

March 3, 2016

Hon. Maria A. Pallante
Register of Copyrights
United States Copyright Office
Library of Congress
101 Independence Ave., S.E.
Washington, D.C. 20559

Re: Section 1201 Study: Notice and Request for Public Comment – Docket No. 2015-8

Dear Ms. Pallante:

Thank you for the opportunity to comment on the operation of Section 1201 of Title 17 (NOI), 80 Fed. Reg. 81369 (Dec. 29, 2015), Docket No. 2015-8. We appreciate your efforts to examine and consider improvements to the triennial rulemaking process established under the Digital Millennium Copyright Act (DMCA) to adopt exemptions to the prohibition against circumvention of technological measures of copyrighted works.

With more than 100,000 members, ACM (Association for Computing Machinery) is the world's largest educational and scientific computing society, uniting computing educators, researchers, and professionals to inspire dialogue, share resources, and address the field's challenges. These comments were developed by the ACM U.S. Public Policy Council (USACM), which serves as the focal point for ACM's interaction with the U.S. government in all matters of U.S. public policy related to information technology. The membership of the ACM U.S. Public Policy Council is comprised of computer scientists, educators, researchers, and other technology professionals. ACM U.S. Public Policy Council statements represent the views of the Council and do not necessarily represent the views of the Association.

Responses to Specific Questions

2. How should section 1201 accommodate interests that are outside of core copyright concerns, for example, in cases where circumvention of access controls protecting computer programs implicates issues of product interoperability or public safety?

Public policies meant to reinforce copyright should be limited to applications where copyright interests are actually at stake. We agree with the recommendation for the treatment of non-copyright policy issues submitted by the National Telecommunications and Information Administration (NTIA) during the sixth triennial proceeding.¹ NTIA urged the Copyright Office to focus primarily on questions relevant to

¹ National Telecommunications and Information Administration, Recommendations to the Register of Copyrights in Response to the Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Notice of Proposed Rulemaking, Docket No. 2014-07 (Sept. 18, 2015), http://copyright.gov/1201/2015/2015_NTIA_Letter.pdf.

copyright law and not to interpret the statute as extending to acts that do not implicate copyright laws. The NTIA referred to the examples of medical device safety, vehicle emissions standards, and best practices in software vulnerability disclosures raised during the latest triennial proceeding as being among issues not contemplated in copyright law. Further, similar to the NTIA, we feel that consideration of privacy and security measures used for non-copyright reasons during the triennial rulemaking process could reduce those beneficial functions in the marketplace while inappropriately overprotecting copyright.²

We urge the Copyright Office to conclude that non-copyright policy issues are outside the scope of Section 1201. The Copyright Office should clarify that this includes privacy and security measures used for non-copyright purposes, reverse engineering, security and privacy research, and other research and development activities. These activities should not require exemptions because they do not constitute infringement. If the Copyright Office concludes that they are within the scope of Section 1201, they should be protected as permissible activities under expanded permanent exemptions. (See response to Question 8.)

The Copyright Office should affirm that technological measures controlling access to copyrighted works under Section 1201 should not be misused to impede innovation and market competition by unduly hindering hardware and software interoperability. Public policy should enable a variety of approaches and systems to emerge, should allow and facilitate competition among them, and should encourage interoperability among them.

We concur with NTIA that the Copyright Office should limit its examination to copyright issues and defer on non-copyright policy issues to Congress, relevant federal regulatory bodies, and state agencies. These other entities are "well-equipped to deal with these non-copyright issues in the appropriate settings and under legal authorities focused on those issues."³

3. Should section 1201 be adjusted to provide for presumptive renewal of previously granted exemptions—for example, when there is no meaningful opposition to renewal—or otherwise be modified to streamline the process of continuing an existing exemption? If so, how?

We favor presumptive renewal of exemptions in cases where there is no credible opposition as a means to improve the efficiency of the triennial rulemaking process. The current requirements to provide the factual and legal evidence anew each time can result in significant inefficiencies and duplication of effort by all parties and your office. Shifting the burden to require interested parties to show why the renewal should not be granted could help focus the examination on any significant changes, such as in the marketplace or in technological advancements. Further, the more efficient processes of presumptive renewals could allow your office to more effectively examine petitions for new exemptions.

² *Id.* at 7.

³ *Id.* at 5.

Question 7. Should section 1201 be amended to allow the adoption of exemptions to the prohibition on circumvention that can extend to exemptions to the anti-trafficking prohibitions, and if so, in what way? For example, should the Register be able to recommend, and the Librarian able to adopt, exemptions that permit third-party assistance when justified by the record?

Appropriate and tailored exemptions to the anti-trafficking prohibitions could have a positive effect by promoting legitimate research and development of improved software tools to support socially beneficial purposes, such as security research, education, and accessibility. In addition, many consumers lack the knowledge and expertise to develop tools that would enable them to benefit from granted exemptions.

8. Please assess whether the existing categories of permanent exemptions are necessary, relevant, and/or sufficient. How do the permanent exemptions affect the current state of reverse engineering, encryption research, and security testing? How do the permanent exemptions affect the activities of libraries, archives, and educational institutions? How might the existing permanent exemptions be amended to better facilitate such activities?

The existing categories of permanent exemptions provide inadequate protections for many noninfringing uses of digital computing and computing research. Such activities are needed to analyze and identify shortcomings in security systems, defend patents and copyrights, discover and fix dangerous bugs in code, facilitate consumer safety, enable access for people with disabilities, and conduct beneficial educational activities. In some instances, the threat of legal action under the DMCA has deterred scientists and technologists from publishing scholarly work or even publicly discussing their computing research, both fundamental tenets of scientific discourse.⁴

To the extent that the Copyright Office finds noninfringing activities as within the scope of Section 1201, we would favor statutory amendments that provide more effective exemptions to enable socially beneficial reverse engineering, encryption research, computer privacy and security research, accessibility for people with disabilities, and educational activities. This would ensure that Section 1201 targets only those circumventions that enable copyright infringement.

As related to the current permanent exemptions, we urge the Copyright Office to conclude that reverse engineering, security and privacy research, and other research and development activities are beyond the scope of Section 1201. These activities do not implicate significant copyright interests and provide legitimate benefits to society by helping to advance a more resilient, robust, and secure digital ecosystem. These activities should not require exemptions because they do not constitute infringement, as also discussed in response to Question 2. If the Copyright Office concludes that they are within the scope of Section 1201, they should be protected as permissible activities under expanded permanent exemptions.

⁴ E.g., Steven Bellovin et al., Long Comment: Proposed Class 25: Security Research, Response to the Register of Copyrights in Response to the Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Notice of Proposed Rulemaking, Docket No. 2014-07 (Feb. 6, 2015), http://copyright.gov/1201/2015/comments-020615/InitialComments_LongForm_SecurityResearchers_Class25.pdf.

Should the Copyright Office conclude that reverse engineering and research activities fall within the scope of Section 1201, the current permanent exemptions should be revised to provide more effective exemptions. Researchers have sought triennial exemptions for significant categories of reverse engineering, encryption research, and software privacy and security research due to lack of adequate legal protections under the respective permanent exemptions given in 1201(f), 1201(g) or 1201(j).

Computer security research is and will become even more vital to society, including for essential governmental and business functions. Computer security plays an indispensable role in maintaining national security, continuity of operations for mission critical infrastructure (e.g., the power grid, air traffic control), trustworthy electronic voting, safety of automotive and avionic systems, the integrity of financial transactions, proper operation of medical and consumer devices, business operations, maintenance of personal privacy, and the overall stability of the U.S. economy. Computer security and data protection will only become more critical as we see increasing deployment of the “Internet of Things.” Security research is critical to maintaining the cybersecurity of networks and systems and must be protected and encouraged to further develop and ensure such security going forward.

We urge you to recognize the distinctions between circumvention for the purposes of: (a) obtaining unauthorized access to a work, (b) engaging in or facilitating infringement, and (c) developing new techniques to protect computer systems and networks against attacks, negligence, malfeasance, and vandalism, or to advance the continued innovation of software and digital computing.

9. Please assess whether there are other permanent exemption categories that Congress should consider establishing—for example, to facilitate access to literary works by print-disabled persons?

We support the adoption of permanent exemptions to enable people with a range of disabilities to access copyrighted works in accessible formats when the lawfully obtained work is inaccessible. Digital content that is not readily available in multiple modalities may be inaccessible to individuals with disabilities. In the triennial rulemakings, the Librarian has granted recurring specific exemptions for multiple classes of works to improve accessibility. Exemptions have included access to literary works using assistive technologies and to movies through captioning and descriptive audio. Further, exemptions have allowed for limited research and development of devices to render captions and descriptive audio for audiovisual works. These specific exemptions have benefited people who are blind, visually impaired, deaf, or hearing impaired.

Despite gains in accessible software and devices, copyrighted works largely continue to be sold and distributed in inaccessible formats. Thus, we recommend consideration of permanent exemptions to enable broader accessibility by people with disabilities and to facilitate research to improve accessible technologies.

Permanent exemptions to facilitate accessibility would be consistent with the demonstrated commitment by Congress to promote accessibility and nondiscrimination. As one example, Congress passed the Twenty-First Century Communications and Video Accessibility Act (CVAA) in 2010 to update affirmative protections for people with disabilities to access modern technologies and digital content, including through captioning and video descriptions for video programming.



Further, the United States is a signatory to the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled. The treaty, adopted under the auspices of the World Intellectual Property Organization (WIPO) in 2013, aims to increase accessibility to written works through mandatory limitations and exceptions to copyright rules. As a signatory, the United States supports the object and purpose of the treaty.

Thank you again for the opportunity to comment on the operation of Section 1201 and the triennial rulemaking process. The staff and members of the ACM U.S. Public Policy Council are available if you have questions or would like additional information about the issues raised in this public comment.

Sincerely,

A handwritten signature in blue ink, appearing to read "Eugene H. Spafford".

Eugene H. Spafford, Ph.D.
Chair
ACM U.S. Public Policy Council

A handwritten signature in blue ink, appearing to read "Paul Hyland".

Paul Hyland, M.A.
Chair, Intellectual Property Committee
ACM U.S. Public Policy Council