Before the

Subcommittee on Intellectual Property

Judiciary Committee

United States Senate

Hearing on

Are Reforms to Section 1201 Needed and Warranted?

Written Testimony of

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Thank you for the invitation to testify on behalf of the Entertainment Software Association (ESA), the Motion Picture Association, Inc. (MPA) and the Recording Industry Association of America (RIAA) (collectively referred to as the "Joint Creators and Copyright Owners") concerning a critically important section of title 17 of the U.S Code, 17 U.S.C. § 1201 ("Section 1201"). The circumvention and trafficking prohibitions contained in Section 1201 have been fundamental to produce today's vibrant digital marketplace in entertainment content, which has evolved to the great benefit of American consumers, copyright owners, and their technology partners.

In 1998, Congress foresaw that "an increasing number of intellectual property works [we]re being distributed using a 'client-server' model, where the work is effectively 'borrowed' by the user (e.g., infrequent users of expensive software purchase a certain number of uses, or viewers watch a movie on a pay-per-view basis). To operate in this environment, content providers will need both the technology to make new uses possible and the legal framework to ensure they can protect their work from piracy."[1]

That Congressional foresight and the resulting statute have withstood the test of time by enabling numerous business models that provide creators and consumers with numerous choices with respect to price, access and mobility. Underpinning all of these choices is the exclusive right of copyright owners to prevent unauthorized access to works, codified in Section 1201(a). While the Senate considers whether reforms to Section 1201 are needed or warranted, it should keep in mind that the statute, in its current form, has undeniably accomplished Congress' goal of

[1] H.R. Rep. No. 105-551 pt. 2, at 23 (1998).

"mak[ing] more works more widely available, and the process of obtaining permissions easier."[2] For the reasons below, the Joint Creators and Copyright Owners do not currently endorse any legislative changes to the Section 1201 rulemaking or to the other provisions of Section 1201.

Digital Products and Services Protected by Section 1201

When Section 1201 was enacted, the market for DVDs was in its infancy, iTunes did not yet exist, and videogame consoles were standard consoles used solely for playing game cartridges or discs. Now, for motion pictures, consumers have access to subscription streaming services and mobile apps like Disney Plus, Netflix, Peacock, HBO Max, Crackle, CBS All Access, and Hulu, as well as enhanced video-on demand and mobile viewing opportunities through cable providers and satellite television providers. This access often involves the ability to temporarily download movies or shows to watch so long as a consumer continues her subscription. Consumers can also "rent" or acquire more permanent digital copies of motion pictures from online retailers, such as Amazon and Apple, and access those titles through the Movies Anywhere service. Similarly, for sound recordings, millions of consumers have elected to access works through subscription services and apps such as SiriusXM, Spotify and Apple Music. Another extremely popular method of listening to sound recordings involves watching music videos on demand, through websites such as YouTube. And videogame consoles and other devices now enable consumers to access many of these services to enjoy motion pictures and sound recordings, in addition to enabling gamers – whether on consoles, mobile devices, or virtual reality equipment – to enjoy videogames with amazing graphics, immersive storylines,

[2] STAFF OF H. COMM. ON THE JUDICIARY, 105TH CONG., SECTION-BY-SECTION ANALYSIS OF H.R. 2281 AS PASSED BY THE UNITED STATES HOUSE OF REPRESENTATIVES ON AUGUST 4TH, 1998, at 6-7 (Comm. Print 1998).

and multi-player functionality that have resulted in one of the fastest growing economic sectors in the United States.

The avalanche of new online business models – all of which depend on access controls – coupled with traditional lines of business have proven to be an economic success story for the entertainment industry and for the U.S. economy. Video games, movies, and recorded music contribute billions to the U.S. economy. Taken together, revenues alone for the three industries were nearly $90 billion in 2019. Video game industry revenue in the U.S. was $41.5 billion. MPA reports that 2019 movie revenue across box office and home entertainment (both physical and digital) amounted to $36.6 billion. And the RIAA reports that U.S. recorded music revenues in 2019 were $11.1 billion across streaming services as well as digital and physical purchases. In the first half of 2020, streaming grew to 85% of retail sound recording revenue, up from 80% the prior year. While the recording industry still has not returned to the revenue levels of the late 1990's, offerings supported by technological protection measures are helping the industry make a comeback.

All of these developments became reality, in large part, because of Section 1201. As the U.S Court of Appeals for the Ninth Circuit described it, "bypassing a password and breaking into a locked room in order to read or view a copyrighted work would not infringe on any of the copyright owner's exclusive rights under [17 U.S.C.] § 106."[3] Accordingly, Congress elected "to grant copyright owners an independent right to enforce the prohibition against circumvention

[3] *MDY Industries, LLC v. Blizzard Entertainment, Inc.*, 629 F.3d 928, 947 (9th Cir. 2010); *see also* S. Rep. No. 105-190, at 1–2, 8–9 (1998) ("[P]rior to this Act, the conduct of circumvention was never before made unlawful.").

of effective technological access controls."[4] This exclusive right prohibits accessing a subscription service without a proper password, 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," and playing pirated, unauthenticated copies of video games. It is critically important that this right against unauthorized access stands alone, independent from acts of traditional copyright infringement. Through the enactment of Section 1201, Congress ensured that copyright protection continued to incentivize American creativity in the digital age. If the prohibition on circumvention of technological protection measures could only be enforced in the context of a specific copyright infringement, it would be essentially redundant of 17 U.S.C. § 106, and would not provide the additional layer of protection necessary to thwart piracy.

Equally important are the protections provided by the anti-trafficking provisions of Sub-sections 1201(a)(2) and 1201(b). Lawmakers rightly understood in 1998 that these provisions prevent the growth of businesses designed to profit from enabling unauthorized access to digital content and/or copyright infringement through the provision of circumvention services or the circulation of circumvention tools.[5]

While no statutory provision can prevent *every* bad actor from engaging in such conduct, Section 1201's anti-trafficking provisions have succeeded in preventing such tools and services from finding their way into the mainstream, legitimate marketplace of big box stores and online

[4] *MDY*, 629 F.3d at 947.

[5] *See WIPO Copyright Treaties Implementation Act; and Online Copyright Liability Limitation Act: Hearing Before the Subcomm. on Courts and Intellectual Prop. of the H. Comm. on the Judiciary*, 105th Cong., 48 (1997) (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office) ("Because of the difficulty involved in discovering and obtaining meaningful relief from individuals who engage in acts of circumvention, a broader protection extending to those in the business of providing the means of circumvention appears to be necessary to make the protection adequate and effective. It is the conduct of commercial suppliers that will enable and result in large-scale circumvention.").

retailers, thereby giving copyright owners enough comfort to experiment and succeed with new business models. Maintaining these protections is a top priority for the Joint Creators and Copyright Owners, and they have successfully litigated multiple cases against defendants that violated the anti-trafficking provisions. Any action to weaken these provisions would create scenarios where services and tools primarily designed to enable unauthorized access to creative content and/or copyright infringement could become widely available to the detriment of the Joint Creators and Copyright Owners and, ultimately, consumers, who would potentially see a decline in the availability of high quality content at different price points.

The Rulemaking Conducted by the Copyright Office and the Library of Congress

Throughout my entire legal career, I have participated – on behalf of clients – in the triennial rulemaking proceeding designed by Congress to enable the creation of regulatory exemptions to Section 1201(a)(1). Although we have not always agreed with the outcome of the rulemaking proceedings, we have found the Copyright Office and the Librarian of Congress to be neutral arbiters capable of addressing with sophistication and fairness the discrete issues raised by petitioners who express concerns about specific uses of copyrightable works within the context of the anti-circumvention regime.

The benefit of this method for addressing such issues is that periodically revisiting the statute's performance and marketplace developments allows for flexibility and an up-to-date understanding of the rapidly changing circumstances, works and uses at play. Indeed, despite the existence of detailed statutory exceptions codified when Section 1201 was enacted, petitioners in the rulemaking frequently argue that regulatory exemptions are nevertheless necessary in areas – such as software security research – that Congress already addressed in the statute in 1998. As

Congress understood at that time, legislative efforts to address such concerns simply cannot keep up with the pace of technological change. This is especially true with respect to entertainment content because the methods for accessing and using such content are constantly evolving.

That said, as participants in the process that resulted in the transmission to Congress of the 2017 "Report of the Register of Copyrights on Section 12 of Title 17", we did not oppose the adoption of the "streamlined renewal" process for regulatory exemptions. This process reduces burdens on petitioners seeking renewal of previously granted exemptions, while also allowing copyright owners to raise "meaningful opposition" to such renewal if changes in the facts or the law provide a basis for doing so. Just recently, we elected not to oppose the renewal of any of the existing exemptions in the current proceeding, which began in June. While we continue to have concerns about the existence, scope and misuse of some the exemptions, we elected to focus on moving forward rather than revisiting the discussions from the last triennial cycle. However, we continue to believe that it is important for the statutory structure that created the rulemaking, including its placement of the burden to justify the need for exemptions on petitioners, to remain in place. As stated above, we do not currently endorse any legislative changes to the rulemaking or to the other provisions of Section 1201.[6] Moreover, we are currently reviewing and are very likely to oppose a number of the petitions for new regulatory exemptions/expansions of existing exemptions, which were filed last week on September 8, 2020.

[6] However, if Congress chooses to act to address the problem of state sovereign immunity from copyright infringement in the wake of the Supreme Court's recent decision in *Allen v. Cooper*, Congress should expressly state in such legislation that states are not only subject to suit for traditional copyright infringements, but also subject to suits for violations of Section 1201. *See* Comments of Copyright Alliance on Sovereign Immunity Study, U.S. Copyright Office, Docket No. 2020-9.

Potential Reforms to Section 1201

The companies disseminating motion pictures, video games, and sound recordings have taken steps to diversify the ways in which their content may be accessed and copied, such that consumers are benefitting from increased, not diminished, access to professional quality, creative materials (including by using/licensing devices, databases, websites, digital retailers and software designed both to protect content and provide fantastic user experiences). With respect to discrete areas of concern unrelated to entertainment content and the devices and services through which consumers access it, we believe that the existing rulemaking, in combination with private sector initiatives, have proven capable of addressing the vast majority of concerns. However, if this Subcommittee identifies specific areas in which it believes legislative reform may be necessary, we would welcome the opportunity to work with the Subcommittee and to emphasize ways of preventing any potential, unintended consequences that could harm the creators, disseminators and consumers of expressive works like video games, sound recordings and motion pictures.

Conclusion

I again want to thank the Subcommittee for inviting me to testify. I look forward to your questions, to hearing the testimony of the other panelists, and to participating as you move forward with deliberations concerning whether Section 1201 should be amended.

Respectfully submitted,

/s/ J. Matthew Williams
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ADDENDUM

The Entertainment Software Association (ESA) is the U.S. trade association serving companies that manufacture video game equipment and create software for game consoles, handheld devices, personal computers, and the internet.

The Motion Picture Association, Inc. (MPA) is a not-for-profit trade association that serves as the voice and advocate of the film and television industry around the world, advancing the business and art of storytelling, protecting the creative and artistic freedoms of storytellers, and bringing entertainment and inspiration to audiences worldwide.

The Recording Industry Association of America, Inc. (RIAA) is the trade organization that supports and promotes the creative and financial vitality of the major recorded music companies. Its members comprise the most vibrant record industry in the world. RIAA members create, manufacture and/or distribute approximately 85% of all recorded music legitimately produced and sold in the U.S.