



October 7, 2020

VIA E-MAIL ONLY

Senator Thom Tillis
Chairman, Subcommittee on Intellectual
Property
113 Dirksen Senate Office Building
Washington, DC 20510

Re: Responses to Questions Concerning the Senate Judiciary Committee Subcommittee on Intellectual Property Hearing: "Are Reforms to Section 1201 Needed and Warranted?"

Dear Chairman Tillis,

Thank you for your written questions for the record following the Senate Judiciary Committee, Subcommittee on Intellectual Property hearing entitled "Are Reforms to Section 1201 Needed and Warranted?". On behalf of the Entertainment Software Association (ESA), the Motion Picture Association, Inc. (MPA) and the Recording Industry Association of America, Inc. (RIAA), I respond to your questions in this letter.

- 1. The Copyright Office did not propose altering the basic framework of section 1201 but made numerous recommendations to improve it. Do you agree with the Copyright Office's conclusion that the basic structure of section 1201 has worked well and should be retained? What has been the greatest success of section 1201? What has been the biggest downside?*

The basic structure of Section 1201 has not only worked well, it has been a remarkable example of how to successfully perpetuate the intended benefits of copyright protection as technology evolves. As described in my written and oral testimony, the statute not only provides copyright owners with necessary legal recourse against those who gain unauthorized access to their works in digital formats and those who traffic in tools and services that enable such access or that enable copyright infringement, but the result of those protections has been tremendous consumer benefit.

As we all know, the purpose of copyright law is to incentivize the creation and dissemination of works of authorship, so that the public may enjoy and learn from them. Section 1201 has furthered that purpose in multiple ways by enabling (i) copyright owners and their licensees to recoup investments and to reinvest more revenues in new content; (ii) the propagation of digital services and products that enable consumers to access works (often on demand) at various price

points and on various devices; and (iii) a revolution in the way many of us elect to listen to recorded music (for example, through subscription streaming services like Spotify and Apple Music), watch motion pictures (for example, through subscription streaming services like Netflix or Hulu) and play video games (for example, through interactive, immersive, multiplayer experiences) – all of which depend on digital rights management (“DRM”) technologies to protect against unauthorized access to the platforms.

Section 1201’s biggest success has certainly been delivering on the goal that Congress had when it passed the statute, *i.e.* encouraging copyright owners to feel secure enough to embrace all the opportunities of the digital environment. For instance, Section 1201’s anti-trafficking prohibitions have created a sufficiently secure marketplace where tools and services designed to enable circumvention of technological protection measures are widely unavailable through legitimate, online and brick and mortar retailers. In turn, the attractiveness of committing infringement of works has declined. While digital infringement remains a massive problem that we must remain vigilant about lessening, the vast majority of consumers now understands and appreciates that the digital content they want is available at affordable prices and in convenient ways.

2. *Fair use is not a defense to an act of circumvention in violation of section 1201, but the statute has mechanisms for allowing certain acts of circumvention, including several permanent exemptions. Do you think the statute currently has the right permanent exemptions – both in terms of the categories and their scope? Would you like to see any new permanent exemptions?*

Congress, deliberately and for good reasons, chose not to make the fair use affirmative defense to acts of copyright infringement applicable to the prohibitions contained in Section 1201.

- First, Section 1201 does not prohibit circumvention solely for engaging in an act covered by the rights established in Section 106 of the Copyright Act (*i.e.*, reproduction, distribution, adaptation, public display or public performance). Rather, Section 1201(a)(1)(A) establishes a separate, exclusive right against unauthorized access to copyrighted works that prevents the acquisition or consumption of works without obtaining proper permissions from and/or paying the appropriate price to the copyright owner. As addressed in my written and oral testimony, Congress understood that this provision would be critically important in the digital age where some forms of unauthorized access may not result in infringement because they do not implicate the bundle of rights established in Section 106, such as the rights of reproduction or public performance.
- Second, it would have been poor judgment on Congress’ part to have made fair use a defense to the anti-trafficking prohibitions of Section 1201. Allowing the widespread circulation of tools and services that purportedly enable fair uses, but inevitably also enable acts of unauthorized access and acts of infringement, would have gutted the value of the statute’s protections and hindered the development of the vibrant digital content ecosystem we enjoy today.

The current statutory exceptions to Section 1201's prohibition on the act of circumventing access controls were based on careful consideration of existing case law and/or discrete policy and security issues such as law enforcement activities, and the protection of privacy and security interests. The efficacy of these statutory exceptions has not been tested during the last two decades because lawsuits related to such conduct are virtually non-existent. Thus, there is no sound basis for claiming that their scope is too narrow. There is no reason to make any changes to these provisions.

There is also no need for the codification of new statutory exceptions. The Copyright Office has proven capable of addressing concerns, when raised, in a professional, qualified and neutral manner in the triennial rulemaking process. The flexibility provided by the triennial review of the marketplace is preferable to new statutory exceptions, as the triennial review process is far more responsive to the ever-changing technology landscape than new statutory exemptions could ever be.

3. *How has the triennial rulemaking conducted by the Copyright Office and adopted by the Librarian of Congress benefited the public? How would a more streamlined process help?*

I have been participating in the triennial rulemaking for my entire legal career. I believe it benefits the public by providing a fair, cordial and thoughtful venue in which individuals, companies, organizations, and institutions present their concerns to a diligent group of staffers and decision makers who, if justified in their view, grant exemptions to the prohibition on circumventing access controls. I was surprised to see in some of the other hearing testimony complaints about the tenor of the proceedings. In my experience, interactions between proceeding participants and their representatives are very professional and polite, even friendly. Petitioners are able to find qualified counsel from law firms, non-profit groups, and law school clinics.¹ Moreover, the Copyright Office staff carefully considers every submission and makes sure that all petitioners for exemptions are heard.

In my opinion, some of the decisions that have resulted from the triennial rulemaking do not benefit the public because they undermine protections in a manner that could result in infringement and other harms. Despite my disagreement with specific outcomes, I continue to believe that the rulemaking process is ultimately beneficial to the public.

I also see a benefit to the so-called "streamlined renewal" process for existing exemptions. The coalition I represent did not oppose the renewal of any exemptions during the previous or the current triennial cycles. Indeed, we supported the creation of the new process during the roundtables that resulted in the transmission to Congress of the Register's Section 1201 Study. But additional streamlining of the process is unnecessary and unwarranted. The petition for renewal forms are now only a couple pages long, and simply demonstrate that at least one

¹ The timing of the triennial proceedings also has been adjusted to accommodate the academic schedule under which these clinics operate to ensure their ability to participate.

petitioner has articulated a continued need for an exemption. In order to overcome that contention, a party who opposes the renewal must then demonstrate a change of law or facts to succeed. There has been no evidence of opposing parties submitting frivolous oppositions to unnecessarily complicate the process or render it burdensome. At this point, that process is already straightforward and streamlined.

With respect to newly requested exemptions, the current structure and standards of evidence remain sound to effectuate the benefits of Section 1201 as discussed above. Given the risks associated with unauthorized circumvention, it is essential for the Copyright Office to obtain adequate evidence from petitioners that demonstrates that the uses in which they intend to engage are non-infringing and that the creation of a new exemption will not unjustifiably cause harm to copyright owners or the marketplace.

4. *Section 1201 does not permit third-party assistance for circumvention, even where circumvention is allowed. What are your thoughts on when third-party assistance should be permitted?*

Unless one of the statutory exceptions applies, Section 1201 makes it unlawful to provide or offer to provide a service that (i) is primarily designed or produced for the purpose of circumventing a technological measure; (ii) has only limited commercially significant purpose or use other than to circumvent a technological measure; or (iii) is marketed for use in circumventing a technological measure. Although the rulemaking process allows for the creation of regulatory exemptions to the prohibition against the act of circumventing access controls, the statute does not allow for the process to result in exemptions for service providers to engage in circumvention services.² See 17 U.S.C. § 1201(a)(1)(E). That is as it should be.

Congress had good reasons for limiting the rulemaking in this fashion. If circumvention services were made lawful, there would be no way to police or identify whether the person seeking such services would exercise an exemption or use the resulting unauthorized access for infringing purposes instead. Devices, services and products designed to provide access to high quality content that is costly to produce – including video games, motion pictures, and sound recordings – would be particularly vulnerable to unscrupulous abuses of such a limitation on the anti-trafficking provisions.

² In the rulemaking, the coalition I represent has not taken the position that, for example, a librarian or information technology office within a university would violate Section 1201's anti-trafficking provision by assisting a professor with circumvention that is allowed under a regulatory exemption (such as the exemption for creating clips from DVDs for use in film studies courses). Similarly, we are not aware of any litigation alleging that someone has enlisted the assistance of a personal acquaintance to assist them in utilizing a valid exemption.

5. *You've represented a lot of the big content companies – what are your thoughts on a right to repair devices that use copyrighted software?*

I have been fortunate to represent some of the most creative, innovative and dynamic companies in the United States. During my fifteen years doing so, I have seen the companies that deliver expressive content such as sound recordings, motion pictures, and video games to consumers continue to transform their businesses to provide the public with higher quality content, at more flexible price points, and with more options – such as mobile and remote access – for enjoying copyrighted works at a time and place of their choosing. Almost all of these transformative marketplace improvements rely on the use of the technological protection measures that Section 1201 protects.

With respect to repairing devices primarily designed to access such expressive works, the Section 1201 triennial rulemaking proceedings have revealed that (i) there is a lack of a demonstrated need to engage in circumvention rather than using other authorized methods of repair and (ii) some types of repair almost inevitably lead to a substantial risk of increased piracy. That is why the current regulatory exemptions covering repair issues do not apply, for example, to video game consoles.³ *See* 37 C.F.R. § 201.40(b)(1).

All three of the major video game console makers in the United States—Microsoft, Nintendo, and Sony Interactive Entertainment—are committed to providing consumers with a variety of repair options that are economical, quick, reliable, and safe. They all offer warranties covering major repairs and affordable repair services beyond the warranty period to ensure that their consoles remain in good working order because their respective platforms' success depends on providing a secure, trustworthy, versatile, and engaging platform on which to play video games and enjoy digital content. They also provide comprehensive online and offline support networks that help consumers remotely troubleshoot issues that limit the need to send in devices for repairs.

Console makers must consider infringement of video game software and digital content, and to that end, they incorporate technological protection measures into their consoles. Unauthorized repair renders these measures vulnerable to tampering if a console's firmware is circumvented.

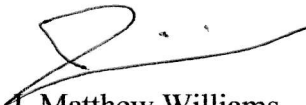
Allowing unauthorized parties to bypass the specialized software that protects video game consoles creates security *and* piracy risks. First, tampering with the consoles for the ostensible purpose of repair can enable copyright infringement and unauthorized access to illegitimate, unauthenticated copies of video games. Second, having the manufacturers (or their authorized representatives) repair their own devices not only lessens the chance of piracy, but also ensures that the consoles' security features will continue to protect the safety and integrity of the players' online experience.

³ Recommendation of the Acting Register of Copyrights, Section 1201 Rulemaking: Seventh Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, at 205-206 (Oct. 2018).

Another important fact is that modern video game consoles provide consumers with more than just video games. ESA's members and a wide network of content partners provide a vast range of valuable content, including movies, television, music, and live-sports programming. These third-party partners make their content available because they trust that video game consoles will protect their copyrighted works from unauthorized access and infringement. As the Register of Copyrights has said: "[TPMs] protect not only the integrity of the console code, but the copyrighted works that run on the consoles. In so doing, they provide important incentives to create video games and other content for consoles, and thus play a critical role in the development and dissemination of highly innovative copyrighted works."⁴

Setting aside devices primarily designed for accessing expressive works, the coalition of associations that I represent has not opposed the renewal of the existing regulatory exemptions related to repair, such as the exemptions for automobiles and farm equipment. *See* 37 U.S.C. § 201.40(b)(9). That said, we have also not observed a need to revise the statute to address repair issues. A wide variety of devices contain embedded software, and each category of device may present unique issues concerning the facilitation of infringement, security and safety. The rulemaking enables the Copyright Office to assess the risk in each particular circumstance. Accordingly, any new statutory exceptions with respect to this topic are unnecessary.

Respectfully submitted,



J. Matthew Williams
Partner of
MITCHELL SILBERBERG & KNUPP LLP

JMW/psb

⁴ U.S. Copyright Office, Library of Congress, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 77 Fed. Reg. 65260, 65274 (Oct. 26, 2012).



October 7, 2020

VIA E-MAIL ONLY

Senator Charles Grassley
135 Hart Senate Office Building
Washington, D.C. 20510

Re: Responses to Questions Concerning the Senate Judiciary Committee Subcommittee on Intellectual Property Hearing: "Are Reforms to Section 1201 Needed and Warranted?"

Dear Senator Grassley,

Thank you for your written questions for the record following the Senate Judiciary Committee, Subcommittee on Intellectual Property hearing entitled "Are Reforms to Section 1201 Needed and Warranted?". On behalf of the Entertainment Software Association (ESA), the Motion Picture Association, Inc. (MPA) and the Recording Industry Association of America, Inc. (RIAA), I respond to your questions in this letter.

- 1. Section 1201's prohibition on circumvention has several permanent exemptions set out in the statute. How well have these worked over the past 22 years? Do you believe that there should be fewer or more exemptions to Section 1201? What are they?*

The current statutory exceptions to Section 1201's prohibitions on the act of circumventing access controls and on trafficking in circumvention devices and tools were based on Congress' careful consideration of existing case law and/or discrete policy and security issues, such as law enforcement activities and the protection of privacy and security interests. The efficacy of these statutory exceptions has not been tested during the last two decades because lawsuits related to such conduct are virtually non-existent. In that way, it appears the exceptions are working as Congress intended. Thus, there is no basis for claims that their scope is too narrow. Changes to these provisions are unnecessary.

There is also no need for the codification of new statutory exceptions. The Copyright Office has proven capable of addressing concerns, when raised, in a professional, qualified and neutral manner in the triennial rulemaking process. The flexibility provided by the triennial review of the marketplace is preferable to new statutory exceptions, as the triennial review process is far more responsive to the ever-changing technology landscape than new statutory exemptions could ever be.

2. *Does Section 1201 permit third-party assistance for circumvention where circumvention is allowed? Is the rule clear? What are your thoughts on whether and when third-party assistance should be permitted?*

Some of the statutory exceptions in Section 1201 expressly permit for third party assistance where circumvention is also allowed by the statute. *See, e.g.*, 17 U.S.C. § 1201(e) (covering law enforcement, intelligence, and other government activities). Otherwise, Section 1201 makes it unlawful to provide or offer to provide a service that (i) is primarily designed or produced for the purpose of circumventing a technological measure; (ii) has only limited commercially significant purpose or use other than to circumvent a technological measure; or (iii) is marketed for use in circumventing a technological measure. This rule is clear. For example, statutory exceptions, such as Section 1201(d) for nonprofit libraries, archives and educational institutions, expressly state that they do not limit in any way liability under the anti-trafficking prohibitions. *See* 17 U.S.C. § 1201(d)(4).

It is also clear from the plain language of the statute that the rulemaking process that allows for the creation of regulatory exemptions to the prohibition against the act of circumventing access controls, does not allow for the process to result in exemptions to allow service providers to engage in circumvention services.¹ *See* 17 U.S.C. § 1201(a)(1)(E). That is as it should be. Congress had good reasons for limiting the rulemaking in this fashion. If circumvention services were made lawful, there would be no way to police or identify whether the person seeking such services would exercise an exemption or use the resulting unauthorized access for infringing purposes instead. Devices, services and products designed to provide access to high quality content that is costly to produce – including video games, motion pictures, and sound recordings – would be particularly vulnerable to unscrupulous abuses of such a limitation to the anti-trafficking provisions.

3. *In 2018, the Copyright Office streamlined the Section 1201 triennial rulemaking process. In your opinion, did the changes improve the process? Do you believe that other changes/improvements are still needed? Is legislation necessary?*

I believe the so-called “streamlined renewal” process for existing exemptions has improved the process. The coalition I represent did not oppose the renewal of any exemptions during the previous or the current triennial cycles. Indeed, we supported the creation of the new process during the roundtables that resulted in the transmission to Congress of the Register’s Section 1201 Study. But additional streamlining of the process is unnecessary and unwarranted. The petition for renewal forms are now only a couple pages long, and simply demonstrate that at least one petitioner has articulated a continued need for an exemption. In order to overcome that

¹ In the rulemaking, the coalition I represent has not taken the position that, for example, a librarian or information technology office within a university would violate Section 1201’s anti-trafficking provision by assisting a professor with circumvention that is allowed under a regulatory exemption (such as the exemption for creating clips from DVDs for use in film studies courses). Similarly, we are not aware of any litigation alleging that someone has enlisted the assistance of a personal acquaintance to assist them in utilizing a valid exemption.

contention, a party who opposes the renewal must then demonstrate a change of law or facts to succeed. There has been no evidence of opposing parties submitting frivolous oppositions to unnecessarily complicate the process or render it burdensome. At this point, that process is already straightforward and streamlined.

With respect to newly requested exemptions, it is critically important that we retain the current structure. Given all the benefits of Section 1201 in terms of increasing the availability of works, and the methods and devices by which consumers can enjoy them, and all of the risks associated with unauthorized circumvention, it is necessary for the Copyright Office to follow its current practice – which is dictated by the statute and legislative history – of obtaining adequate evidence from petitioners to demonstrate that the uses in which they intend to engage are non-infringing and that the creation of an exemption will not unjustifiably cause harm to copyright owners or the marketplace. In sum, legislative changes to the triennial rulemaking process are unnecessary.

4. *Do you believe that stakeholders are able to easily participate in the Section 1201 proceedings? How has the Copyright Office ensured that users and their positions are adequately represented at the proceedings? In what ways can the process be made less burdensome for rulemaking participants?*

I believe that there is no undue burden for stakeholders who wish to participate in the rulemaking. The issues at stake are often very important to the health of the content ecosystem and to accomplish Congress' goals for Section 1201. Accordingly, while the proceeding does involve work and investment, that work and investment is justified by the import of what is at stake.

Throughout the fifteen years I have represented clients in connection with the rulemaking, my experience is that petitioners and opponents are able to find qualified counsel from law firms, non-profit groups, and law school clinics that are more than capable of presenting the evidence and issues to the Copyright Office.² In addition, the Office provides a fair, cordial and thoughtful venue in which individuals, companies, organizations, and institutions may present their concerns to a diligent group of staffers and decision makers and, if justified in their view, obtain exemptions to the prohibition on circumventing access controls.

I was surprised to see in some of the other hearing testimony complaints about the tenor of the proceedings. In my experience, interactions between proceeding participants and their representatives are very professional and polite, even friendly. Moreover, the Copyright Office staff carefully considers every submission and makes sure that all petitioners for exemptions are heard. If a petitioner does not have counsel, the Office does not discard or ignore the petition and provides every opportunity to build a proper record. Indeed, the Office has even announced that it will do its own research into proposals for exemptions to assess whether petitioners failed to present something helpful on their own behalf.

² The timing of the triennial proceedings has also been adjusted to accommodate the academic schedule under which these clinics operate to ensure their ability to participate.

5. *What is your understanding of how Section 1201 specifically handles TPM circumvention for repairs of vehicles, farm equipment, machinery and other products? Do you think that it is adequate? In your opinion, should the way Section 1201 exemptions handle repairs be modified? If you believe Section 1201 exemptions should be modified with respect to the ability to repair products, how would [you] like to see them modified?*

With respect to repairing devices primarily designed to access expressive works such as sound recordings, motion pictures and video games, the Section 1201 triennial rulemaking proceedings have revealed that (i) there is a lack of a demonstrated need to engage in circumvention rather than using other authorized methods of repair and (ii) some types of repair almost inevitably lead to a substantial risk of increased piracy. That is why the current regulatory exemptions covering repair issues do not apply, for example, to video game consoles.³ See 37 C.F.R. § 201.40(b)(1).

All three of the major video game console makers in the United States—Microsoft, Nintendo, and Sony Interactive Entertainment—are committed to providing consumers with a variety of repair options that are economical, quick, reliable, and safe. They all offer warranties covering major repairs and affordable repair services beyond the warranty period to ensure that their consoles remain in good working order because their respective platforms' success depends on providing a secure, trustworthy, versatile, and engaging platform on which to play video games and enjoy digital content. They also provide comprehensive online and offline support networks that help consumers remotely troubleshoot issues that limit the need to send in devices for repairs.

Console makers must consider infringement of video game software and digital content, and to that end, they incorporate technological protection measures into their consoles. Unauthorized repair renders these measures vulnerable to tampering if a console's firmware is circumvented. Allowing unauthorized parties to bypass the specialized software that protects video game consoles creates security and piracy risks. First, tampering with the consoles for the ostensible purpose of repair can enable copyright infringement and unauthorized access to illegitimate, unauthenticated copies of video games. Second, having the manufacturers (or their authorized representatives) repair their own devices not only lessens the chance of piracy, but also ensures that the consoles' security features will continue to protect the safety and integrity of the players' online experience.

Another important fact is that modern video game consoles provide consumers with more than just video games. ESA's members and a wide network of content partners provide a vast range of valuable content, including movies, television, music, and live-sports programming. These third-party partners make their content available because they trust that video game consoles will protect their copyrighted works from unauthorized access and infringement. As the Register of Copyrights has said: "[TPMs] protect not only the integrity of the console code, but the

³ Recommendation of the Acting Register of Copyrights, Section 1201 Rulemaking: Seventh Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, at 205-206 (Oct. 2018).

copyrighted works that run on the consoles. In so doing, they provide important incentives to create video games and other content for consoles, and thus play a critical role in the development and dissemination of highly innovative copyrighted works.”⁴

Setting aside devices primarily designed for accessing expressive works, the coalition of associations that I represent has not opposed the renewal of the existing regulatory exemptions related to repair, such as the exemption for automobiles and farm equipment. *See* 37 U.S.C. § 201.40(b)(9). That said, we have also not observed a need to revise the statute to address repair issues. A wide variety of devices contain embedded software, and each category of device may present unique issues concerning the facilitation of infringement, security and safety. The rulemaking enables the Copyright Office to assess the risk in each particular circumstance. Moreover, private sector memoranda-of-understanding and other initiatives are a good method of addressing concerns in some industries. Accordingly, any new statutory exceptions with respect to this topic are unnecessary.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. Matthew Williams", written over a horizontal line.

J. Matthew Williams
Partner of
MITCHELL SILBERBERG & KNUPP LLP

JMW/psb

⁴ U.S. Copyright Office, Library of Congress, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 77 Fed. Reg. 65260, 65274 (Oct. 26, 2012).