



LIBRARY OF CONGRESS

U.S. Copyright Office

[Docket No. 2015-8]

Section 1201 Study: Notice and Request for Public Comment

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Notice of Inquiry.

SUMMARY: The United States Copyright Office is undertaking a public study to assess the operation of section 1201 of Title 17, including the triennial rulemaking process established under the DMCA to adopt exemptions to the prohibition against circumvention of technological measures that control access to copyrighted works. To aid this effort, and to ensure thorough assistance to Congress, the Office is seeking public input on a number of key questions.

DATES: Written comments must be received no later than 11:59 p.m. Eastern Time on February 25, 2016. Written reply comments must be received no later than 11:59 p.m. Eastern Time on March 25, 2016. The Office will be announcing one or more public meetings, to take place after written comments are received, by separate notice in the future.

ADDRESSES: All comments must be submitted electronically. Specific instructions for submitting comments will be posted on the Copyright Office website at <http://www.copyright.gov/policy/1201> on or before February 1, 2016. To meet accessibility standards, all comments must be provided in a single file not to exceed six megabytes (MB) in one of the following formats: Portable Document File (PDF) format containing searchable, accessible text (not an image); Microsoft Word; WordPerfect;

Rich Text Format (RTF); or ASCII text file format (not a scanned document). All comments must include the name of the submitter and any organization the submitter represents. The Office will post all comments publicly in the form that they are received. If electronic submission of comments is not feasible, please contact the Office using the contact information below for special instructions.

FOR FURTHER INFORMATION CONTACT: Regan A. Smith, Associate General Counsel, by email at resm@loc.gov or by telephone at 202-707-8350; or Kevin Amer, Senior Counsel for Policy and International Affairs, by email at kamer@loc.gov or by telephone at 202-707-8350.

SUPPLEMENTARY INFORMATION:

I. Background

The Digital Millennium Copyright Act (“DMCA”) has played a pivotal role in the development of the modern digital economy. Enacted in 1998 to implement the United States’ obligations under two international treaties,¹ it is intended to foster the growth of the digital marketplace by ensuring adequate legal protections for copyrighted content.² As envisioned by Congress, the DMCA seeks to balance the interests of copyright owners and users, including the personal interests of consumers, in the digital environment.³ In addition to provisions limiting the liability of online service providers,⁴ the DMCA includes provisions prohibiting the circumvention of technological measures used to

¹ See WIPO Copyright Treaty art. 11, Dec. 20, 1996, 36 I.L.M. 65 (1997); WIPO Performances and Phonograms Treaty art. 18, Dec. 20, 1996, 36 I.L.M. 76 (1997).

² See H.R. REP. NO. 105-551, pt. 2, at 23 (1998).

³ See *id.* at 26.

⁴ See 17 U.S.C. 512.

protect copyrighted works as well as trafficking in anticircumvention devices.⁵ These anticircumvention provisions, codified in section 1201 of the Copyright Act, were the subject of a 2014 hearing held by the House Judiciary Committee’s Subcommittee on Courts, Intellectual Property and the Internet as part of its comprehensive review of the nation’s copyright law,⁶ and, as discussed below, a recently concluded rulemaking conducted by the Copyright Office. In accordance with the request from the House Judiciary Committee’s Ranking Member to the Register of Copyrights at the April 2015 House Judiciary Committee hearing on copyright review, and consistent with the Register’s testimony in that hearing that the impact and efficacy of section 1201 merit analysis at this time, the Office is undertaking a study and soliciting public input.⁷

A. Overview of Section 1201

Prohibitions on Circumvention and Trafficking

Section 1201 prohibits the circumvention of technological measures employed by or on behalf of copyright owners to control access to their works (also known as “access controls”), as well as the trafficking in technologies or services that facilitate such

⁵ The DMCA also established protections for the integrity of copyright management information. *See id.* 1202.

⁶ *See Chapter 12 of Title 17: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (“*Chapter 12 of Title 17 Hearing*”).

⁷ *See Register’s Perspective on Copyright Review: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 6 (2015) (“*Register’s Perspective on Copyright Review Hearing*”) (statement of Maria A. Pallante, Register of Copyrights and Director, U.S. Copyright Office) (“For [certain] aspects of section 1201, we are recommending a comprehensive study, including the permanent exemptions for security, encryption, and privacy research.”); *id.* at 49 (statement of Rep. John Conyers, Jr., Ranking Member, H. Comm. on the Judiciary) (“[T]here are policy issues that warrant studies and analysis, including section 512, section 1201, mass digitization, and moral rights. I would like the Copyright Office to conduct and complete reports on those policy issues . . .”). Separately, as discussed below, the Register has also proposed amending the triennial rulemaking process to ease the burden of renewing existing exemptions. *See id.* at 5 (statement of Maria A. Pallante, Register of Copyrights and Director, U.S. Copyright Office) (“We are therefore recommending a legislative change to provide a presumption in favor of renewal in cases where there is no opposition.”).

circumvention.⁸ It also prohibits trafficking in technologies or services that facilitate circumvention of technological measures that protect the exclusive rights granted to copyright owners under Title 17 (also known as “copy controls”).⁹ In enacting section 1201, Congress recognized that technological measures can be deployed “not only to prevent piracy and other economically harmful unauthorized uses of copyrighted material, but also to support new ways of disseminating copyrighted materials to users,” as well as to make “the process of obtaining permissions easier.”¹⁰ Violations of section 1201 are subject to both civil and criminal penalties.¹¹

Rulemaking Process

Section 1201 includes a triennial rulemaking process through which the Librarian of Congress, following a public proceeding conducted by the Register of Copyrights in consultation with the National Telecommunications and Information Administration of the Department of Commerce (“NTIA”), may grant limited exceptions to section 1201(a)(1)’s bar on the circumvention of access controls. By statute, the triennial rulemaking process addresses only the prohibition on the act of circumvention itself; section 1201 does not provide a mechanism to grant exceptions to the anti-trafficking

⁸ 17 U.S.C. 1201(a); *see* STAFF OF H. COMM. ON THE JUDICIARY, 105TH CONG., SECTION-BY-SECTION ANALYSIS OF H.R. 2281 AS PASSED BY THE UNITED STATES HOUSE OF REPRESENTATIVES ON AUGUST 4TH, 1998, at 5-9 (Comm. Print 1998) (“House Manager’s Report”).

⁹ 17 U.S.C. 1201(b); *see* House Manager’s Report at 12-13. While section 1201 does not prohibit the circumvention of copy controls, in some cases access control and copy control measures are merged, and thus circumvention of such measures is prohibited by section 1201(a)(1). U.S. COPYRIGHT OFFICE, SECTION 1201 RULEMAKING: SIXTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION, RECOMMENDATION OF THE REGISTER OF COPYRIGHTS 4 n.13 (2015), <http://copyright.gov/1201/2015/registers-recommendation.pdf> (“2015 Recommendation”); U.S. COPYRIGHT OFFICE, RECOMMENDATION OF THE REGISTER OF COPYRIGHTS IN RM 2008-8, RULEMAKING ON EXEMPTIONS FROM PROHIBITION ON CIRCUMVENTION OF COPYRIGHT PROTECTION SYSTEMS FOR ACCESS CONTROL TECHNOLOGIES 44-47 (June 11, 2010), <http://www.copyright.gov/1201/2010/initial-ed-registers-recommendation-june-11-2010.pdf> (“2010 Recommendation”).

¹⁰ House Manager’s Report at 6.

¹¹ 17 U.S.C. 1203-1204.

provisions of sections 1201(a)(2) or 1201(b).¹² The section 1201 rulemaking is intended to serve as a “fail-safe” mechanism through which the Copyright Office can monitor developments in the copyright marketplace and recommend limited exemptions as needed to prevent the unnecessary restriction of fair and other noninfringing uses.¹³ In keeping with that goal, the primary responsibility of the Office in the rulemaking proceeding is to assess whether the implementation of access controls impairs the ability of individuals to make noninfringing uses of copyrighted works within the meaning of section 1201(a)(1). To do this, the Register solicits proposals from the public, develops a comprehensive administrative record using information submitted by interested parties, and makes recommendations to the Librarian concerning whether exemptions are warranted based on that record. While the first triennial rulemaking completed in the year 2000 considered nearly 400 comments, resulting in the adoption of two exemptions,¹⁴ the process has grown such that the recently concluded sixth triennial rulemaking considered nearly 40,000 comments, resulting in exemptions for twenty-two types of uses.¹⁵

Those seeking an exemption from the prohibition on circumvention must establish that “persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition . . . in their ability to make noninfringing uses under this title of a particular class of copyrighted works.”¹⁶ To

¹² *Id.* 1201(a)(1)(C).

¹³ H.R. REP. NO. 105-551, pt. 2, at 36.

¹⁴ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 65 FR 64556, 64557 (Oct. 27, 2000).

¹⁵ 2015 Recommendation at 2-7 (2015).

¹⁶ 17 U.S.C. 1201(a)(1)(C); *see* 2015 Recommendation at 13-14; 2010 Recommendation at 10. Under the APA, “[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof.” 5 U.S.C. 556(d). The Breaking Down Barriers to Innovation Act of 2015, introduced in both the House and

meet the statutory standard, a proponent must show: (1) that uses affected by the prohibition on circumvention are or are likely to be noninfringing; and (2) that as a result of a technological measure controlling access to a copyrighted work, the prohibition is causing, or in the next three years is likely to cause, an adverse impact on those uses.¹⁷

With respect to the first requirement, proponents in prior rulemakings have pointed to several types of noninfringing uses that could be affected by the prohibition of section 1201(a)(1), including fair use (codified in section 107 of the Copyright Act), certain educational uses (section 110), and certain uses of computer programs (section 117).¹⁸

The second requirement asks whether technological measures are “diminishing the ability of individuals to use these works in ways that are otherwise lawful.”¹⁹ Congress stressed 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 the “likelihood of future adverse impact during that time period” where such evidence is “highly specific, strong and persuasive.”²⁰

In considering a proposed exemption, the Librarian—and hence the Register—must also weigh the statutory factors listed in section 1201(a)(1)(C), namely: “(i) the availability for use of copyrighted works; (ii) the availability for use of works for

the Senate, would shift the burden of proof away from proponents of exemptions and provide discretion to the Librarian to conduct a rulemaking proceeding outside the triennial process. H.R. 1883, 114th Cong. sec. 3(a)(1)(E) (2015); S. 990, 114th Cong. sec. 3(a)(1)(E) (2015).

¹⁷ 17 U.S.C. 1201(a)(1)(B).

¹⁸ See, e.g., Transcript, U.S. Copyright Office, Hearing on Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies 10:17-11:9 (May 2, 2000) (statement of Peter Jaszi, Digital Future Coalition) (discussing adverse effects of section 1201(a)(1) on noninfringing uses under sections 107 and 110); Internet Archive, Creative Commons, and Berkman Center for Internet & Society, Initial Comments Submitted in Response to U.S. Copyright Office’s Oct. 15, 2002 Notice of Inquiry at 7-9 (2002) (seeking an exemption to allow software archiving as allowed under sections 117 and 107); National Association of Independent Schools, Initial Comments Submitted in Response to U.S. Copyright Office’s Nov. 24, 1999 Notice of Inquiry (2000) (discussing fair use for educational purposes).

¹⁹ H.R. REP. NO. 105-551, pt. 2, at 37.

²⁰ House Manager’s Report at 6.

nonprofit archival, preservation, and educational purposes; (iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research; (iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and (v) such other factors as the Librarian considers appropriate.”²¹

In addition, section 1201(a)(1) specifies that exemptions adopted through the triennial rulemaking must be defined based on “a particular *class* of works.”²² The legislative history explains that “the ‘particular class of copyrighted works’ [is intended to] be a narrow and focused subset of the broad categories of works” appearing in section 102 of Title 17, such as literary works, musical works, and sound recordings.²³ In the course of prior rulemakings, the Register has concluded that, based on the record presented, a “class of works” defined initially by reference to a section 102 category or subcategory of works may be additionally refined by reference to the medium in which the works are distributed, the particular access controls at issue, or the particular type of use and/or user to which the exemption will apply.²⁴

²¹ 17 U.S.C. 1201(a)(1)(C). In the latest triennial rulemaking, due to the increasing prevalence of technological measures employed in connection with embedded computer software, many participants urged the Register and Librarian to consider non-copyright issues relating to health, safety, and environmental concerns under the rubric of “other factors” appropriate for consideration. *See* 2015 Recommendation at 2-3. The Breaking Down Barriers to Innovation Act of 2015 would add two additional factors to the list to be considered by the Librarian when deciding whether to grant an exemption: (1) whether the prohibition on circumvention impacts accessibility for persons with disabilities, and (2) whether the prohibition impacts the furtherance of security research. H.R. 1883 sec. 3(a)(1)(B)(v); S. 990 sec. 3(a)(1)(B)(v).

²² *See* 17 U.S.C. 1201(a)(1)(B) (emphasis added).

²³ H.R. REP. NO. 105-551, pt. 2, at 38.

²⁴ U.S. COPYRIGHT OFFICE, RECOMMENDATION OF THE REGISTER OF COPYRIGHTS IN RM 2005-11, RULEMAKING ON EXEMPTIONS FROM PROHIBITION ON CIRCUMVENTION OF COPYRIGHT PROTECTION SYSTEMS FOR ACCESS CONTROL TECHNOLOGIES 9-10 (Nov. 17, 2006), http://www.copyright.gov/1201/docs/1201_recommendation.pdf.

Exemptions adopted via the rulemaking process are to remain in effect for three years. Congress made clear that the basis for an exemption must be established *de novo* in each triennial proceeding.²⁵ Accordingly, even if the same exemption is sought again, it cannot be granted unless its proponents establish a new record that satisfies the statutory criteria.

Permanent Exemptions

In addition to the temporary exemptions adopted pursuant to the triennial rulemaking process, section 1201 provides eight permanent exemptions to the prohibition on circumvention, namely for certain activities of nonprofit libraries, archives, and educational institutions (section 1201(d)) and law enforcement (section 1201(e)); for reverse engineering (section 1201(f)); encryption research (section 1201(g)); the protection of personally identifying information (section 1201(i)); security testing (section 1201(j)); the prevention of access by minors to the internet (section 1201(h)); and relating to certain analog devices such as VHS and Beta format cassettes (section 1201(k)). Separately, section 112 includes a limited permanent exception to section 1201 for purposes of making ephemeral recordings.²⁶ As discussed below, the applicability and usefulness of the existing permanent exemptions has been questioned by some.²⁷

Unlocking Consumer Choice and Wireless Competition Act

²⁵ See H.R. REP. NO. 105-551, pt. 2, at 37 (explaining that for every rulemaking, “the assessment of adverse impacts on particular categories of works is to be determined *de novo*”).

²⁶ 17 U.S.C. 112(a)(2).

²⁷ See *Register’s Perspective on Copyright Review Hearing* at 29 (statement of Maria A. Pallante, Register of Copyrights and Director, U.S. Copyright Office) (“The permanent exemptions in Section 1201 relating to reverse engineering, encryption research, and security testing are an ongoing issue, with some stakeholders suggesting that they are too narrow in scope and others of the view that they strike an appropriate balance. For its part, the Office has previously highlighted the limited nature of the existing security testing exemptions and supported congressional review of the problem.”) (citations omitted).

In 2014, Congress addressed certain issues relating to section 1201 by passing the Unlocking Consumer Choice and Wireless Competition Act (“Unlocking Act”), which primarily concerned the circumvention of technological measures that control access to computer programs that enable wireless telephone handsets to connect to wireless communication networks (“cellphone unlocking”).²⁸ The Unlocking Act reinstated the cellphone unlocking exemption adopted by the Librarian in 2010,²⁹ replacing the narrower version adopted in 2012,³⁰ and directed the Librarian to consider in the 2015 rulemaking whether to “extend” the exemption “to include any other category of wireless devices in addition to wireless telephone handsets.”³¹ (On the Register’s recommendation, the Librarian granted additional exemptions for tablets and other types of wireless devices in the 2015 proceeding.³²)

The Unlocking Act also permanently established that circumvention under any exemption to permit a wireless telephone handset or other wireless device to connect to a different telecommunications network may be initiated by the owner of the handset or device, by another person at the direction of the owner, or by a provider of commercial mobile radio or data service, so long as the purpose is to enable the owner or a family member to connect to a wireless network in an authorized manner.³³ The legislation

²⁸ Unlocking Consumer Choice and Wireless Competition Act, Pub. L. No. 113-144, 128 Stat. 1751 (2014). Subsequently, the Librarian adopted regulatory amendments to reflect the new legislation. *See* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Wireless Telephone Handsets, Final Rule, 79 FR 50552 (Aug. 25, 2014).

²⁹ *See* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 75 FR 43825, 43828-32 (July 27, 2010).

³⁰ *See* Unlocking Consumer Choice and Wireless Competition Act sec. 2(a), 128 Stat. at 1751.

³¹ *Id.* 2(b), 128 Stat. at 1751.

³² *See* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 80 FR 65944, 65952, 65962-63.

³³ Unlocking Consumer Choice and Wireless Competition Act sec. 2(a), (c), 128 Stat. at 1751-52; *see also* 37 C.F.R. 201.40(b)(3) (2012).

served to clarify that the owner of a device or the owner's family member can obtain assistance with the circumvention from another party notwithstanding the anti-trafficking provisions of section 1201.³⁴

B. Areas of Concern

Rulemaking Process

As the number of participants in the triennial rulemaking has expanded with each successive cycle, the Office has done what it can within the existing statutory framework to streamline the proceedings. For the recent sixth triennial rulemaking proceeding, the Register (in consultation with NTIA and past proceeding participants) adjusted the administrative procedures to make the process more accessible and understandable; facilitate participation, coordination, and the development of the factual record; and reduce administrative burdens on both the participants and the Copyright Office.³⁵ The Office solicited initial petitions setting forth only the essential elements of proposed exemptions and then issued a Notice of Proposed Rulemaking that reviewed and grouped the proposals and provided detailed guidance on the submission of written comments.³⁶ The Office also refined the comment phase to encourage a more organized and complete administrative record, including by instituting three distinct rounds of comments to allow

³⁴ Other bills have recently been introduced that would alter the operation of section 1201. Recent examples include the Unlocking Technology Act of 2015, H.R. 1587, 114th Cong. (2015); and the Breaking Down Barriers to Innovation Act of 2015, H.R. 1883, S. 990, 114th Cong. (2015).

³⁵ See generally Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Notice of Inquiry, 79 FR 55687 (Sept. 17, 2014) ("Sixth Triennial Rulemaking NOI"); Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Notice of Proposed Rulemaking, 79 FR 73856 (Dec. 12, 2014) ("Sixth Triennial Rulemaking NPRM"); cf. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Notice of Inquiry, 76 FR 60398 (Sept. 29, 2011).

³⁶ Sixth Triennial Rulemaking NPRM, 79 FR 73856, 73858-71.

participants to better respond to issues raised by other commenters.³⁷ The Office instituted procedures to encourage advance submission of multimedia evidence where appropriate.³⁸

Even with these improvements, however, the rulemaking procedure, as enacted by Congress, is resource-intensive for both participants and the Office. An area of particular concern is the requirement that previously granted exemptions be reviewed anew. During the most recent rulemaking, a number of petitions essentially sought renewal of existing exemptions—for example, unlocking of cellphones and jailbreaking of smartphones. Some of these petitions—including a petition to permit circumvention so that literary works distributed electronically could continue to be accessed by persons who are blind, visually impaired, or print disabled—were unopposed.³⁹ In testimony, the Register has recommended that Congress amend the rulemaking process to create a presumption in favor of renewal when there is no meaningful opposition to the continuation of an exemption.⁴⁰

Consumer Issues

Since the enactment of section 1201, the use of technological measures has been useful in expanding consumer choice and the avenues for dissemination of creative works,

³⁷ See Sixth Triennial Rulemaking NPRM, 79 FR 73856, 73857-58; see also Sixth Triennial Rulemaking NOI, 79 FR 55687, 55693.

³⁸ See Sixth Triennial Rulemaking NPRM, 79 FR 73856, 73858.

³⁹ See 2015 Recommendation at 127-37.

⁴⁰ In her testimony, the Register noted this issue is ripe for legislative process. See *Register's Perspective on Copyright Review Hearing* at 27 (statement of Maria A. Pallante, Register of Copyrights and Director, U.S. Copyright Office); 2015 Recommendation at 4. The Breaking Down Barriers to Innovation Act of 2015 would require the renewal of previously-granted exemptions unless “changed circumstances” justify revoking the exemption. H.R. 1883 sec. 3(a)(1)(F)(iii); S. 990 sec. 3(a)(1)(F)(iii).

for example, movies and video games.⁴¹ At the same time, as the Copyright Office has stated, it is also apparent that 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.⁴² Considering these impacts, some stakeholders have expressed concern over the effect of section 1201 on competition and innovation in the marketplace. In their view, technological measures are often deployed to “lock in” particular business models by inhibiting the development of interoperable products, such as printer cartridges, or to prevent individuals from engaging in otherwise legitimate pursuits, such as the repair of automobiles and farm equipment—despite the fact that these sorts of activities seem far removed from piracy of copyrighted works.⁴³

These concerns were highlighted throughout the recently completed sixth triennial proceeding. In the 2015 rulemaking, some of the proposed exemptions concerned the ability to access and make noninfringing uses of expressive copyrighted works, such as motion pictures, video games, and e-books, which Congress undoubtedly had in mind when it created the triennial review process. But others concerned the ability to circumvent access controls on copyrighted computer code in consumer devices. Proponents of these latter classes sought to access the computer code not for its creative content, but rather to enable greater functionality and interoperability of devices ranging from cellphones, tablets, and smart TVs to 3-D printers, automobiles, tractors, and

⁴¹ See, e.g., *Chapter 12 of Title 17 Hearing* at 28-29 (statement of Christian Genetski, Senior Vice-President and General Counsel, Entertainment Software Association).

⁴² 2015 Recommendation at 2.

⁴³ See, e.g., *Chapter 12 of Title 17 Hearing* at 43-44 (statement of Corynne McSherry, Intellectual Property Director, Electronic Frontier Foundation); *Unintended Consequences: Fifteen Years under the DMCA*, ELECTRONIC FRONTIER FOUNDATION, <https://www.eff.org/pages/unintended-consequences-fifteen-years-under-dmca> (last updated March 2013). The proposed Unlocking Technology Act of 2015 would amend both the anticircumvention and anti-trafficking provisions of section 1201(a) to prohibit such conduct only when done with the intent to facilitate the infringement of a copyrighted work. H.R. 1587 sec. 2(a).

pacemakers.⁴⁴ As the Register has testified, the effect of section 1201 on a wide range of consumer goods that today contain copyrighted software merits review.⁴⁵

Third-Party Assistance

A related issue is whether section 1201 should be clarified to ensure that intended beneficiaries of exemptions are able to engage in the permitted circumvention activities.⁴⁶ For example, a vehicle owner may require assistance from a repair shop technician to take advantage of an exemption that allows circumvention of access controls on automobile software to make a repair.⁴⁷ The anti-trafficking provisions of section 1201, however, prevent the adoption of exemptions that permit third parties to offer circumvention services.⁴⁸ While the Unlocking Act clarified section 1201 to permit specified third parties to circumvent technological measures on behalf of device owners in the case of cellphones and other wireless devices, the statute does not extend to other types of uses or allow the Librarian to grant an exemption that provides for third-party assistance in other circumstances.

Permanent Exemptions

Another concern is that section 1201's permanent exemptions have failed to keep up with changing technologies. In testimony, the Register has identified the limited nature of the existing security testing exemptions and supported congressional review of

⁴⁴ 2015 Recommendation at 2; *Register's Perspective on Copyright Review Hearing* at 29-30 (statement of Maria A. Pallante, Register of Copyrights and Director, U.S. Copyright Office).

⁴⁵ *Register's Perspective on Copyright Review Hearing* at 29-30 (statement of Maria A. Pallante, Register of Copyrights and Director, U.S. Copyright Office).

⁴⁶ *Id.* at 29 (noting that intended beneficiaries of exemptions lack the practical ability to engage in the permitted circumvention themselves and suggesting the need for further study).

⁴⁷ See 2015 Recommendation at 4-5.

⁴⁸ *Id.*

this problem.⁴⁹ Based on the record in the most recent section 1201 rulemaking, the Register concluded that commenting parties had made a “compelling case that the current permanent exemptions in section 1201, specifically section 1201(f) for reverse engineering, section 1201(g) for encryption research, and section 1201(j) for security testing, are inadequate to accommodate their intended purposes.”⁵⁰ For example, when considering a requested exemption for good-faith security research, the Register noted that “the existing permanent exemptions . . . do not cover the full range of proposed security research activities, many of which . . . are likely [to] be noninfringing.”⁵¹ Separately, others have suggested that section 1201(d)’s exemption for activities of nonprofit entities is inadequate to meet the legitimate archiving and preservation needs of libraries and archives.⁵²

International Issues

As noted above, section 1201 was adopted in 1998 to implement the United States’ obligations under two international treaties.⁵³ Those treaties—the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty—require signatory countries to provide “adequate legal protection and effective legal remedies against the

⁴⁹ *Register’s Perspective on Copyright Review Hearing* at 29 (statement of Maria A. Pallante, Register of Copyrights and Director, U.S. Copyright Office).

⁵⁰ 2015 Recommendation at 307. Legislation recently introduced in Congress would increase exemptions for reverse engineering, encryption research, the protection of personally identifying information, and security testing. *See* Breaking Down Barriers to Innovation Act of 2015, H.R. 1883 sec. 3(b)-(e); Breaking Down Barriers to Innovation Act of 2015, S. 990 sec. 3(b)-(e).

⁵¹ 2015 Recommendation at 299. The Breaking Down Barriers to Innovation Act of 2015 would increase exemptions for reverse engineering, encryption research, the protection of personally identifying information, and security testing. H.R. 1883 sec. 3(b)-(e); S. 990 sec. 3(b)-(e).

⁵² *See, e.g.*, 2015 Recommendation at 327 (discussing proposal for exemption for video game preservationists); PAN C. LEE ET AL., SAMUELSON LAW, TECHNOLOGY & PUBLIC POLICY CLINIC, UNIVERSITY OF CALIFORNIA, BERKELEY SCHOOL OF LAW, ON BEHALF OF PUBLIC KNOWLEDGE, UPDATING 17 U.S.C. § 1201 FOR INNOVATORS, CREATORS, AND CONSUMERS IN THE DIGITAL AGE 52 (2010), https://www.publicknowledge.org/assets/uploads/blog/2_Circumvention.pdf.

⁵³ *See* H.R. REP. NO. 105-551, pt. 2, at 20.

circumvention of effective technological measures” that are used by authors, performers, and phonogram producers in connection with the exercise of their rights, and that restrict acts, in respect of their works, performances, or phonograms, which are not authorized by rightsholders or permitted by law.⁵⁴ Since then, the United States has included anticircumvention provisions in a number of bilateral and regional agreements entered into with other nations.⁵⁵ Therefore, any proposals to modify or amend Section 1201 would require consideration of the United States’ international obligations.

C. Relationship to Software Study

The scope of this study is limited to the operation and effectiveness of section 1201. It is not intended to focus on broader issues concerning the role of copyright with respect to software embedded in everyday products. Those issues are the subject of a

⁵⁴ WIPO Copyright Treaty art. 11, Dec. 20, 1996, 36 I.L.M. 65 (1997); WIPO Performances and Phonograms Treaty art. 18, Dec. 20, 1996, 36 I.L.M. 76 (1997).

⁵⁵ See United States-Australia Free Trade Agreement, U.S.-Austl., art. 17.4.7, May 18, 2004, 43 I.L.M. 1248, <http://www.ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text>; United States-Bahrain Free Trade Agreement, U.S.-Bahr., art. 14.4.7, Sept. 14, 2004, 44 I.L.M. 544, <http://www.ustr.gov/trade-agreements/free-trade-agreements/bahrain-fta/final-text>; United States-Chile Free Trade Agreement, U.S.-Chile, art. 17.7.5, June 6, 2003, 42 I.L.M. 1026, <http://www.ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text>; United States-Colombia Trade Promotion Agreement, U.S.-Colom., art. 16.7.4, Nov. 22, 2006, <http://www.ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text>; Dominican Republic-Central America-United States Free Trade Agreement, U.S.-Costa Rica-Dom. Rep.-El Sal.-Guat.-Hond.-Nicar., art. 15.5.7, Aug. 5, 2004, 43 I.L.M. 514, <https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text>; United States-Jordan Free Trade Agreement, U.S.-Jordan, art. 4(13), Oct. 24, 2000, 41 I.L.M. 63, <http://www.ustr.gov/trade-agreements/free-trade-agreements/jordan-fta/final-text>; United States-Korea Free Trade Agreement, U.S.-S. Kor. art. 18.4.7, June 30, 2007, 46 I.L.M. 642, <https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text>; United States-Morocco Free Trade Agreement, U.S.-Morocco, art. 15.5.8, June 15, 2004, 44 I.L.M. 544, <http://www.ustr.gov/trade-agreements/free-trade-agreements/morocco-fta/final-text>; United States-Oman Free Trade Agreement, U.S.-Oman, art. 15.4.7, Jan. 19, 2006, <http://www.ustr.gov/trade-agreements/free-trade-agreements/oman-fta/final-text>; United States-Panama Trade Promotion Agreement, U.S.-Pan., art. 15.5.7, June 28, 2007, <http://www.ustr.gov/trade-agreements/free-trade-agreements/panama-tpa/final-text>; United States-Peru Trade Promotion Agreement, U.S.-Peru, art. 16.7.4, Apr. 12, 2006, <http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>; United States-Singapore Free Trade Agreement, U.S.-Sing., art. 16.4.7, May 6, 2003, 42 I.L.M. 1026, <https://ustr.gov/trade-agreements/free-trade-agreements/singapore-fta/final-text>.

separate and concurrent Copyright Office study.⁵⁶ Although, as noted, section 1201 certainly has implications for the use of such products, members of the public who wish to address the impact of other provisions of copyright law on embedded software are encouraged to submit comments in that separate process. More information about the Software-Enabled Consumer Products Study may be found at <http://www.copyright.gov/policy/software/>.

II. Subjects of Inquiry

The Office invites written comments on the specific subjects below. A party choosing to respond to this Notice of Inquiry need not address every subject, but the Office requests that responding parties clearly identify and separately address each subject for which a response is submitted.

General

1. Please provide any insights or observations regarding the role and effectiveness of the prohibition on circumvention of technological measures in section 1201(a).
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?

Rulemaking Process

3. Should section 1201 be adjusted to provide for presumptive renewal of previously granted exemptions—for example, when there is no meaningful opposition to

⁵⁶ See Software-Enabled Consumer Products Study: Notice and Request for Public Comment, 80 FR 77668 (Dec. 15, 2015).

renewal—or otherwise be modified to streamline the process of continuing an existing exemption? If so, how?

4. Please assess the current legal requirements that proponents of an exemption must satisfy to demonstrate entitlement to an exemption. Should they be altered? If so, how? In responding, please comment on the relationship to traditional principles of administrative law.
5. Please provide additional suggestions to improve the rulemaking process.

Anti-Trafficking Prohibitions

6. Please assess the role of the anti-trafficking provisions of sections 1201(a)(2) and 1201(b) in deterring copyright infringement, and address whether any amendments may be advisable.
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?

Permanent 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?

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?

Other

10. To what extent and how might any proposed amendments to section 1201 implicate the United States' trade and treaty obligations?
11. Please identify any pertinent issues not referenced above that the Copyright Office should consider in conducting its study.

Dated: December 22, 2015.

Maria A. Pallante,
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U.S. Copyright Office.

[BILLING CODE 1410-30-P]

[FR Doc. 2015-32678 Filed: 12/28/2015 8:45 am; Publication Date: 12/29/2015]