C. Sec. 1201(a)(C).

¹⁴ 2015 Register’s Recommendation at 311.

raised by opponents concerning public safety and regulatory compliance[.]”¹⁵ It is unclear whether the Office dismissed proponents’ safety-related concerns because they were raised under the fourth factor of section 1201(a)(1)(B)—the effect on the market for or value of copyrighted works—or because they were unaccompanied by an expression of concern from regulatory agencies. In any event, further clarity as to how the Office will evaluate concerns unrelated to copyright will ensure that one of the least clear and probative factors under section 1201—the “other factors” catchall—does not become dispositive.

b. Regulatory Concerns Unrelated to Copyright

In the Sixth Triennial Exemption proceeding, the Register expressed concerns about some proposed exemptions’ effects on compliance with laws and regulations outside of copyright.¹⁶ Agencies should work together when their policy fields overlap. However, conditioning the applicability of 1201 exemptions on laws and regulations outside the Copyright Act adds uncertainty to a process intended to reduce it. CDT agrees with NTIA that expanding the scope of considerations in 1201 proceedings to regulatory matters unrelated to copyright could require the Office to develop expertise in any number of fields that would duplicate the expertise of other agencies.¹⁷ CDT also shares NTIA’s confidence that when triennial exemptions raise substantial concerns outside the scope of copyright, clear and transparent communication can provide notice to other agencies, alerting them to the potential need to address issues that lie within their realm of expertise.¹⁸

An exemption under section 1201 does not obviate the need to comply with other laws and regulations. The Health Insurance Portability and Accountability, the Computer Fraud and Abuse Act (CFAA), and regulations promulgated by federal agencies are no less applicable to users of copyrighted works simply because they have circumvented a technological protection measure pursuant to an exemption granted under section 1201. CDT agrees with NTIA that rather than conditioning exemption applicability on compliance with these laws and regulations and requiring would-be circumventors to wager their interpretation of those laws against liability under 1201(a), a provision in exemptions “stating that it does not preclude liability under other applicable laws” suffices to ensure that users do not misconstrue an exemption under section 1201 as a blanket exemption from legal compliance generally.¹⁹

2. Rulemaking Process

¹⁵ *Id.* at 312.

¹⁶ *Id.* at 248, 315, 403.

¹⁷ NTIA Recommendations at 4 (“NTIA urges the Copyright Office against interpreting the statute in a way that would require it to develop expertise in every area of policy that participants may cite on the record.”)

¹⁸ *Id.* at 62 (“NTIA appreciates that parties have raised important questions about the safety and efficacy of medical devices, and NTIA is confident that the appropriate regulatory agencies will address any non-copyright issues that may arise once this exemption is granted.”)

¹⁹ *Id.* at 58, 72.

a. Presumptive Renewal of Previously Granted Exemptions

CDT agrees with the Register that the process of renewing existing exemptions should be adjusted to create a regulatory presumption in favor of renewal.²⁰ In the last triennial rulemaking, no party opposed renewal of the Class 9 exemption for assistive technologies to make literary works distributed electronically accessible to persons who are blind, visually impaired, or print disabled.²¹ Indeed, groups such as the Association of American Publishers supported renewal of the exemption.²² In such cases, developing a new record from scratch imposes an administrative burden on the Office and parties with no apparent benefit.

Even in cases where a party opposes a previously granted exemption, the Office's earlier grant of the exemption should satisfy the proponent's obligation to demonstrate that the exemption is warranted and consistent with the requirements of section 1201. Absent new, specific evidence that undermines the basis for granting the exemption, those who benefit from an exemption should be able to rely upon it. As demonstrated in the case of cellphone unlocking, consumers may come to rely on exemptions even when the Office later deems the evidence to support them "weak, incomplete, or otherwise inadequate."²³ CDT therefore supports proposals such as the Breaking Down Barriers to Innovation Act that would instruct the Librarian to renew exemptions automatically absent a showing of changed circumstances.²⁴

Even without legislative change, the Librarian is entitled to rely on the evidence adduced in earlier rulemakings. The reference to *de novo* review cited by the Register in the Notice of Inquiry (NOI) in this proceeding²⁵ and elsewhere comes from the House Commerce Committee's Report explaining the triennial rulemaking that the Commerce Committee required the Secretary of Commerce to conduct in consultation with NTIA, the Patent and Trademark Office, and the Copyright Office.²⁶ It is questionable whether this passage in the House Commerce Report is entitled to much weight. The Report's instruction to the Secretary of Commerce to make "a new determination that the adverse impact criteria have been met with respect to a particular class"²⁷ does not appear in either the Senate or House Judiciary Committee Reports. Indeed, the Senate or House Judiciary legislation did not include a triennial review at all. The House Manager's Report, issued after the legislation had passed the House,

²⁰ Statement of Maria A. Pallante before the Committee on the Judiciary, United States House of Representatives, "The Register's Perspective on Copyright Review" (Apr. 29, 2015) at 21.

²¹ Library of Congress, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 80 Fed. Reg. 65944, 65950 (Oct. 28, 2015) (2015 Final Rule).

²² *Id.*

²³ 2015 Register's Recommendations at 4.

²⁴ H.R. 1883, 114th Cong. Sec 3(a)(1)(F)(iii) (2015); S.990, 114th Cong. Sec 3(a)(1)(F)(iii) (2015).

²⁵ Library of Congress, Section 1201 Study: Notice and Request for Public Comment, 80 Fed. Reg. 81369, 81370 (Dec. 29, 2015) (2015 NOI).

²⁶ H.R. Rep. No. 105-551, Part 2 at 37 (Jul. 22, 1998).

²⁷ *Id.*; see also 2015 NOI 80 Fed. Reg. at 81370 & n.25.

discusses the triennial review but does not mention a *de novo* review standard or whether the Secretary of Commerce must make a new determination. It states only that “[d]uring the next rulemaking proceeding, if it is determined that there is no longer an adverse impact on noninfringing use, the prohibition will apply and the exemption will cease to exist.”²⁸ This passage suggests if the Secretary *does not* make such a determination, the exemption persists. The House Conference Report does not explain how rulemaking duties migrated from the Secretary of Commerce to the Librarian of Congress, but it certainly does not mandate that the House Commerce Report’s mention of *de novo* review migrated with them.

Even if the statute does require *de novo* review of a requested exemption, that review does not foreclose consideration of or reliance on evidence adduced in prior rulemakings. *De novo* review determines the weight accorded a prior determination, not the permissible evidence on which the determination is made. It means only that the decision maker must consider the matter anew, as if no decision previously had been rendered.²⁹ Moreover, *de novo* review is generally understood to apply to questions of law rather than factual determinations, which are generally reviewed for clear error.³⁰ Just as appellate courts may rely on the record developed below when reviewing a lower court’s decision *de novo*, the Office is entitled to rely on evidence from a prior rulemaking when conducting a subsequent one.

Renewed exemptions are particularly important to legitimate activity that may require more than three years (or in the case of some exemptions, two years) to complete. This is a concern for researchers whose projects may have time horizons extending beyond the pendency of a temporary exemption to anti-circumvention liability under section 1201. Without any assurance that their actions are at least presumptively legal, they may never undertake them in the first place, even if the Librarian has determined they are entitled to an exemption during a particular triennial review period.

b. Calibrating Proponents’ Burdens to Copyright-Related Interests

As noted in the Librarian’s 2000 Final Rule, the language of section 1201 “does not offer much guidance as to the respective burdens of proponents and opponents of any classes of works to be exempted . . .”³¹ The Librarian therefore relied on case law, restatements, and legislative history to find that a proponent of an exemption must demonstrate a “substantial” adverse impact to be eligible for an exemption.³² The NOI in this proceeding relies on the House Manager’s Report for the proposition that “proponents must establish that a ‘substantial diminution’ of the availability of works for noninfringing uses is ‘actually occurring’ in the marketplace—or, in ‘extraordinary circumstances,’ may establish that the ‘likelihood of future adverse impact during that time period’ where such evidence is

²⁸ House Manager’s Report at 8.

²⁹ *Freeman v. DirecTV, Inc.*, 457 F.3d 1001, 1004 (9th Cir. 2006).

³⁰ *United States v. Wilkes*, 662 F.3d 524, 532 (9th Cir. 2011).

³¹ Library of Congress, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 64 Fed. Reg. 64556, 64558 (Oct. 27, 2000) (2000 Final Rule).

³² *Id.*

‘highly specific, strong and persuasive.’”³³

It is questionable whether this heightened burden on proponents of an exemption is either required or consistent with the purpose of section 1201’s exemption process. Although administrative law generally places the burden of proof on the proponent of a rule or order,³⁴ the plain text of section 1201 requires the Librarian to make a triennial determination as to the provision’s adverse effect or likely adverse effect on users making noninfringing uses of particular classes of works, regardless whether any parties step forward. Thus, exemption proponents are not typical petitioners in the sense of seeking an unanticipated declaratory rulemaking or waiver from a rule of general application. Section 1201(a)(1)(B) itself states that the prohibition of circumvention of technological measures “shall not apply” to persons determined to be adversely affected by section 1201’s anti-circumvention provision’s application to noninfringing uses of a particular class of works. Thus, it is more appropriate to say that the prohibition does not apply to such uses than to say that such uses are eligible for a discretionary exemption from the prohibition.

Placing the burden on exemption proponents in all cases to demonstrate a “substantial diminution” of the availability of works for noninfringing uses or a substantial adverse impact on such uses deprives the rulemaking process of needed flexibility for cases in which noninfringing uses have a negligible impact on the availability, value, or market for copyrighted works. The current allocation of burdens in the section 1201 rulemaking process makes no distinction between access controls that protect music, art, books, video games, automobiles, cell phone firmware, or garage door openers. A better approach would be one that calibrates the proponent’s burden to the potential harm of granting an exemption to rightsholders’ copyright-related interests. Nothing in the text of section 1201 would prevent the Office from adopting such an approach.

c. Avoiding Delay

The section 1201 rulemaking process must recognize that delayed exemptions frustrate legitimate, noninfringing uses of copyrighted works and create substantial uncertainty for users. Unlike prior rulemakings that delayed the expiration of a previously granted exemption,³⁵ the twelve-month delayed implementation of newly granted exemptions in the most recent rulemaking place users in administrative limbo: the Office has determined that the proponents have carried their burden to demonstrate the need of the exemption, but left them open to liability under section 1201 should they circumvent access controls to engage in the noninfringing use during the year-long phase-in.

³³ 2015 NOI, 80 Fed. Reg. at 81370 (citing House Manager’s Report at 6). In past proceedings, some commenters have questioned the Office’s reliance on the House Manager’s Report. 2000 Final Rule, 64 Fed. Reg. at 64558 n.4. CDT does not seek to relitigate that issue here but notes that the Conference and Committee Reports do not refer to “substantial diminution” or characterize forward-looking assertions of harm as relevant only in “extraordinary circumstances.”

³⁴ 5 U.S.C. § 556(d).

³⁵ Librarian of Congress, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Wireless Telephone Handsets, Final Rule, 79 Fed. Reg. 50552, 50552-53 (Aug. 25, 2014).

Aside from this uncertainty, delayed implementation deprives a granted exemption of much of its usefulness. In the case of the Class 25 exemption for good-faith security research, researchers may have to delay their work, compress their research into a two-year window, or account for the possibility that further restrictions will be placed on the exemption as a result of the implementation process. Such obstacles may disincentivize researchers and other proponents to expend the necessary effort and resources to seek an exemption in the first place.

It is unclear that the statute even contemplates exemptions of less than three years. To the extent that it does, the Librarian should resort to delay only sparingly and should be transparent as to a delayed exemption's implementation process. In the most recent rulemaking, exemption proponents and opponents were given no opportunity to respond to the letters from state and federal agencies that cited concerns with or opposed requested exemptions.³⁶ These concerns led the Librarian to find that "twelve months was the shortest period that would reasonably permit other agencies to respond" to delayed exemptions."³⁷ However, four months into that period, exemption proponents (and users) still have no participation, or even visibility, into those agencies' response. A more transparent and participatory approach to addressing the concerns of other agencies will reduce the element of surprise with respect to any requirements or limitations placed on granted exemptions and, ideally, obviate the need for future delays.

3. Anti-trafficking

According to the House Manager's Report, the anti-trafficking provision in section 1201(a)(2) was "drafted carefully to target 'black boxes' and to ensure that legitimate multipurpose devices can continue to be made or sold."³⁸ While prohibiting trafficking in devices intended to circumvent technological protection measures can deter infringement, some assertions of liability under section 1201's anti-trafficking provisions have gone well beyond such devices. Those provisions pose unique and unwarranted risks for both researchers and third parties seeking to assist users in lawful circumvention of access controls on the devices they own.

a. Accommodating Research

The anti-trafficking provisions in section 1201 create uncertainty and risk for those performing research that requires circumvention of access controls and wish to publish their work or subject it to peer review. On their face, references to "technology, product, service, device, component, or part

³⁶ See, e.g., Letter from Geoff Cooper, Ass't. Gen. Counsel, U.S. Environmental Protection Agency, to Jacqueline C. Charlesworth, Gen. Counsel & Assoc. Register of Copyrights, U.S. Copyright Office, (Jul. 17, 2015) (urging the Office not to recommend the proposed Class 21 and Class 22 exemptions), available at [http://copyright.gov/1201/2015/USCO-letters/EPA Letter to USCO re 1201.pdf](http://copyright.gov/1201/2015/USCO-letters/EPA%20Letter%20to%20USCO%20re%201201.pdf).

³⁷ 2055 Final Rule, 80 Fed. Reg. at 65956.

³⁸ House Manager's Report at 9.

thereof” do not reach mere discussions of circumvention for research purposes.³⁹ Nonetheless, some parties have taken the position that publishing information that can be used to circumvent access controls constitutes prohibited trafficking within the meaning of section 1201(a)(2) and 1201(b).⁴⁰

The risk of liability attached to the sharing of any information that could be used to circumvent access controls, even in the context of a broader discussion, inhibits security researchers who seek to build on each other’s work or subject their own discoveries to independent scrutiny and duplication of results that are essential to the scientific method. Although section 1201(f)’s exemption for reverse engineering allows users to share information acquired through circumvention, that provision is limited and does not apply to exemptions secured through the triennial review process.⁴¹

Particularly where scholarship or research *about* access controls forms the basis for an exemption from liability for circumventing those access controls, that basis should exempt from anti-trafficking liability information that can be used to circumvent the access controls in question. While section 1201’s exemption regime would be improved in general by granting the Librarian authority to grant exemptions from anti-trafficking liability, the need for such authority is acute in the case of research-based exemptions.

b. Facilitating Third-Party Circumvention

Consumers seeking to make noninfringing uses of devices they already own present a compelling case for permitting third-party circumvention when that circumvention requires technical knowledge or skill beyond the grasp of a typical device owner. Congress recognized as much in the Unlocking Consumer Choice and Wireless Competition Act, which allows circumvention by the user and also “by another person at the direction of the owner . . .”⁴² In her recommendations to the Librarian, the Register notes that the issue of third-party circumvention also arose in the context of proposed exemptions for vehicle repair and access to medical data.⁴³ The Register suggested that “Congress may wish to consider another amendment to section 1201 to address these sorts of situations, for example, by expressly allowing the Librarian to adopt exemptions that permit third-party assistance when justified by the record.”⁴⁴

³⁹ 17 U.S.C. § 1201(a)(2), (b).

⁴⁰ Complaint at 6 ¶ 9, *OdioWorks, LLC v. Apple, Inc.*, (N.D. Cal. No. CV-09-1818), available at <https://www.eff.org/document/complaint-41>.

⁴¹ See 17 U.S.C. § 1201(f)(3) (“The information acquired through the acts permitted under [the reverse engineering exception] may be made available to others . . . solely for the purpose of enabling interoperability of an independently created computer program with other programs, and to the extent that doing so does not constitute infringement under this title or violate applicable law other than this section.”).

⁴² Unlocking Consumer Choice and Wireless Competition Act, Pub. L. 113-144 Section 2(c).

⁴³ 2015 Register Recommendations at 5.

⁴⁴ *Id.*

CDT strongly agrees with the Register's suggestion, which is echoed by NTIA's recommendation to grant certain exemptions that allow circumvention "at the request of the owner" or, in the case of medical data, "at the direction of a patient."⁴⁵ With highly sophisticated devices, the inability to enlist the aid of a third party can deprive the device owner of much of the utility of the exemption. In certain cases, users may even render the device inoperable through a poorly executed attempt at lawful circumvention. Where the record supports an exemption for a device or vehicle owner to circumvent access controls to engage in noninfringing uses, it equally supports the owner enlisting the assistance of others to do so.

4. Permanent Exemptions: Security Testing

The existing categories of section 1201's permanent exemptions are necessary. However, the continued participation of security researchers, educational institutions, and libraries in triennial rulemakings demonstrate that, in their current form, section 1201's permanent exemptions are insufficient to cover the full range of legitimate, noninfringing circumvention for research purposes.⁴⁶ The overlap between permanent exemptions and exemptions granted or renewed in triennial rulemakings shows that the statutory exemptions correctly identify areas where the prohibition on circumvention is likely to adversely affect legitimate noninfringing uses, but do not provide adequate guidance or certainty as to their applicability in many situations.⁴⁷ Whether through legislation or interpretive guidance, enabling more noninfringing uses to fit within the permanent exemptions may help to reduce the scope of future triennial rulemakings, conserving the resources of the Office and those who would otherwise participate in the rulemaking process.

The existing permanent exemption for security testing allows "accessing a computer, computer system, or computer network, solely for the purpose of good faith testing, investigating, or correcting a security flaw or vulnerability,"⁴⁸ yet researchers have asked for triennial exemptions to allow security research three times, each time citing uncertainty as to the applicability of 1201(j) to their proposed areas of research.⁴⁹ That uncertainty stems primarily from three features of the existing exemption: the required authorization of the "owner or operator," the required compliance with other laws including the CFAA, and the consideration of a nonexclusive set of factors.⁵⁰

⁴⁵ NTIA Recommendations at 58, 62.

⁴⁶ See 2015 Register's Recommendations at 309 ("...the permanent exemptions embodied in sections 1201(j), 1201(f) and 1201(g) do not appear unambiguously to permit the full range of legitimate security research that could be encompassed by the proposed exemption").

⁴⁷ 2015 Register's Recommendations at 308; NTIA Recommendations at 81 ("the widely reported mass uncertainty over these exemptions, combined with the potentially unrealistic requirements and restrictions, necessitate a complementary exemption for general security research.").

⁴⁸ 17 U.S.C. § 1201(j)

⁴⁹ See, e.g., 2006 Register's Recommendations at 57-59 (Citing testimony of Perzanowski, 3/31/06, at 19-20, and Comments of CCIA/OSAIA, at 9); 2015 Register's Recommendations at 267 (citing Comments of Matthew Green, Class 25 Supp. at 19; CDT Supp. at 3-4; Green Class 25 Reply at 9).

⁵⁰ 17 U.S.C. § 1201(j)

First, the exemption requires a researcher to obtain the authorization of the “owner or operator” of the computer, system or network she wishes to research before starting the project.⁵¹ Due to the interconnected nature of many devices, systems, and networks, however, determining *which* owner or owners must authorize the research is an increasingly complex task that may not always be possible. Clarification of the extent of authorization required and how to properly assess ownership in the case of research that may involve interdependent computers, systems, and networks would add certainty to this element of the permanent exemption for security testing.

Second, requiring compliance with other laws, especially the reference to the CFAA, with its attendant ambiguities,⁵² compounds the uncertainty researchers face when trying to determine the scope of 1201(j). Removing from section 1201 the requirement to comply with this and other laws would not eliminate the responsibility to do so, nor would it make legal any acts otherwise inconsistent with the CFAA. However, it would reduce liability risk and uncertainty for good-faith security researchers who might use the exemption, only to find later that a court’s adverse construction of “exceeding authorized access”⁵³ within the meaning of the CFAA has exposed them to liability both under that statute and section 1201.

Third, consideration of the two factors listed in 1201(j)(3), which may be “of uncertain application to at least some” activities,⁵⁴ adds uncertainty because the statute suggests that these factors are but two in a non-exhaustive list and gives no signal as to how those factors should be weighed. In particular, the factor assessing “whether the information derived from the security testing was used solely to promote the security of the owner or operator”⁵⁵ raises questions in cases where research may be undertaken with the security of someone other than the owner in mind. Advance clarification of how the Office might weigh these factors would help researchers assess section 1201(j)’s application to their projects. Alternately, CDT supports simply striking the portions of the statute requiring compliance with other laws and the unspecified consideration of factors, as proposed by the Breaking Down Barriers to Innovation Act.⁵⁶

⁵¹ 17 U.S.C. § 1201(j)(1).

⁵² The Second, Fourth, and Ninth Circuits interpret the statute’s phrase “exceeding authorized access” narrowly, limiting it to instances of traditional hacking activity (*United States v. Valle*, 807 F.3d 508 (2d Cir. 2015); *WEC Carolina Energy Solutions v. Miller*, 687 F.3d 199 (4th Cir. 2012); *United States v. Nosal*, 676 F.3d 854 (9th Cir. 2012)), while the First, Fifth, Seventh, and Eleventh Circuits read the phrase more broadly, including using a computer for purposes prohibited in a terms of use agreement (*EF Cultural Travel BV v. Explorica Inc.*, 274 F.3d 577 (1st Cir. 2001); *United States v. John*, 597 F.3d 263 (5th Cir. 2010); *Int’l Airport Ctrs. LLC v. Citrin*, 440 F.3d 418 (7th Cir. 2006); *United States v. Rodriguez*, 628 F.3d 1258 (11th Cir. 2010)).

⁵³ 18 U.S.C. Sec. 1030(a)(1).

⁵⁴ 2015 Register’s Recommendations at 309.

⁵⁵ 17 U.S.C. § 1201(j)(3)(A).

⁵⁶ H.R. 1883, 114th Cong. Sec 3(a)(1)(F)(iii) (2015); S.990, 114th Cong. Sec 3(a)(1)(F)(iii) (2015).

CDT thanks the Register for declining to include a mandatory disclosure requirement in her recommendation to the Librarian. As the Office has observed, the appropriate disclosure of flaws and vulnerabilities is a complex and fact-dependent endeavor,⁵⁷ the regulation of which “may implicate First Amendment concerns.”⁵⁸ Free expression concerns aside, the norms of the security research community are still evolving, and appropriate research and disclosure practices are highly contextual. Consequently, any limiting language should be flexible so as not to constrain the development of safe testing or disclosure practices.⁵⁹ Through multi-stakeholder collaborative efforts, such as NTIA’s current process addressing cybersecurity vulnerabilities,⁶⁰ developing consensus on appropriate disclosure practices may be possible. Any legislative changes to the permanent exemptions should leave room for these efforts to comprehensively address disclosure practices. Similarly, provisions such as section 1201(j)(3)(A), which evaluates whether information was “shared directly with the developer of such computer, computer system, or computer network” should not be construed as a strict disclosure requirement.

5. Other: International Trade and Treaty Obligations

Congress enacted section 1201 to implement provisions of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.⁶¹ The largely parallel provisions of those treaties require contracting parties to “provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect to their works, which are not authorized by the authors concerned or permitted by law.”⁶²

As then-Register Marybeth Peters explained in testimony before the House Judiciary Committee, “[t]his language was deliberately written to be broad and general, and to leave to individual countries considerable flexibility in determining how to formulate the prohibition [on circumvention of technological protection measures].”⁶³ That considerable flexibility gives Congress the latitude it needs to amend section 1201 in ways that address known defects while ensuring that the statute continues to accomplish its core purpose of deterring copyright infringement. Congress can amend section 1201 to extend exemptions to anti-trafficking provisions, create a presumption of renewal (which could be

⁵⁷ 2015 Register’s Recommendations at 311-315, 318-19.

⁵⁸ *Id.* at 311

⁵⁹ NTIA letter at 87.

⁶⁰ See NTIA, Multistakeholder Process: Cybersecurity Vulnerabilities, at <https://www.ntia.doc.gov/other-publication/2015/multistakeholder-process-cybersecurity-vulnerabilities>.

⁶¹ WIPO Copyright Treaty, Dec. 20, 1996; WIPO Performances and Phonograms Treaty, Dec. 20, 1996.

⁶² WIPO Copyright Treaty, Article 11, available at <http://www.wipo.int/wipolex/en/details.jsp?id=12740>.

⁶³ Statement of Marybeth Peters before the Subcommittee on Courts and Intellectual Property, Committee on the Judiciary, United States House of Representatives, 105th Cong., 1st Session, (Sept. 16, 1997) available at http://copyright.gov/docs/2180_stat.html.

accomplished without amendment), or clarify statutory exemptions while preserving our commitments under international treaties and trade agreements.

CDT urges caution in entering into trade agreements—or advocating for provisions in those agreements—that would barter away the flexibility Congress and the Office need to focus anti-circumvention liability on copyright concerns. The United States-Korea Free Trade Agreement (KORUS) contains anti-circumvention provisions that largely duplicate terms of section 1201, along with their acknowledged shortcomings.⁶⁴ KORUS’s fixed list of exemptions (along with a triennial review process) is an unfortunate departure from the WIPO treaties’ more flexible approach. The recently negotiated Trans Pacific Partnership (TPP) provides more flexibility than KORUS, but includes anti-trafficking provisions and mandatory criminal penalties in certain cases.⁶⁵ However well-intentioned, overly prescriptive anti-circumvention and anti-trafficking provisions in trade agreements carry the dual risks of exporting known defects with those provisions and also complicating efforts to fix those defects at home. Should the United States continue to deem it advisable to advocate for these adjuncts to copyright protection in future trade agreements, such provisions should be modeled after the flexible approaches taken in the WIPO Treaties.

CONCLUSION

CDT once again thanks the Office for initiating this proceeding and especially thanks the Register for recognizing the need to address such matters as renewals of existing exemptions secured through prior rulemakings, third-party circumvention, and the interplay between statutory exemptions and proposed exemptions in the triennial review process. By addressing these matters, the Office can make significant headway in more clearly focusing section 1201 on copyright-related interests and reducing burdens and uncertainty for both rightsholders and users. CDT looks forward to participating with the Office and others in this ongoing effort.

Respectfully submitted,

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⁶⁴ United States-Korea Free Trade Agreement, Art. 18.4(7), available at <https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text>.

⁶⁵ Trans-Pacific Partnership, Art. 18.68, available at <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>.