

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

ADDITIONAL COMMENTS OF THE CENTER FOR DEMOCRACY & TECHNOLOGY

The Center for Democracy & Technology (CDT) thanks the Office for continuing this inquiry into possible amendments to section 1201 of the Digital Millennium Copyright Act (DMCA). The ubiquity of technological protection measures (TPMs) within the ever-expanding universe of software and devices that we use and depend on has heightened the need for effective exemptions to 1201's prohibition on circumvention of those TPMs. The leveraging of the prohibition on circumventing access controls to promote interests beyond the scope of copyright, like customer "lock-in," by makers of everything from cellphones, to printer ink cartridges, to tractors is symptomatic of 1201's problems. So, too, is the chilling effect of the uncertainty that 1201 creates for those studying the security of our devices, vehicles, and networks. There may be no better evidence of the need for more effective exemptions than the growth of the triennial exemption procedure, the most recent of which began with 44 petitions for exemptions and resulted in 10 temporary exemptions.¹ New or improved statutory exemptions could help some who might otherwise need to seek a temporary exemption instead make use of a permanent exemption.

Indeed, if the statutory exemptions were sufficiently broad to encompass all non-infringing circumventions, then the triennial proceeding likely would be unnecessary. Short of this, however, temporary exemptions and the process by which they are obtained will remain 1201's central means of relieving the unintended side-effects of its ban on circumvention. In the constantly changing landscape of computer technology, an adaptable, albeit temporary exemption may prove more useful than fixed statutory language. Indeed, one reason for the present inquiry is that 1201's permanent exemptions have failed to keep up with changing technologies. Unfortunately, the triennial procedure itself, as it has been historically administered, makes temporary exemptions less than an ideal solution. It is unclear whether the Office intends to further address potential improvements to the triennial rulemaking process, but CDT believes that repairing this process would ultimately have a greater impact on facilitating non-infringing uses.

As a general matter, CDT believes that flexibility and certainty must be added to 1201. As currently structured and interpreted, section 1201 is problematic for at least two reasons: the burdensome triennial rulemaking procedure's lack of predictable results and the uncertainties associated with the statutory exemptions. Aside from legislative solutions, there are steps the Office could take to mitigate these problems. First, the Register of Copyrights and the Librarian of Congress could exercise their authority to draft broader and simpler exemptions in the triennial rulemakings. Second, CDT supports

¹ Library of Congress, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, *Final Rule*, 80 Fed. Reg. 65944, 65946 (Oct. 28, 2015); *Id.* at 65946-59

the reinterpretation of the statutory provisions governing the triennial review process to create a presumption in favor of renewal for previously granted exemptions. Combined, these two actions would add considerable certainty as to the continuation of temporary exemptions while retaining the flexibility necessary to adapt those exemptions to changing technologies and their uses.

In the following comments, CDT addresses the Office's proposed amendments and new permanent exemptions. Many of these proposals are steps toward correcting the imbalance between the weight of 1201's ban on circumvention and the uncertainty of its exemptions. However, CDT encourages the Office to also pursue potential modifications to the temporary exemptions process. As we stated in our initial comments, nothing in the statute nor the legislative history prevents the Office from substantially improving the process via interpretive and administrative adjustments.² Finally, these comments will address other opportunities to improve 1201 through non-legislative alternatives.

Proposed New Permanent Exemptions

Senator Wyden correctly stated that "no matter how many exemptions are granted, the process for granting exemptions to the DMCA is broken."³ Representative Polis noted that without altering the law, the DMCA will not be able to reflect the vastly changing world and the role technology plays in it.⁴ Unfortunately, this request for additional comments is less than responsive to the above observations. In light of the legislative focus of this inquiry and in recognition of the significant effort required to achieve legislative solutions, CDT suggests that, generally, amendments in the form of new permanent exemptions should be crafted to remain relevant as new technologies emerge and to encompass as many non-infringing uses as possible. It is not clear that the Office's proposals meet this goal.

Device unlocking

In its petition for a temporary exemption in last year's rulemaking, Consumers Union noted the importance of allowing consumers to unlock their devices.⁵ The organization explained that failure to grant an unlocking exemption at the 2015 triennial review would reduce healthy incentives for competition and innovation in the way devices and wireless devices are developed and offered for

² Initial Comment of the Center for Democracy and Technology, Section 1201 Study, Docket No. 2015-8, March 3, 2016 ("CDT Initial 1201 Study Comment") at 1, 5 (citing the Register's desire to shift toward a regulatory presumption in favor of renewing temporary exemptions, 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.)

³ Press Release, Ron Wyden Senator for Oregon, Wyden: DMCA Exemption Process Is Broken (Oct. 27, 2015) available at: <https://www.wyden.senate.gov/news/press-releases/wyden-dmca-exemptions-process-is-broken>.

⁴ Public Knowledge, *It's Time to Fix the DMCA*, <https://www.publicknowledge.org/what-people-are-saying-about-reforming-the-dmca> (last visited Oct 25, 2015).

⁵ See Comments of the Consumers Union, Proposed Exemption to Prohibition on Circumvention Under 47 U.S.C. § 1201 (Feb. 6, 2015), at 13.

sale.⁶ Likewise, with its implementation of the Unlocking Consumer Choice and Wireless Competition Act, Congress recognized that limiting the right for consumers to unlock their devices or denying consumers the ability to seek outside help with the mechanics of unlocking would be detrimental.⁷ The need for a lasting exemption for device unlocking is clear.

In previous comments, CDT supported legislation aimed at enabling device unlocking, such as the Unlocking Technology Act.⁸ As a legislative alternative intended to achieve similar results, we urge the Copyright Office to craft any new exemptions with broad language to ensure that they remain flexible enough to incorporate new technology. Rather than listing the currently existing devices to which an exemption would apply, using language inclusive of all devices sharing a common attribute, such as network connectivity, would allow for simplicity, breadth, and adaptability. An example of such language might be “any machine, computer, or other device capable of connecting to a network.” Without broadly inclusive and flexible exemptions, the DMCA will perpetuate a system of laws focused only on outdated technology. Thus, should the Office choose to pursue a permanent exemption for device unlocking, CDT encourages the Office to consider language that will remain relevant to all potential technologies capable of network connections.

Computer programs

CDT regards the inquiry into computer programs that enable the operation of a machine or device as particularly important when considering potential alterations to section 1201. We commend the Copyright Office for its inclusion of repair activities under the computer programs exemption.⁹ It is unclear, however, why it is necessary to separate diagnosis, maintenance, and repair from other non-infringing purposes for circumvention, like security research. Though there may be differences among these activities that warrant separate regulatory approaches elsewhere, CDT is unaware of any copyright-related elements of these various activities that would require distinct limitations or conditions for eligibility under an exemption to protect copyright interests. To the extent that the Office has addressed these activities separately to accommodate interests unrelated to copyright protection, CDT discourages such an approach.

Rather than attempting to address concerns outside the scope of copyright, new permanent exemptions should focus on permitting circumvention for non-infringing purposes. Creating more inclusive language to reconcile the multitude of non-infringing purposes to circumvent access-controlled computer programs would unify diagnosis, repair, maintenance, and security research under one streamlined and durable exemption. Additionally, it is unclear that the Office’s piecemeal

⁶ *Id.*

⁷ Unlocking Consumer Choice and Wireless Competition Act, Pub. L. No. 113-144, 128 Stat. 1751 (2014).

⁸ Comment of the Center for Democracy and Technology, Software-Enabled Devices Study, Docket No. 2015-6, February 16, 2016, at 5; H.R. 1587, 114th Cong (2015).

⁹ Library of Congress, Section 1201 Study: Request for Additional Comments, *Notice of Inquiry*, 81 Fed. Reg. 66296, 66296 (Sept. 27, 2016) (“Request for Additional Comments”).

proposals aimed at improving exemptions for security research would effectively address the uncertainty associated with the various statutory exemptions. Therefore, CDT supports a more unified approach to exempting the circumvention of access controls on computer programs that unambiguously includes security research. One step the Office could take towards this would be to clarify its interpretation of 1201 as only applicable to circumvention sharing a nexus with occurrences of copyright infringement. This would help to refocus the statute on its original purpose, copyright protection, and slough off many of the undesirable side-effects, such as leveraging the prohibited circumvention of access controls for anti-competitive purposes.

Proposed Amendments to Existing Permanent Exemptions

The 2015 triennial exemption for security research

The language used in the 2015 exemption for security research is too narrow to serve as an effective and lasting permanent exemption. In limiting its applicability to devices and machines “primarily designed for use by individual consumers,” “motorized land vehicles,” and certain medical devices, this exemption artificially and unnecessarily constrains its usefulness. Although adding to 1201 a new exemption such as the Office proposes could, in the short-term, reduce the number of parties seeking temporary exemptions for such “classes of works” as the proposal describes, it would be less useful in the long-term than an administrative transition toward presumptive renewals of existing temporary exemptions.

CDT questions the wisdom of crafting a new permanent exemption from language tailored for a single iteration of a triennial exemption period, particularly for an exemption apparently so fraught with questions that its implementation was delayed for a third of its three-year span. A better long-term solution would be designed to account for technological development rather than contorted to fit the demands and concerns of a single triennial rulemaking. Likewise, new exemptions should avoid re-creating the uncertainty embedded in the existing statutory exemptions that induce researchers to seek temporary exemptions rather than assessing their ability to qualify for a permanent one. That uncertainty will not lessen as we make new uses of existing technology or as new technologies emerge.

The largest source of uncertainty in the proposed exemption is the provision requiring compliance with “any applicable law.”¹⁰ Further conditioning researchers’ eligibility under this exemption upon compliance with other laws, particularly the Computer Fraud and Abuse Act of 1986 (CFAA), compounds both uncertainty and risk without changing researchers’ legal obligations.¹¹ Since eligibility under the proposed exemption would hinge on whether or not a researcher’s practices fell within the ill-defined bounds of the CFAA’s notion of “authorized access,”¹² the researcher must risk liability

¹⁰ Request for Additional Comments at 66298.

¹¹ See CDT Initial 1201 Study Comment at 11.

¹² *Id.* at 11 and n. 52.

under both statutes even though their practices otherwise fall entirely within the scope of the 1201 exemption. Including such provisions does not advance copyright interests, nor would excluding them excuse researchers from compliance with other laws. However, avoiding the use of this condition in this proposal and in future temporary exemptions would significantly reduce the risk and uncertainty for researchers wishing to make use of an exemption.

Rather than adopting a new permanent exemption that only addresses a portion of the subject matter for security research and suffers from some of the same flaws that make the existing permanent exemptions less useful than they could be, the Office could simply adjust its interpretation of 1201(a)(1)(C) regarding the determination of “adversely affected” users. Nothing in the statute, nor in the legislative history prevents the Office from adopting a presumption favoring renewal of previously granted exemptions,¹³ thus reducing the strain on both the Office and proponents of exemptions as well as preserving the flexibility to modify exemptions as necessary. To maximize certainty and continuity for exemption proponents, whether new or renewed, exemptions should be implemented without delay and maintained to avoid lapses.

Removing the authorization requirement from 1201(j)

Removing the authorization requirement from 1201(j) would help to make the exemption more useful for security researchers. In our initial comments, CDT noted that the authorization requirement is one of three elements of 1201(j) that create uncertainty for researchers.¹⁴ In some cases, the difficulty in obtaining authorization stems from the interconnected nature of systems and networks; there may be multiple owners or operators, making the proper entity from whom to obtain permission difficult, or impossible to determine. To remedy this uncertainty, we suggested clarification as to how this provision applies to interconnected systems and how to assess ownership therein.¹⁵ In many cases, simply clarifying that licensees of machines or devices containing discrete copies of works are considered owners for the purpose of authorization under 1201(j)(1) would improve the functionality of this exception for much of the research performed on consumer-focused software.

Through administrative guidance, such clarification would update the statutory exemption to more accurately reflect the current norms for development and ownership of computer programs, systems, and networks, correcting an imbalance caused by the out-of-date language that reduced the exemption’s intended effect of enabling security testing.

¹³ CDT Initial 1201 Study Comment at 5-6.

¹⁴ *Id.* at 10-11.

¹⁵ *Id.* at 11.

Removing the two factors from 1201(j)

Section 1201(j)(3) presents a non-exclusive list of two factors to consider when determining whether a person qualifies for an exemption under 1201(j): whether the “information derived from security testing was used solely to promote the security of the owner” of the computer and whether that information was “used or maintained in a manner that does not facilitate infringement.”¹⁶ The statute gives no indication how to consider these factors, describes no threshold for eligibility, and says nothing about what other factors, if any, could or should be considered. Although removing the two factors, and presumably all of 1201(j)(3), would help to reduce the uncertainty they add to 1201(j), the exemption would still retain the uncertainty and added risk embodied in 1201(j)(2)’s requirement to comply with the CFAA and other “applicable laws.”

Instead of legislative proposals that would not fully address 1201(j)’s uncertainties, the Office could pursue administrative clarification by issuing guidance as to the Office’s interpretation of the meaning and appropriate application of those factors. As the expert agency responsible for administering Section 1201’s triennial exemption proceeding, the Office is the entity best suited to clarify how the conditions listed in 1201’s statutory exemptions should apply. Any such clarification would provide persuasive guidance for those interested in making use of the existing statutory exemptions as they are.

The four factors in 1201(g)

The Office is correct in noting that satisfying this four-factor framework may be difficult, if not impossible in many cases. As with 1201(j)(1), obtaining authorization may be difficult for a number of reasons; 1201(g)(2)(C) makes this even more difficult by failing to specify from whom authorization should be obtained. The statutory exemption for encryption also shares with 1201(j) the uncertainty- and risk-adding provision requiring compliance with the notoriously uncertain CFAA. Removing these clauses would help to make it easier to qualify for the exemption. However, 1201(g)(3) lists three more “factors to consider” in determining whether a person qualifies for the exemption. As with the factors in 1201(j), the statute offers no guidance as to how these factors should be weighed or where the threshold for qualification lies, thereby introducing sufficient ambiguity and uncertainty as to render the exemption unusable. Here, again, interpretive guidance could provide more certainty than an incomplete amendment.

Conclusion

CDT commends the Office’s efforts to improve and strengthen 1201 by considering potential updates. The statute’s problematic effects pervade consumers’ ability to make lawful uses of their devices, vehicles, and software and chill the research critical to maintaining their security. Amending 1201’s list

¹⁶ 17 U.S.C. § 1201(j)(3).

of statutory exemptions could help to correct the imbalance caused by the statute's broad ban on circumvention, broadening the ability to make non-infringing uses of copyrighted works protected by access controls. Of the two DMCA policy studies recently undertaken by the Office,¹⁷ only the 1201 Study reflects an imbalance deserving of further action and in no way merits proposals to amend other portions of the DMCA to counter perceived imbalances therein. CDT looks forward to continuing work with the Office to protect and improve Section 1201.

Respectfully submitted,



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October 27, 2016

¹⁷ Library of Congress, Section 1201 Study: Notice and Request for Public Comment, *Notice of Inquiry*, 80 Fed. Reg. 81369 (Dec. 29, 2015); Section 512 Study: Notice and Request for Public Comment, *Notice of Inquiry*, 80 Fed. Reg. 81862 (Dec. 31, 2015).