UNITED STATES COPYRIGHT OFFICE

SECTION 1201 RULEMAKING:
Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention

RECOMMENDATION OF THE REGISTER OF COPYRIGHTS

OCTOBER 2015

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INTRODUCTION

The Digital Millennium Copyright Act ("DMCA") has played a critical role in the development of the digital marketplace that is a defining feature of modern life. Enacted by Congress in 1998,[1] the DMCA has fostered widespread dissemination and enjoyment of creative works by establishing legal protections for copyrighted content—as well as for the consumers and businesses who wish to access and use it—whether over the internet or through a computer or device.[2]

The section 1201 rulemaking is a key part of the DMCA, striking a balance between copyright and digital technologies. While the DMCA generally prohibits the circumvention of technological measures employed by or on behalf of copyright owners to protect their works (also known as "access controls"), the rulemaking process permits the Librarian of Congress, following a public proceeding conducted by the Copyright Office, to grant limited exceptions every three years to ensure that the public can still engage in fair and other noninfringing uses of works.[3] In accordance with the statute, the Librarian's determination to grant an exemption is based upon the recommendation of the Register of Copyrights, who also consults with the National Telecommunications and Information Administration ("NTIA") of the Department of Commerce.[4]

Revised Rulemaking Procedures

The Register revised the administrative process for this sixth rulemaking proceeding. In prior proceedings, the Copyright Office required proponents to provide complete legal and evidentiary support for their proposals at the outset of the rulemaking process. For this rulemaking, members of the public were instead able to propose exemptions by filing brief petitions containing only basic information. The Office then reviewed and grouped the 44 petition requests into 27 classes and published the proposals, after which proponents and opponents of the proposals had the opportunity to submit written comments offering specific legal and factual support for their respective positions.[5] The Office provided detailed guidance to assist the public during this process,

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[1] *See generally* DMCA, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

[2] *See* H.R. REP. NO. 105-551, pt. 2, at 22 (1998) ("Commerce Comm. Report").

[3] 17 U.S.C. § 1201(a)(1); *see also* Commerce Comm. Report at 25-26, 35-36.

[4] 17 U.S.C. § 1201(a)(1)(C); *see also* Commerce Comm. Report at 37.

[5] *See* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 79 Fed. Reg. 73,856, 73,857-59 (Dec. 12, 2014) ("NPRM").

including template forms.[6] During the course of the rulemaking, the Office received nearly 40,000 comments. The written submissions were followed by seven days of public hearings in Los Angeles and Washington, D.C.,[7] at which the Office received testimony from sixty-three witnesses.

Policy Considerations

This sixth triennial rulemaking has been the most extensive and wide-ranging to date and is carefully documented and addressed in the ensuing 403-page Recommendation. As explained, some of the proposed exemptions concern the ability to access and make noninfringing uses of expressive copyrighted works such as motion pictures, video games and e-books, as Congress undoubtedly had in mind when it created the triennial review process. But many other proposals seek to access the copyrighted computer code that now pervades consumer devices. Proponents of these latter classes are not seeking to access software for its creative content, but rather to enable greater functionality of devices ranging from cellphones, tablets and smart TVs to automobiles, tractors and pacemakers. For example, good-faith security researchers seek the ability to circumvent access controls in order to identify and address flaws and malfunctions in the computer programs embedded in consumer products, vehicles and medical devices. Automobile and tractor owners want to access vehicle software to make repairs and modifications. Patients seek access to compilations of data generated by the life-saving medical devices on which they rely. In each of these cases, the prospective users are concerned about violating section 1201.

The discussion of the various proposals that follows richly illustrates both the importance and limitations of the DMCA's anticircumvention rule and triennial rulemaking process. While it is clear that section 1201 has played a critical role in the development of secure platforms for the digital distribution of copyrighted works, it is also the case 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. Many of the issues that were raised in this proceeding would be more properly debated by Congress or the agencies with primary jurisdiction in the relevant areas. Indeed, the present record indicates that different parts of the Administration have varying views on the wisdom of permitting circumvention for security research or to enable modification of motor vehicles. NTIA has endorsed broad exemptions to facilitate these activities, while the Environmental Protection Agency is opposed, and the Department of Transportation expresses substantial reservations. There are also concerns about circumvention of medical device software. While the Food and

[6] *See id.* at 73,857-58.

[7] *See* Notice of Public Hearings: Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 80 Fed. Reg. 19,255, 19,255 (Apr. 10, 2015). The hearing agenda is posted at http://copyright.gov/1201/2015/Final_1201_hearing_agenda_20150507.pdf. Transcripts for the hearings are posted at http://copyright.gov/1201/2015/hearing-transcripts. Hearing exhibits are posted at http://copyright.gov/1201/2015/hearing-exhibits.

Drug Administration has raised regulatory concerns concerning the impact of circumvention activities on the devices it regulates, NTIA supports proposed exemptions to allow security testing on medical devices as well as access to the data they generate.

In light of the substantial public safety and environmental concerns raised by government actors and others, the Register is of the view that the Librarian should exercise a degree of caution in adopting exemptions to facilitate security research on consumer goods, motor vehicles and medical devices, as well as for purposes of vehicle repair. The Register appreciates and agrees with NTIA's view that such concerns have "at best a very tenuous nexus to copyright protection."[8] But they are serious issues nevertheless. Accordingly, while the Register generally concurs with NTIA that exemptions should be granted in these areas, the Register nonetheless believes it is appropriate to take the competing concerns of other agencies into consideration. As explained more fully below, the Register is recommending a window of twelve months before exemptions that may implicate public safety and environmental concerns become effective, which will provide an opportunity for the various parts of the federal government, as well as state agencies, to prepare for any impact.

This proceeding points to other policy concerns as well. As in the past, the rulemaking process has highlighted aspects of the Copyright Act that have not kept up with changing technologies. For example, while Congress clearly foresaw the need to facilitate good-faith security research when it enacted a standing exemption for security testing in section 1201(j), the exemption does not seem sufficiently robust in light of the perils of today's connected world.[9] And, as is apparent in the proposal to allow preservation of video games, the exceptions for preservation activities set forth in section 108 appear inadequate to address institutional needs in relation to digital works.[10] The

[8] Letter from Lawrence E. Strickling, Assistant Sec'y for Commc'ns & Info., Nat'l Telecomms. & Info. Admin., U.S. Dep't of Commerce, to Maria A. Pallante, Register of Copyrights and Dir., U.S. Copyright Office ("USCO"), at 4 (Sept. 18, 2015) ("NTIA Letter").

[9] *The Register's Perspective on Copyright Review: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 29, 57 (2015) ("*The Register's Perspective on Copyright Review Hearing*") (statement of Maria A. Pallante, Register of Copyrights and Dir., USCO); *id.* at 57 (statement of Rep. Zoe Lofgren, Member, H. Comm. on the Judiciary) ("I recently met with some researchers, academically based, ... [a]nd they are good guys. They are exploring cybersecurity issues. And to do so, they have to actually do some breaking. And we want them to because we want to find out what the holes are. But they're very concerned. They're a law-abiding group. They don't want to be behind a law violation.").

[10] *Id.* at 20-21 (statement of Maria A. Pallante, Register of Copyrights and Dir., USCO); *see also Preservation and Reuse of Copyrighted Works: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 2 (2014) (statement of Rep. Jerrold Nadler, Ranking Member, Subcomm. on Courts, Intellectual Prop., and the Internet) ("Recognizing the unique public service mission served by libraries and archives, Congress first enacted section 108 in 1976, allowing these entities a limited exception for preservation, replacement, and research purposes long before technological innovations made it possible to make digital copies of analog works on a mass scale, a process otherwise known as mass digitization."); THE SECTION 108 STUDY GROUP, THE SECTION 108 STUDY GROUP REPORT, at i (2008), *available at* http://www.section108.gov/docs/Sec108StudyGroup Report.pdf.

sixth triennial rulemaking thus soundly affirms Congress's substantial efforts over the past two years to review the Copyright Act and assess where it is in need of updates.[11]

Additionally, as has also been true in the past, a number of proposals essentially seek renewal of existing exemptions—for example, unlocking of cellphones and jailbreaking of smartphones. As the Register suggested in recent testimony before the Judiciary Committee of the House of Representatives, Congress could amend the rulemaking process to create a presumption in favor of renewal when there is no meaningful opposition to the continuation of an exemption.[12] Not only will this lessen the burden on proponents, but it will also allow for a more streamlined rulemaking process. Under current law, the Copyright Office must assess proponents' evidence every three years anew as though the exemption were presented for the first time, even when proponents have in a previous rulemaking made a strong case. When there is an existing exemption, however, the evidence may be weak, incomplete or otherwise inadequate to support the request for renewal, as was the case with the cellphone unlocking proposals in the 2012 proceeding.

Finally, Congress may wish to consider clarifications to section 1201 to ensure that the beneficiaries of exemptions are able to take full advantage of them even if they need assistance from third parties.[13] The anti-trafficking rules set forth in sections 1201(a)(2) and 1201(b) generally prohibit the manufacture and provision of technologies, products or services—or "part[s] thereof"—that are "primarily" designed for purposes of

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[11] *See* Press Release, H. Comm. on the Judiciary, Chairman Goodlatte Announces Comprehensive Review of Copyright Law (Apr. 24, 2013), *available at* http://judiciary.house.gov/index.cfm/2013/4/chairman goodlatteannouncescomprehensivereviewofcopyrightlaw ("There is little doubt that our copyright system faces new challenges today."); *The Register's Perspective on Copyright Review Hearing* at 7-8 (statement of Maria A. Pallante, Register of Copyrights and Dir., USCO); *The Register's Perspective on Copyright Review Hearing* at 56 (statement of Rep. Zoe Lofgren, Member, H. Comm. on the Judiciary) (noting that "as the [1201] exemptions have proliferated, I think it tells us something about the underlying defect in the statute"); *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. 64 (2014) (statement of Rep. Bob Goodlatte, Chairman, H. Comm. on the Judiciary) ("As someone who was very active in negotiating all of the DMCA, I am not sure that anyone involved in the drafting would have anticipated some of the TPM uses that have been litigated in court. Such as replacement printer toner cartridges and garage door openers. So I am also interested in ways to better focus Chapter 12 on protecting copyright works from piracy rather than protecting non-copyright industries from competition.").

[12] *The Register's Perspective on Copyright Review Hearing* at 27 (statement of Maria A. Pallante, Register of Copyrights and Dir., USCO).

[13] Section 1201(a)(2) is addressed to technological measures limiting access to works, while section 1201(b) is addressed to technological measures limiting copying of works. *See* 17 U.S.C. § 1201(a)(2), (b). Some technological measures control both access to and copying of works. 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, at 44-47 (June 11, 2010) ("2010 Recommendation") (quoting Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 Fed. Reg. 64,556, 64,568 (Oct. 27, 2000) ("2000 Final Rule")) (explaining that the Content Scramble System, a TPM that protects DVDs, "is an access control that also (and, arguably, primarily) serves to prevent copying").

circumvention.[14] Any exemption granted by the Librarian on the Register's recommendation may not override these provisions.[15] While the anti-trafficking provisions can curtail bad actors seeking to profit from circumvention by others, they also constrain the ability to allow third parties to offer assistance to exempted users.

Congress adopted a limited clarification on this point in relation to the unlocking of wireless devices in 2014 when it passed the Unlocking Consumer Choice and Wireless Competition Act ("Unlocking Act"), which, among other things, amended section 1201 to permit specified third parties to circumvent technological measures "at the direction of" a cellphone or device owner to enable its use on a different wireless network.[16] The issue of third-party assistance has surfaced again in the current proceeding, as reflected in proposals to allow circumvention "on behalf of" vehicle owners to facilitate repairs or permit access to medical data "at the direction of" the patient. Assistance with these types of activities is not authorized under the 2014 Unlocking Act. 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.

Summary of Recommendations

The Librarian has previously adopted five sets of exemptions under section 1201[17] based upon prior Recommendations of the Register.[18] In this sixth triennial

[14] Section 1201(a)(2) provides that "[n]o person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that . . . is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title . . . ." 17 U.S.C. § 1201(a)(2)(A). Section 1201(b) provides that "[n]o person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that . . . is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof . . . ." *Id.* § 1201(b)(1)(A).

[15] *See id.* § 1201(a)(1)(E) ("Neither the exception under subparagraph (B) from the applicability of the prohibition contained in subparagraph (A), nor any determination made in a rulemaking conducted under subparagraph (C), may be used as a defense in any action to enforce any provision of this title other than this paragraph."); *see also* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 79 Fed. Reg. 55,687, 55,688 n.2 (Sept. 17, 2014) ("NOI").

[16] *See* Unlocking Act, Pub. L. No. 113-144, § 2(c), 128 Stat. 1751, 1751-52 (2014) (providing that circumvention "may be initiated . . . by another person at the direction of the owner, or by a provider of a commercial mobile radio service or a commercial mobile data service at the direction of such owner or other person, solely in order to enable such owner or a family member of such owner to connect to a wireless telecommunications network . . . ."). The Unlocking Act, however, provides a narrow fix to the issue of third-party circumvention since the Act applies only in the context of exemptions that permit unlocking of cellphones and other wireless devices. *See* S. REP. NO. 113-212, at 6-7 (2014).

[17] Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 77 Fed. Reg. 65,260 (Oct. 26, 2012) ("2012 Final Rule"), *amended by* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Wireless Telephone Handsets, 79 Fed. Reg. 50,552 (Aug. 25, 2014) (codified at 37 C.F.R. § 201.40(b)(3), (c)); Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 75 Fed. Reg. 43,825

proceeding, as discussed more fully below, the Register recommends that the Librarian adopt another set of exemptions covering twenty-two types of uses, as follows:

- Motion pictures (including television programs and videos):
  - For educational uses by college and university instructors and students
  - For educational uses by K-12 instructors and students
  - For educational uses in massive open online courses ("MOOCs")
  - For educational uses in digital and literacy programs offered by libraries, museums and other nonprofits
  - For multimedia e-books offering film analysis
  - For uses in documentary films
  - For uses in noncommercial videos
- Literary works distributed electronically (*i.e.*, e-books), for use with assistive technologies for persons who are blind, visually impaired or have print disabilities
- Computer programs that operate the following types of devices, to allow connection of a used device to an alternative wireless network ("unlocking"):
  - Cellphones
  - Tablets
  - Mobile hotspots
  - Wearable devices (*e.g.*, smartwatches)
- Computer programs that operate the following types of devices, to allow the device to interoperate with or to remove software applications ("jailbreaking"):

(July 27, 2010) ("2010 Final Rule"); Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 71 Fed. Reg. 68,472 (Nov. 27, 2006) ("2006 Final Rule"); Copyright Office, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 68 Fed. Reg. 62,011 (Oct. 31, 2003) ("2003 Final Rule"); 2000 Final Rule, 65 Fed. Reg. 64,556 .

[18] Register of Copyrights, Section 1201 Rulemaking: Fifth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights (Oct. 12, 2012) ("2012 Recommendation"); 2010 Recommendation; 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 (Nov. 17, 2006) ("2006 Recommendation"); Recommendation of the Register of Copyrights in RM 2002-4, Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies (Oct. 27, 2003) ("2003 Recommendation"); 2000 Final Rule, 65 Fed. Reg. 64,556 (Librarian's Final Rule, including the full text of the Register's Recommendation). The Final Rules and the Register's Recommendations can be found at http://www.copyright.gov/1201.

  - Smartphones
  - Tablets and other all-purpose mobile computing devices
  - Smart TVs
- Computer programs that control motorized land vehicles, including farm equipment, for purposes of diagnosis, repair and modification of the vehicle (effective in 12 months)
- Computer programs that operate the following devices and machines, for purposes of good-faith security research (effective in 12 months or, for voting machines, immediately):
  - Devices and machines primarily designed for use by individual consumers, including voting machines
  - Motorized land vehicles
  - Medical devices designed for implantation in patients and corresponding personal monitoring systems
- Video games for which outside server support has been discontinued, to allow individual play by gamers and preservation of games by libraries, archives and museums (as well as necessary jailbreaking of console computer code for preservation uses only)
- Computer programs that operate 3D printers, to allow use of alternative feedstock
- Literary works consisting of compilations of data generated by implanted medical devices and corresponding personal monitoring systems

The Register declines to recommend the following requested exemptions:

- Audiovisual works, for broad-based space-shifting and format-shifting (declined due to lack of legal and factual support for exemption)
- Computer programs in video game consoles, for jailbreaking purposes (declined due to lack of legal and factual support for exemption)
- Literary works distributed electronically (e-books), for space-shifting and format shifting (declined because incomplete record presented)
- Computer programs that operate "consumer machines," for unlocking (declined because incomplete record presented)
- Computer programs that operate dedicated e-book readers, for jailbreaking (declined because incomplete record presented)
- Computer programs consisting of specific music recording software that is no longer supported, to allow continued use of the software (declined because incomplete record presented)