

Blake Reid
Clinical Professor, Colorado Law
Director, Samuelson-Glushko
Technology Law & Policy Clinic (TLPC)
Faculty Director, Silicon Flatirons Center¹



Chairman Lindsey O. Graham
Senate Committee on the Judiciary

Chairman Thom Tillis
Senate Subcommittee on Intellectual Property

Senator Richard Blumenthal
Senator Chuck Grassley

October 7, 2020

Re: **Hearing: Are Reforms to Section 1201 Needed and Warranted?**²
Responses to Questions for the Record

Dear Chairman Graham, Chairman Tillis, Senator Blumenthal, and Senator Grassley:

Thank you for the opportunity to testify before the Subcommittee at the above-referenced hearing and for the additional opportunity to respond to questions from Chairman Tillis, Senator Blumenthal, and Senator Grassley in writing.

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¹ Affiliations listed for identification purposes only.

² <https://www.judiciary.senate.gov/meetings/are-reforms-to-section-1201-needed-and-warranted>.

I. Responses to Questions from Chairman Tillis

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?*

I disagree with the Office's 2017 contention that that Section 1201's "overall structure and scope—including its treatment of circumvention as a standalone violation independent of copyright infringement—remain sound."³ As I explained in my written statement to the Subcommittee, the Office's 2017 study of Section 1201's basic framework essentially ignored the resounding chorus of comments that Section 1201 needs reform, even while acknowledging that the statute's balance of interests was askew.⁴ Indeed, Section 1201's hallmark is two decades of harmful chilling effects on the beneficial activities of people with disabilities, security researchers, teachers, students, authors, video creators, patients, phone customers, computer users, mechanics, farmers, technicians, car owners, homeowners, and librarians, among others.⁵ These ordinary people bear the burden of affirmatively demonstrating to the Copyright Office that their often public-facing work is consistent with the law and deserving of an exemption that allows them to conduct their legitimate activities without fear of liability or threats of litigation.⁶

While the regulatory burden faced by those chilled by Section 1201 is real, the hearing also demonstrated that the alleged "successes" of Section 1201 are often illusory and premised on self-serving speculation by manufacturers of digital rights management (DRM) technologies and trade associations in the business of opposing 1201 exemptions:

- Intel, which manufactures HDCP,⁷ a widely reviled DRM technology that "causes an unfortunate number of headaches for regular old consumers just trying to enjoy their televisions,"⁸ testified that Section 1201 "provides content creators

³ See Copyright Office, *Section 1207 of Title 17: A Report of the Register of Copyrights* at iii (June 2017), <https://www.copyright.gov/policy/1201/section-1201-full-report.pdf> ("2017 Study Report")

⁴ See Testimony of Blake E. Reid, <https://www.judiciary.senate.gov/imo/media/doc/Reid%20Testimony.pdf> (citing 1201 Study Report, *supra* note 3, at ii-iii (acknowledging that many commenters "argue[d] that section 1201 does little to prevent digital piracy, while chilling a wide range of otherwise lawful activities," that "the statutory language sweeps far beyond the concerns Congress had in mind when it adopted the DMCA and has given rise to anticompetitive and other claims unrelated to legitimate copyright interests," and that "that these concerns are only partially remedied by the permanent exemptions and the triennial rulemaking")).

⁵ See *id.* at 5-6.

⁶ See *id.* at 6-9.

⁷ Testimony of Vanessa P. Bailey at 3, <https://www.judiciary.senate.gov/imo/media/doc/Bailey%20Testimony.pdf>.

⁸ Jason Fitzpatrick, *Why HDCP Causes Errors on Your HDTV, and How to Fix It*, HOW-TO GEEK (Mar. 31, 2018), <https://www.howtogeek.com/208917/htg-explains-how-hdcp-breaks-your-hdtv-and-how-to-fix-it/>.

with confidence that robust anti-circumvention and anti-trafficking protections will be continuously enforced to secure digital content.”⁹ But Intel does not cite a single case where Section 1201 has been used in litigation against any circumventor or developer of circumvention tools related to HDCP.¹⁰

- The Entertainment Software Association, Motion Picture Association, and Recording Industry Association of America claim that “[i]t is critically important that [1201’s] right against unauthorized access stands alone, independent from acts of traditional copyright infringement.”¹¹ Yet the scenarios cited by these trade associations as evidence of 1201’s necessity are often premised on the commission of copyright infringement or breach of contract and rarely (if ever) pursued with 1201 litigation (or at all):
 - The first scenario the trade associations raise is refer to “accessing a subscription service without a proper password.”¹² But hackers routinely compromise user accounts on services like Netflix,¹³ Hulu,¹⁴ and Disney Plus,¹⁵ and the trade associations cite no example of Section 1201 being used to thwart illicit access to a streaming service,¹⁶ though Netflix did once cite Section 1201 as an excuse for its efforts to evade a civil rights lawsuit over its failure to provide closed captions with its videos.¹⁷
 - The second scenario involves “keeping a permanent copy of a sound recording downloaded based on subscription payments or a motion picture downloaded at a low price as a ‘rental.’”¹⁸ The trade associations again cite no example of Section 1201 being used in litigation involving

⁹ Bailey Testimony at 7-9.

¹⁰ *See id.* The only two cases involving Section 1201 and HDCP resulting in a published judicial opinion of which I am aware involve efforts by the developers of video devices to seek declaratory judgment that their noninfringing technology does not violate Section 1201. *See Apogee v. Digital Content Prot.*, No. CV 13-01909 (EGS), 2015 WL 13660483, at *1 (D.D.C. Aug. 11, 2015); *Green v. DOJ*, 392 F. Supp. 3d 68, 78-79 (D.D.C. 2019).

¹¹ Testimony of J. Matthew Williams at 3-4, <https://www.judiciary.senate.gov/imo/media/doc/WilliamsTestimony1.pdf>

¹² *Id.* at 5.

¹³ Rob Pegoraro, *Netflix: Why would somebody bother to hack your account on the streaming service?*, USA TODAY (Aug. 31, 2019), <https://www.usatoday.com/story/tech/columnist/2019/08/31/did-someone-steal-your-netflix-password/2168504001/>.

¹⁴ Alina Bradford, *Your Hulu or Netflix may be hacked, here's what to do*, CNET (July 6, 2017), <https://www.cnet.com/how-to/your-hulu-or-netflix-may-be-hacked-heres-what-to-do/>.

¹⁵ Jordan Valinsky, *So, your Disney+ account was hacked. Here's what to do*, CNN BUSINESS (Nov. 19, 2019), <https://www.cnn.com/2019/11/19/tech/disney-plus-password-account-hacked-trnd/index.html>.

¹⁶ *See Williams Testimony* at 5.

¹⁷ “[C]aptioning may also require Netflix to decrypt digital rights management protections that accompany video files, a separate violation of the Digital Millennium Copyright Act” *Nat’l Ass’n of the Deaf v. Netflix*, Memorandum of Points and Authorities, 2012 WL 1578335 (D.Mass.) (citing 17 U.S.C. § 1201(a)).

¹⁸ *Williams Testimony* at 5.

circumvention in this hypothetical scenario,¹⁹ perhaps because doing so would require users to evade the elaborate contractual limitations that typically govern the use of music streaming services and video rentals.²⁰

- The final scenario involves “playing pirated, unauthenticated copies of video games.”²¹ Yet a scenario involving “pirated” content presumably involves archetypical “acts of traditional copyright infringement” that implicate the copyright holders’ exclusive rights under Section 106.²² Again, the trade associations provide no examples of Section 1201 being used as the sole remedy—or at all—in litigation under this scenario.²³
- ACT—The App Association contends that “[s]trong protections against circumvention are necessary because even ‘free’ apps are commonly stolen.”²⁴ But ACT’s concerns similarly entail “piracy and counterfeits” that presumably implicate copyright holders’ exclusive rights under Section 106, and ACT cites no examples of 1201’s use to address the scenarios it describes.²⁵ ACT also concedes that “the criminal penalties for [counterfeiting] activities . . . are likely a greater deterrent than the consequences for the violation of copyright laws.”²⁶
- The only meaningful effort in the hearing to assemble any evidence of Section 1201’s use for circumvention unrelated to copyright infringement came from Seth D. Greenstein, who contends that “cases at the ‘core’ of the DMCA continue to succeed today.”²⁷ But of the small handful of “core” cases cited by Mr. Greenstein—just ten total cases over the past two decades, an average of less than one case every two years—the majority involved specific allegations of copyright infringement in addition to violations of Section 1201.²⁸

¹⁹ *See id.*

²⁰ *E.g.*, Spotify Terms and Conditions of Use at § 9, <https://www.spotify.com/us/legal/end-user-agreement/#s23> (describing dozens of restrictions on Spotify users’ use of music, including “circumventing any technology used by Spotify”); Apple Media Services Terms and Conditions, <https://www.apple.com/legal/internet-services/itunes/us/terms.html> (barring Apple users from “tamper[ing] with or circumvent[ing] any security technology” on rental content).

²¹ Williams Testimony at 5.

²² *See id.*

²³ *See id.*

²⁴ Testimony of Morgan Reed at 1, <https://www.judiciary.senate.gov/imo/media/doc/ReedTestimony1.pdf>

²⁵ *See id.* at 2.

²⁶ *See id.* at 3.

²⁷ Testimony of Seth D. Greenstein at 6, <https://www.judiciary.senate.gov/imo/media/doc/GreensteinTestimony.pdf>.

²⁸ *Compare* Disney v. VidAngel, 869 F.3d 848, 855 (9th Cir. 2017) (“The Studios’ complaint alleged copyright infringement . . .”); MDY Indus. v. Blizzard Entm’t, 629 F.3d 928, 937 (9th Cir. 2010) (subsequent history omitted) (“Blizzard filed counterclaims and third-party claims against MDY and Donnelly for, *inter alia*, contributory and vicarious copyright infringement . . .”); Davidson v. Jung, 422

In short: the record over two decades of the DMCA's existence holds scant evidence that Section 1201 has proven useful for its stated purpose or that a standalone circumvention right is necessary or even useful to copyright holders. Section 1201's primary effect has been to impose costly burdens on people engaging in beneficial, non-infringing uses who seek to comply with the law.

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?

At the outset, I disagree with the premise that “fair use is not a defense to an act of circumvention in violation of Section 1201.” The Federal Circuit takes the view that the DMCA’s “statutory structure and the legislative history both make it clear that the DMCA granted copyright holders additional legal protections, but neither rescinded the basic bargain granting the public noninfringing and fair uses of copyrighted materials,”²⁹ and judges in the Sixth Circuit have reached similar conclusions.³⁰ The Ninth Circuit similarly has “le[ft] open the question whether fair use might serve as an affirmative defense to a prima facie violation of § 1201.”³¹

These conclusions are arguably mandated by the Constitution because fair use is not merely a statutory nicety, but a requirement of the First Amendment. Without fair use, the Copyright Act could not weather the strict scrutiny required of its numerous content-

F.3d 630, 637 (8th Cir. 2005) (“The second amended complaint alleged copyright infringement”); *Sony v. Divineo*, 457 F. Supp. 2d 957, 962 (N.D. Cal. 2006) (“Plaintiff alleges Defendants’ sale of circumvention devices violates . . . the federal Copyright Act, 17 U.S.C. § 101 et seq. . . .”); *Sony v. Filipiak*, 406 F. Supp. 2d 1068, 1070 (N.D. Cal. 2005) (“ . . . seeking injunctive relief and damages for . . . contributory infringement under the Copyright Act, 17 U.S.C. §§ 101 et seq. . . .”); *Apple v. Psystar*, 673 F. Supp. 2d 931, 934 (N.D. Cal. 2009) (subsequent history omitted) (“Apple contends that Psystar’s reproduction, modification, and distribution of Mac OS X on non-Apple computers constituted copyright infringement under the Copyright Act”) with *Universal City Studios v. Corley*, 273 F.3d 429, 436 (2d Cir. 2001) (“ . . . seeking injunctive relief against Corley under the DMCA.”); *Realnetworks v. DVD CCA*, 641 F. Supp. 2d 913, 918 (N.D. Cal. 2009) (“Real has never been accused of copyright infringement”); *Synopsys v. AzurEngine*, 401 F. Supp. 3d 1068, 1072, (S.D. Cal. 2019) (“Synopsys claims that AzurEngine’s unauthorized use of its software constitutes a violation of the Digital Millennium Copyright Act (‘DMCA’)”); *RealNetworks v. Streambox*, No. 2:99CV02070, 2000 WL 127311, at *1 (W.D. Wash. Jan. 18, 2000) (“ . . . claims that Defendant Streambox has violated provisions of the Digital Millennium Copyright Act (‘DMCA’)”); cf. *321 Studios v. MGM Studios*, 307 F. Supp. 2d 1085, 1090 (N.D. Cal. 2004) (involving a request for a declaratory judgment of noninfringement).

²⁹ *Chamberlain v. Skylink*, 381 F.3d 1178, 1202-03 (Fed. Cir. 2004).

³⁰ See *Lexmark v. Static Control Components*, 387 F.3d 522, 552 (6th Cir. 2004) (Merritt, J. concurring) (“Congress . . . only sought to reach those who circumvented protective measures ‘for the purpose’ of pirating works protected by the copyright statute.”); 387 F. 3d at 562 (Feikens, D.J., concurring in part and dissenting in part) (reaching a similar conclusion).

³¹ *MDY*, 629 F.3d at 950 n.12.

based regulations of speech. While the Second Circuit concluded that fair use is not a defense to violations of Section 1201,³² it did so on the faulty premise that “the Supreme Court has never held that fair use is constitutionally required.”³³ In short order, the Supreme Court implicitly rejected the Second Circuit’s reasoning, noting in *Eldred v. Ashcroft* that fair use is one of copyright law’s “built-in First Amendment accommodations,”³⁴ a principle it explicitly reaffirmed in *Golan v. Holder*.³⁵

Nevertheless, in considering permanent exceptions to Section 1201, Congress should consider both the categories of activities that are covered and their scope. In terms of categories, there are a wide range of beneficial, non-infringing activities not fully covered by permanent exceptions that have required the Copyright Office to recommend a wide array of temporary exemptions. These temporary exemptions, which should be made permanent, cover a range of activities including accessibility, education, cybersecurity, documentary filmmaking, the authoring of noncommercial remix videos and multimedia e-books, patients’ extraction of their own medical data from implantable medical devices, switching wireless networks, installing software of a user’s choosing, repairing devices and vehicles, and archivism.³⁶

In crafting permanent exceptions, however, Congress should treat the unduly narrow scope of Section 1201’s existing permanent exceptions as a cautionary tale. Indeed, nearly all of the permanent exceptions are drawn narrowly with numerous caveats and loopholes that make them difficult to apply in practice:

- **Reverse Engineering and Interoperability.** Section 1201(f) covers the circumvention of access controls for the sake of interoperability³⁷—in theory, providing relief for the development of competitive, interoperable software. However, the scope of covered activity is again quite narrow.³⁸ And even within that scope, some courts have interpreted this exception narrowly, denying its application on the grounds that reverse engineering activity may constitute or facilitate vanilla copyright infringement³⁹ or violate contractual provisions,⁴⁰ or on

³² See *Corley*, 273 F.3d at 443-44.

³³ *Id.* at 458.

³⁴ See 537 U.S. 186, 219-220 (2003).

³⁵ See 565 U.S. 302, 328 (2012) (citing *Eldred*, 537 U.S. at 219).

³⁶ Reid Testimony, *supra* note 4 at 5-6.

³⁷ 17 U.S.C. § 1201(f).

³⁸ *Cf.* *U.S. v. Reichert*, 747 F.3d 445, 459-460 (6th Cir. 2014) (Donald, C.J., dissenting) (lamenting the narrow interpretation of Section 1201(f) by the Copyright Office in the context of its application to modification chips (“mod chips”) for video game consoles).

³⁹ See *Pyrotechnics Mgmt., Inc. v. XFX Pyrotechnics LLC*, 2020 WL 2085251, at *5 (W.D. Pa. Apr. 30, 2020); *Gen. Motors v. Autel*, 2016 WL 1223357, at *8 (E.D. Mich. Mar. 29, 2016); *Blizzard Entm’t v. Ceiling Fan Software*, No. SACV1200144JVSРНBX, 2013 WL 12143935, at *3 (C.D. Cal. Jan. 7, 2013); *Divineo*, 457 F. Supp. 2d at 965; *Davidson*, 422 F.3d at 642. *But see* *Lexmark v. Static Control Components*, 387 F.3d 522, 550-51 (6th Cir. 2004) (broadly interpreting Section 1201(f)(3)).

⁴⁰ *Neon Enter. v. IBM*, No. A-09-CA-896 AWA, 2011 WL 2036674, at *2 (W.D. Tex. May 24, 2011).

the grounds that the exception’s requirement of “lawfully obtain[ing]” a copy of the relevant work and other requirements may defeat its application.⁴¹

- **Encryption Research.** Section 1201(g) covers circumvention in service of “encryption research.”⁴² However, 1201(g) limits “encryption research” to a narrow scope of activities “conducted to advance the state of knowledge in the field of encryption technology or to assist in the development of encryption products”⁴³ and imposes a wide range of limitations,⁴⁴ including an indeterminate multifactor test with vague questions like whether the researcher in question is “appropriately trained or experienced, in the field of encryption technology,” without providing any explanation of what that qualification entails⁴⁵ and a requirement that the researcher attempt to obtain the permission of the copyright holder before beginning research.⁴⁶ As a result, Section 1201(g) has seldom been asserted in court and with little success.⁴⁷
- **Security Testing.** Section 1201(j) covers circumvention necessary for “security testing.”⁴⁸ Like Section 1201(g), however, it is riddled with caveats and loopholes, including an indeterminate multifactor test that implies a researcher might only be able share information about a fundamentally insecure product with the product’s developer (to “promote the security of the . . . owner or operator”) and might run afoul of the exception if the researcher alerts the public that a product is unsafe to use.⁴⁹ Like Section 1201(g), Section 1201(j) has seldom been asserted in court and with little success.⁵⁰
- **Acquisition Determinations.** Section 1201(d) covers circumvention necessary for non-profit libraries, archives, and educational institutions to make good-faith determinations about whether to acquire a copy of an access-controlled work.⁵¹ However, the scope of covered activity is quite narrow, and the exception does not extend to the trafficking bans under Section 1201(a)(2) and (b).⁵² I am unable to locate a single published judicial opinion that discusses this exception.
- **Internet Controls for Minors.** Section 1201(h) theoretically limits the application of the access control anti-circumvention and trafficking provisions in scenarios

⁴¹ See *Philips Med. v. Alpha Biomedical*, No. CIVIL 19-1488CCC, 2020 WL 475616, at *6 (D.P.R. Jan. 29, 2020); *Davidson & Assocs. v. Internet Gateway*, 334 F. Supp. 2d 1164, 1185 (8th Cir. 2005) (subsequent history omitted); *Universal City Studios v. Reimerdes*, 111 F. Supp. 2d 294, 320 (2d Cir. 2001).

⁴² 17 U.S.C. § 1201(g).

⁴³ See 17 U.S.C. § 1201(g)(1)(A).

⁴⁴ See 17 U.S.C. §§ 1201(g)(2)-(3).

⁴⁵ See 17 U.S.C. § 1201(g)(3)(C).

⁴⁶ See 17 U.S.C. § 1201(g)(2)(C).

⁴⁷ See *Reimerdes*, 111 F. Supp. 2d at 321.

⁴⁸ 17 U.S.C. § 1201(j).

⁴⁹ See 17 U.S.C. § 1201(j)(3)(A).

⁵⁰ See *Reimerdes*, 111 F. Supp. 2d at 321.

⁵¹ 17 U.S.C. § 1201(d).

⁵² See 17 U.S.C. § 1201(d)(4).

where some circumvention activity or tool “has the sole purpose to prevent the access of minors to materials on the Internet.”⁵³ But it is difficult to understand the circumstances under which this exception is intended to apply, and I am unable to locate a single published judicial opinion that discusses this exception.

- **Protection of PII.** Section 1201(i) allows circumvention necessary for defeating technological measures and software that “collect or disseminate personally identifying information.”⁵⁴ The exception is limited with numerous caveats including having “the sole effect” of identifying data collection and dissemination functionality,⁵⁵ and I am unable to locate a single published judicial opinion that discusses this exception.

The only exception drawn relatively broadly and explained in a single paragraph without complex subsections, limitations, and caveats is Section 1201(e), which covers investigative, protective, information security, and intelligence activities.⁵⁶ But there’s a catch: only law enforcement officers and other government officials are eligible for Section 1201(e).

The permanent exceptions have proven less helpful than Congress intended in crafting them. Any new efforts to adopt permanent exceptions should aim to draw exceptions broadly and simply so they can actually be used by people with disabilities, security researchers, teachers, students, authors, video creators, patients, phone customers, computer users, mechanics, farmers, technicians, car owners, homeowners, and librarians. Given the difficulty in crafting sufficiently broad exceptions, Congress could more aptly solve Section 1201’s chilling effects by simply requiring a nexus with copyright infringement.⁵⁷

3. What are your thoughts on the Copyright Office’s recommended permanent exemption to increase accessibility for the blind or visually impaired?

The exemption proposed by the Copyright Office in this hearing references the 2017 Section 1201 Report.⁵⁸ The 2017 Study Report recommends making permanent the temporary exemption for circumvention to facilitate access to literary works for people who are blind, visually impaired, or print disabled.⁵⁹

⁵³ See 17 U.S.C. § 1201(h).

⁵⁴ 17 U.S.C. § 1201(i).

⁵⁵ See 17 U.S.C. § 1201(i)(1)(C).

⁵⁶ See 17 U.S.C. § 1201(e).

⁵⁷ See Reid Testimony, *supra* note 4 at 11.

⁵⁸ See Testimony of Regan A. Smith at 12 & n. 12, [https://www.judiciary.senate.gov/imo/media/doc/Smith Testimony2.pdf](https://www.judiciary.senate.gov/imo/media/doc/Smith%20Testimony2.pdf) (citing Copyright Office, *Section 1207 of Title 17: A Report of the Register of Copyrights* at v, 84-87 (June 2017), <https://www.copyright.gov/policy/1201/section-1201-full-report.pdf> (“2017 Study Report”).

⁵⁹ 2017 Study Report at 84.

While I strongly support adopting permanent exceptions for accessibility, the recommendation of the Copyright Office is unduly narrow. It focuses on the existing temporary exemption for assistive technologies for e-books,⁶⁰ which has yet to be updated to bring the United States into compliance with its obligations under the Marrakesh Treaty.⁶¹ In particular, the existing exemption covers a narrower scope of eligible people with disabilities and a narrower scope of eligible works than required by U.S. law implementing the Treaty, and its interaction with the new cross-border exchange provisions required by the Treaty is unclear.⁶² It also contains an antiquated, ableist reference to inaccessible books as “mainstream,” implying that accessible books are not “mainstream.”⁶³

The 2017 Study Report also recommends against “broader exemption[s]” for accessibility.⁶⁴ However, the 2018 triennial review resulted in the adoption of a new exemption to ensure that educational disability services offices can make video programming used in classrooms accessible to students who are deaf, hard of hearing, blind, visually impaired, or DeafBlind—a critical priority during the COVID-19 pandemic⁶⁵ Both the e-book accessibility⁶⁶ and disability services⁶⁷ temporary exemptions are before the Office for expansion during the pending triennial review. A broad coalition of disability organizations also have petitioned the Office to adopt a cross-class, cross-disability accessibility exemption during the pending review.⁶⁸

It is unclear whether the numerous pending needs for expanded coverage of non-infringing accessibility activities are encompassed in the Copyright Office’s present view of a permanent accessibility exemption.⁶⁹ Regardless, any permanent exemption should sweep far more broadly than the existing exemption for e-book accessibility to cover circumvention necessary to make any copyrighted work accessible to any person with a disability, consistent with the civil and human rights of people with disabilities to access information and culture on equal terms. Because accessibility is an undeniably non-

⁶⁰ See 37 C.F.R. § 201.40(b)(3).

⁶¹ See Petition of American Council of the Blind, American Foundation for the Blind, National Federation of the Blind, et al. (Sept. 8, 2020), <https://www.copyright.gov/1201/2021/petitions/proposed/New%20Pet.%20-%20American%20Council%20of%20the%20Blind%20et%20al.pdf> (“E-Book Update Petition”).

⁶² *Id.* at 3-4.

⁶³ *Id.* at 4.

⁶⁴ 2017 Study Report at 87-88.

⁶⁵ See 37 C.F.R. § 201.40(b)(2).

⁶⁶ E-Book Update Petition, *supra* note 61.

⁶⁷ Petition of Association of Transcribers and Speech-to-Text Providers (ATSP) (Sept. 8, 2020).

⁶⁸ Petition of American Council of the Blind, et al. (Sept. 8, 2020), <https://www.copyright.gov/1201/2021/petitions/proposed/New%20Pet.%20-%20Accessibility%20Petitioners.pdf>.

⁶⁹ See Smith Testimony at 12.

infringing use, Congress could also address these needs simply by narrowing Section 1201 to apply only where a nexus with copyright infringement exists.⁷⁰

4. 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 commend the Office for its good-faith efforts over the past two triennial reviews to make available a streamlined process for participants and their representatives seeking renewal of long-standing exemptions.⁷¹ Nevertheless, as I describe in detail in my written statement, the streamlined process is not available for the numerous exemptions that require modification, expansion, and other changes.⁷² The process to seek even minor changes to an exemption is a significant burden that requires hundreds of hours of legal assistance at significant expense that is out of reach for many would-be exemption proponents.⁷³ The triennial review is an unduly burdensome, repetitive, and unsatisfactory context in which to address the numerous policy issues that it implicates, and copyright holders and the public alike would be better served by narrowing Section 1201 to apply only where a nexus with copyright infringement exists.⁷⁴

5. 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?

I believe reading Section 1201 to treat third-party assistance as potentially implicating the anti-trafficking ban, as the Copyright Office has chosen to do,⁷⁵ is at odds with the statute. The Office and courts should avoid treating the exemptions granted by the Librarian under Section 1201(a)(1)(C) as necessarily excluding third-party assistance, since doing so obviates the clear purpose of Section 1201(a)(1)(C) to provide a mechanism to allow users to meaningfully engage in non-infringing uses.

Nevertheless, I agree with the Office's recommendation that temporary exemption should be able to be extended to third-party assistance.⁷⁶ I would go further by permitting the Office to extend exemptions to the trafficking bans under Section 1201(a)(2) and (b).⁷⁷ Then again, this problem could be most simply addressed, as with nearly every other issue under Section 1201, by narrowing Section 1201 to apply only where a nexus with copyright infringement exists.⁷⁸

⁷⁰ See Reid Testimony, *supra* note 4 at 11.

⁷¹ See *id.* at 9.

⁷² See *id.* 6-9.

⁷³ See *id.*

⁷⁴ See *id.* at 11.

⁷⁵ See Smith Testimony at 10.

⁷⁶ See *id.*

⁷⁷ See Reid Testimony, *supra* note 4 at 10.

⁷⁸ See *id.* at 11.

II. Responses to Questions from Senator Blumenthal

1. In creating Section 1201's anti-circumvention measures, Congress recognized the need for exemptions. For example, Congress codified permanent exemptions to allow reverse engineering for the purposes of achieving interoperability of computer programs, and to allow for encryption research. Congress also acknowledged that the need for exemptions may evolve, and tasked the Library of Congress with granting temporary exemptions in accordance with the triennial rulemaking process proscribed in the statute.

a. Has the triennial rulemaking process proven to be an effective mechanism for dealing with the new and developing impacts Section 1201 is having on consumers, particularly as it relates to the expansion of the Internet of Things?

As I described in detail in my written statement, the triennial review has proved a fundamentally flawed context in which to address the wide-ranging impacts of Section 1201 on consumers.⁷⁹ While evolving security, privacy, accessibility, and other consumer protection problems unfold daily as new IoT technology proliferates, the triennial review presents a window just once every three years to seek relief, virtually guaranteeing that consumers will remain unprotected in the face of new threats.

b. Is the rulemaking process accessible to those who have a need for an exemption? What hurdles might the current process pose to particular parties seeking an exemption, including consumers seeking to repair or otherwise legitimately use a product?

While I commend the Office for taking good-faith steps to make the triennial review more accessible, participation in the triennial review still imposes a significant burden that requires hundreds of hours of legal assistance at significant expense that is out of reach for many would-be exemption proponents.⁸⁰ It requires hundreds of hours of legal assistance, numerous, lengthy, and complex filings and hearing testimony, and the indignity of having one's credibility repeatedly and needlessly attacked by exemption opponents and government officials.⁸¹ Finally, it results in complex exemptions laden with loopholes and vague language that are difficult to apply in practice.⁸²

2. As I mentioned during the hearing, the infrastructure that powers our elections is continually under attack. Promoting research on election security is of the highest importance at this critical time. The Library of Congress has granted a temporary exemption allowing circumvention to access voting

⁷⁹ See Reid Testimony, *supra* note 4 at 6-9.

⁸⁰ See *id.* 6-9.

⁸¹ See *id.*

⁸² See *id.*

machines for the purposes of good-faith security research. To follow-up on my questions on this topic at the hearing:

a. Why is this temporary exemption important, and how do researchers use it to protect our critical election infrastructure?

Over the years, the temporary exemption for security research⁸³ has proven critical to ensuring the security of election infrastructure. As Prof. J. Alex Halderman and Prof. Ed Felten explained during the 2018 triennial review, allowing independent researchers to conduct good-faith security research “is a matter of national security” that is critical to addressing a wide range of cybersecurity harms, including breaches of election systems.⁸⁴ “[R]esearchers, in order to ensure that no bad actor can interfere with elections, need to be able to ensure and demonstrate that electronic voting machines are not ‘hackable’”⁸⁵ The Center for Democracy and Technology further explains:

At their most basic, flaws in election systems can cause disruption in election processes, leading to long lines or mistakes in ballot contents presented to voters. At their worst, flaws can allow remote attackers a pathway to changing the election outcome from anywhere in the world. Academic researchers have, in some cases, been able to investigate the security of election systems in the past. By contrast, only recently have election systems been the focus of independent security researchers. Election systems and voting machines have authentication systems and cryptographic protections. In the past, these protections impeded independent security researchers who wished to investigate these machines. This was because of the potential for application of [Section 1201] to these researchers. The [long-standing] triennial exemption from anti-circumvention liability for voting systems . . . permit[s] more independent security researchers to investigate and thereby contribute to the improved security of these systems.⁸⁶

The need to insulate researchers from threats of legal liability has been made clear by hostile comments from election technology vendors. These vendors have vociferously fought the coverage of voting machines under the temporary exemption on a variety of dubious grounds, including the insinuation that testing the security of a voting machine

⁸³ 37 C.F.R. § 201.40(b)(11).

⁸⁴ Comment of Prof. Halderman and Prof. Felten at 32 (Dec. 18, 2017), <https://cdn.loc.gov/copyright/1201/2018/comments-121817/class10/class-10-initialcomments-felten-halderman.pdf>.

⁸⁵ *Id.* at 39.

⁸⁶ Comments of CDT (Dec. 18, 2017), <https://cdn.loc.gov/copyright/1201/2018/comments-121817/class10/class-10-initialcomments-cdt.pdf>.

might implicate copyright infringement.⁸⁷ Some election vendors have continued to attack security researchers attempting to identify and fix vulnerabilities in election systems in the leadup to the 2020 election.⁸⁸

b. Is a temporary exemption for this research and security testing sufficient to protect important interests in election security? Would a permanent exemption better serve the interest of protecting our election infrastructure?

As I noted in my response to Chairman Tillis, it is clear that the ongoing need to renew and expand the temporary security research exemption could be better served by a permanent exemption that would provide greater clarity that researchers can engage in good-faith security testing without fear of liability.⁸⁹ In crafting permanent exceptions, however, Congress must treat the unduly narrow scope of Section 1201's existing permanent exceptions—including the exception for security testing and encryption research—as a cautionary tale.⁹⁰ In the context of security research, Congress's failure to craft a sufficiently broad exception has itself led to the need for a seemingly endless battle before the Copyright Office to secure a sufficiently broad exemption.

Against that backdrop, any new efforts to adopt a permanent exception for security research (or to modify the existing exceptions) should aim to draw the exception broadly and simply so it can be easily applied with certainty by researchers to typical research projects that do not implicate any concerns about copyright infringement. Given the difficulty in crafting sufficiently broad exceptions, Congress could address the need for more certainty for researchers simply by limiting Section 1201's application to situations where there is a nexus with copyright infringement.⁹¹

3. Once a company integrates copyrightable computer code into a product, Section 1201 can dramatically limit a consumer's ability to use it. Although the Copyright Office has granted exemptions to remedy the right to repair, many consumers remain unable to repair or otherwise edit products for purposes of fair use.

a. Has Section 1201's limitations on the use of consumer products expanded beyond the scope of what Congress intended the law to protect when it was enacted?

Yes. Section 1201's history demonstrates that it was primarily concerned with facilitating the digital distribution traditional categories of copyrighted works such as movies, music,

⁸⁷ See Comments of Dominion Election Systems, et al. at 4-5 (Feb. 12, 2018), https://cdn.loc.gov/copyright/1201/2018/comments-021218/class10/Class_10_Opp'n_Election_System_Providers.pdf.

⁸⁸ See Jack Cable, et al., *Response to Voatz's Supreme Court Amicus Brief* (Sept. 14, 2020), <https://disclose.io/voatz-response-letter.pdf>.

⁸⁹ See discussion *supra*, Part I(2).

⁹⁰ See *id.*

⁹¹ See Reid Testimony, *supra* note 4 at 11.

and books. The widespread proliferation of software in devices and products that touch on every aspect of modern life could hardly have been foreseen by Congress more than two decades ago. It is also clear that Congress did not intend for the Copyright Office to become a general-purpose regulatory agency over any activity that implicates devices simply because they coincidentally include copyrighted computer software. Section 1201 has drifted far from its mission of facilitating digital media distribution.

b. What policy solutions might more appropriately balance interests in consumers' right to repair (or otherwise legitimately use a product that they have purchased) and the need to prevent copyright infringement? Would requiring a nexus between copyright infringement and liability under Section 1201 be a solution, and why or why not?

In my written statement, I detailed a number of reforms to the triennial review process that could facilitate a better balance of interests surrounding a variety of uses, including repair, and copyright infringement. In particular, I suggest that Congress:

- Expand and permanently codify long-standing temporary exemptions and eliminate the automatic expiration of exemptions;
- Ensure that exemptions apply to the prohibitions on trafficking;
- Allow proponents to seek renewal and expansion of exemptions at any time on an accelerated timetable;
- Make clear that the Librarian can grant exemptions that cut across multiple or all classes of works for noninfringing uses, users, and purposes;
- Remove from the ambit of the Office's authority analysis of infringement in proposed exemptions;
- Eliminate the "mere inconvenience" doctrine;
- Eliminate or significantly lower the standard for establishing a likelihood of adverse effects;
- Bar the Copyright Office from denying or limiting exemptions on grounds unrelated to copyright policy; and
- Transform the proceeding into a non-adversarial policymaking exercise by requiring the Library and the Office to proactively investigate needed exemptions, to stop categorizing commenters as litigation-style proponents and opponents, and to comply with the Administrative Procedure Act.⁹²

However, I believe the imposition of a nexus requirement would most neatly and cleanly provide the certainty needed by the wide array of exemption proponents, including those seeking to repair their devices, while balancing the interests of copyright holders.⁹³

⁹² *Id.* at 10-11.

⁹³ *Id.* at 11.

c. Is the solution to this problem simple enough to be remedied by a clear “fair use” exception to Section 1201? What downsides might come from this approach? If you oppose such an exception, how should fair use be addressed instead?

A “fair use” exception that explicitly removed from the ambit of Section 1201 non-infringing fair uses would be an improvement over the treatment of the statute by courts that wrongly refuse to recognize a nexus requirement.⁹⁴ However, a express fair use exception might risk raising confusion around non-infringing activity that is covered by statutory exceptions in addition to fair use. For example, the temporary e-book accessibility exemption covers circumvention by “authorized entities” acting pursuant to the specific exception in the Chafee Amendment to the Copyright Act.⁹⁵

Rather than attempting to account for each of the numerous specific statutory exceptions, their intersection with Section 1201, and the extent to which they are coextensive with fair use, a better approach would be for Congress to adopt a nexus requirement. A nexus requirement would premise Section 1201 liability on a base finding of infringement, thereby ensuring that Section 1201 would accommodate fair uses and activities eligible for statutory exemptions alike.

III. Responses to Questions from Senator Grassley

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?

As I noted in my response to Chairman Tillis, Congress should consider both the categories of activities that are covered and their scope in evaluating permanent exemptions.⁹⁶ In terms of categories, there are a wide range of beneficial, non-infringing activities not fully covered by permanent exceptions that have required the Copyright Office to recommend a wide array of temporary exemptions. These temporary exemptions, which should be made permanent, cover a range of activities including accessibility, education, cybersecurity, documentary filmmaking, the authoring of noncommercial remix videos and multimedia e-books, patients’ extraction of their own medical data from implantable medical devices, switching wireless networks, installing software of a user’s choosing, repairing devices and vehicles, and archivism.⁹⁷

⁹⁴ See discussion *supra*, Part I(2).

⁹⁵ See 37 C.F.R. § 201.40(3)(ii) (allowing circumvention to use a “nondramatic literary work, lawfully obtained and used by an authorized entity pursuant to 17 U.S.C. 121.”).

⁹⁶ See discussion *supra*, Part I(2).

⁹⁷ Reid Testimony, *supra* note 4 at 5-6.

In crafting permanent exceptions, however, Congress should treat the unduly narrow scope of Section 1201's existing permanent exceptions as a cautionary tale. Indeed, nearly all of the permanent exceptions are drawn narrowly with numerous caveats and loopholes that make them difficult to apply in practice, which my response to Chairman Tillis spells out in detail.⁹⁸

The permanent exceptions have proven less helpful than Congress intended in crafting them. Any new efforts to adopt permanent exceptions should aim to draw them broadly and simply so they can actually be used by people with disabilities, security researchers, teachers, students, authors, video creators, patients, phone customers, computer users, mechanics, farmers, technicians, car owners, homeowners, and librarians. Given the difficulty in crafting sufficiently broad exceptions, Congress could more aptly solve Section 1201's chilling effects by simply requiring a nexus with copyright infringement.⁹⁹

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?

As I noted in my response to Chairman Tillis, I believe reading Section 1201 to treat third-party assistance as potentially implicating the anti-trafficking tools, as the Copyright Office has chosen to do,¹⁰⁰ is at odds with the statute itself.¹⁰¹ The Office and courts should avoid treating the exemptions granted by the Librarian under Section 1201(a)(1)(C) as necessarily excluding third-party assistance, since doing so undercuts the clear purpose of Section 1201(a)(1)(C).

Nevertheless, I agree with the Office's recommendation that temporary exemptions should be extended to necessary third-party assistance.¹⁰² I would go further by expressly permitting the Office to extend exemptions to the trafficking bans under Section 1201(a)(2) and (b).¹⁰³ Again, this problem could be most simply addressed by narrowing Section 1201 to apply only where a nexus with copyright infringement exists.¹⁰⁴

⁹⁸ See discussion *supra*, Part I(2).

⁹⁹ See Reid Testimony, *supra* note 44 at 11.

¹⁰⁰ See Smith Testimony at 10.

¹⁰¹ See discussion *supra*, Part I(5).

¹⁰² See Smith Testimony at 10.

¹⁰³ See Reid Testimony, *supra* note 4 at 10.

¹⁰⁴ See *id.* at 11.

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?*

As I noted in my response to Chairman Tillis, I commend the Office for its good-faith efforts over the past two triennial reviews to make available a streamlined process for participants and their representatives seeking renewal of long-standing exemptions.¹⁰⁵ Nevertheless, as I describe in detail in my written statement, the streamlined process is not available for the numerous exemptions that require modification, expansion, and other changes, and the process to seek even minor changes to an exemption is a significant burden that requires hundreds of hours of legal assistance at significant expense that is out of reach for many would-be exemption proponents.¹⁰⁶ The triennial review is an unduly burdensome, repetitive, and unsatisfactory context in which to address the numerous policy goals that it considers and copyright holders and the public alike would be better served by narrowing Section 1201 to apply only where a nexus with copyright infringement exists.¹⁰⁷

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?*

As I noted in my response to Sen. Blumenthal, my written statement details a number of reforms to the triennial review process that could facilitate better access to the triennial review.¹⁰⁸ In particular, I suggest that Congress:

- Expand and permanently codify long-standing temporary exemptions and eliminate the automatic expiration of exemptions;
- Ensure that exemptions apply to the prohibitions on trafficking;
- Allow proponents to seek renewal and expansion of exemptions at any time on an accelerated timetable;
- Make clear that the Librarian can grant exemptions that cut across multiple or all classes of works for noninfringing uses, users, and purposes;
- Remove from the ambit of the Office’s authority analysis of infringement in proposed exemptions;
- Eliminate the “mere inconvenience” doctrine;
- Eliminate or significantly lower the standard for establishing a likelihood of adverse effects;

¹⁰⁵ See discussion *supra*, Part I(4) (citing Reid Testimony, *supra* note 4 at 9).

¹⁰⁶ See Reid Testimony, *supra* note 4 at 6-9.

¹⁰⁷ See *id.* at 11.

¹⁰⁸ See discussion *supra*, Part II(3)(b).

- Bar the Copyright Office from denying or limiting exemptions on grounds unrelated to copyright policy; and
- Transform the proceeding into a non-adversarial policymaking exercise by requiring the Library and the Office to proactively investigate needed exemptions, to stop categorizing commenters as litigation-style proponents and opponents, and to comply with the Administrative Procedure Act.¹⁰⁹

However, I again believe the imposition of a nexus requirement would most neatly and cleanly provide the certainty needed to promote the need for certainty by the wide array of exemption proponents while balancing the interests of copyright holders.¹¹⁰

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 the caveat that I have not worked directly on the development of the repair exemption, my understanding is that the repair of vehicles, farm equipment, machinery, and other products is addressed through two existing temporary exemptions, one for motorized land vehicles¹¹¹ and another for smartphones, home appliances, and home systems,¹¹² and is currently subject to additional proposals for expanded temporary exemptions and permanent exceptions.

Motorized Land Vehicles. The motorized land vehicle exemption allows for circumvention as necessary to access software for “diagnosis, repair, or lawful modification of a vehicle function” on a personal automobile, commercial vehicle, or mechanized agricultural vehicle.¹¹³ There are two limitations to the exemption:

- *Subscription Services.* The first limitation does not allow users to access computer programs that are ordinarily “accessed through a separate subscription service.”¹¹⁴ It is my understanding that this limitation is intended to allow for car companies to ship the physical components necessary to enable an optional feature of a vehicle to work, but to limit the feature using software until a user pays an additional fee to access the feature.
- *Compliance with Other Laws.* The second limitation obviates the application of the exemption unless the circumvention is consistent with other laws, including EPA

¹⁰⁹ *Id.* at 10-11.

¹¹⁰ *Id.* at 11.

¹¹¹ 37 C.F.R. § 201.40(b)(9).

¹¹² 37 C.F.R. § 201.40(b)(10).

¹¹³ 37 C.F.R. § 201.40(b)(9).

¹¹⁴ *Id.*

and DOT regulations, and isn't intended to facilitate access to other copyrighted works.

It is my understanding the renewal of the exemption is pending in the current triennial review and supported by a number of organizations, including the Auto Care Association,¹¹⁵ the American Farm Bureau Federation,¹¹⁶ Consumer Reports,¹¹⁷ and others.¹¹⁸

Smartphones, Home Appliances, and Home Systems. The other repair exemption allows for circumvention as necessary for the “diagnosis, maintenance, or repair” of a “smartphone, home appliance, or home system, such as a refrigerator, thermostat, HVAC, or electrical system.”¹¹⁹ The “repair” of a device or system is defined as the “the restoring of the device or system to the state of working in accordance with its original specifications and any changes to those specifications authorized for that device or system,”¹²⁰ while the “maintenance” of a device or system is defined as “the servicing of the device or system in order to make it work in accordance with its original specifications and any changes to those specifications authorized for that device or system.”¹²¹ As with the motorized land vehicle exemption, there are limitations to the device-or-system exemption in addition to the definitions:

- *Lawfully Acquired.* The device or system must be “lawfully acquired.”¹²²
- *Compliance with Other Laws.* The circumvention must not be intended for the purpose of gaining access to other copyrighted works.

¹¹⁵ Petition of ACA (July 22, 2020), <https://www.copyright.gov/1201/2021/petitions/renewal/Renewal%20Pet.%20-%20Vehicle%20Repair%20-%20ACA.pdf>.

¹¹⁶ Petition of AFBF (July 22, 2020), <https://www.copyright.gov/1201/2021/petitions/renewal/Renewal%20Pet.%20-%20Vehicle%20Repair%20-%20Am.%20Farm%20Bureau%20Fed..pdf>.

¹¹⁷ Supporting Comments of Consumer Reports (Sept. 8, 2020), <https://www.copyright.gov/1201/2021/petitions/renewal/Supp.%20-%20Vehicle%20Repair%20-%20Consumer%20Reports.pdf>.

¹¹⁸ A full list of petitioners is available at the Copyright Office's website. <https://www.copyright.gov/1201/2021/petitions/renewal/>.

¹¹⁹ 37 C.F.R. § 201.40(b)(10).

¹²⁰ 37 C.F.R. § 201.40(b)(10)(ii).

¹²¹ 37 C.F.R. § 201.40(b)(10)(i).

¹²² 37 C.F.R. § 201.40(b)(10).

It is also my understanding that renewal of the device-or-system exemption is pending in the triennial review and supported by a number of organizations including the Electronic Frontier Foundation,¹²³ iFixit and Repair.org,¹²⁴ and Consumer Reports.¹²⁵

Expanded Exemptions. In addition to the requests for renewal exemptions, iFixit and Public Knowledge have petitioned the Office for a new exemption for repairing video game consoles.¹²⁶ They explain:

Video game consoles, like PCs, contain numerous discrete physical components. Failure of any one of these components can render the entire console inoperable. Manufacturers such as Sony, Nintendo, and Microsoft are increasingly using TPMs to pair console components to one another, thus preventing their repair or replacement by owners or third parties.¹²⁷

iFixit and Repair.org have petitioned the Office for an expanded exemption that would supplant the two existing exemptions with an umbrella exemption that would cover all “lawfully acquired devices to permit the diagnosis, repair, maintenance, or modification of those devices.”¹²⁸ Noting concerns about ambiguities in the existing exemptions, they explain:

The Register and Librarian should not create limited categories of devices that are excluded from or included in the exemption based on non-copyright concerns or arbitrary features of those devices. Owners of devices should be able to lawfully engage in noninfringing repair of their property regardless of whether they wear it, drive it, or type on it.¹²⁹

¹²³ Petition of EFF (July 22, 2020), <https://www.copyright.gov/1201/2021/petitions/renewal/Renewal%20Pet.%20-%20Device%20Repair%20-%20EFF.pdf>.

¹²⁴ Petition of EFF, iFixit, and Repair.org (July 22, 2020), <https://www.copyright.gov/1201/2021/petitions/renewal/Renewal%20Pet.%20-%20Device%20Repair%20-%20Repair.org%20et%20al.pdf>.

¹²⁵ Supporting Comments of Consumer Reports (Sept. 8, 2020), <https://www.copyright.gov/1201/2021/petitions/renewal/Supp.%20-%20Device%20Repair%20-%20Consumer%20Reports.pdf>

¹²⁶ Petition of iFixit and Public Knowledge (Sept. 8, 2020), <https://www.copyright.gov/1201/2021/petitions/proposed/New%20Pet.%20-%20iFixit%20&%20Public%20Knowledge.pdf>.

¹²⁷ *Id.* at 2.

¹²⁸ Petition of iFixit and Repair.org (Sept. 8, 2020), <https://www.copyright.gov/1201/2021/petitions/proposed/New%20Pet.%20-%20Repair.org%20&%20iFixit.pdf>.

¹²⁹ *Id.* at 2.

It is also my understanding that the Office has recommended a permanent repair exemption, though it appears to be significantly narrower than the expanded exemptions described above.¹³⁰

My Views. While I defer to my colleagues at EFF, Public Knowledge, iFixit, and other organizations who have led the effort to secure and expand these exemptions, I note that the need for the Office to yet again address problematic limitations with these exemptions exemplifies the ongoing problems with the triennial review. The grant of unduly limited exemptions continues to exclude or fail to identify important categories of devices and introduce ambiguities and other problems that require further reconsideration of what should be a straightforward right for consumers and users to repair their devices. I would also note that the motorized land vehicle exemption problematically imports environmental and transportation law into copyright policy and positions the Copyright Office as a general-purpose regulator rather than leaving detailed questions about environmental and transportation to agencies with expertise and delegated responsibilities in those areas.

* * *

Thank you for the opportunity to testify before the Subcommittee and for the additional opportunity to respond to questions in writing. I look forward to working with the Subcommittee as you continue to explore reforms to Section 1201.

/s/

Blake E. Reid

CC:
Brad Greenberg
Jason Covey

¹³⁰ See 2017 Study Report, *supra* note 3 at 94-95.