

## Submission of Knowledge Ecology International

RE: 17 U.S.C. 1201: Notice and Request for Public Comment

To: Library of Congress; U.S. Copyright Office Docket No. 2015-8

This is the submission of Knowledge Ecology International (KEI) in response to the U.S. Copyright Office request for public comment on the “operation of section 1201 of Title 17, including the triennial rulemaking process established under the DMCA to adopt exemptions to the prohibition against circumvention of technological measures that control access to copyrighted works.” (U.S. Copyright Office Docket No. 2015-8).<sup>1</sup> Knowledge Ecology International is a non-governmental organization with offices in Washington, DC, and Geneva, Switzerland, that advocates for access to knowledge and access to affordable medicines, with a focus on promoting human rights and social justice.

- I. Rulemaking Procedure
- II. Anti-Trafficking Provisions
- III. Permanent Exemptions
- IV. Additional Proposed Requirements

**We propose the following amendments to 17 U.S.C. 1201(a)-(c), with proposed new language in bold, and language to be removed shown with strikethrough:**

(a) Violations regarding circumvention of technological measures.

(1) (A) No person shall circumvent a technological measure that effectively controls access to a work protected under this title. ~~The prohibition contained in the preceding sentence shall take effect at the end of the 2-year period beginning on the date of the enactment of this chapter [enacted Oct. 28, 1998].~~

(B) The prohibition contained in subparagraph (A) shall not apply to persons who are users of a copyrighted work which is in a particular class of works, if such persons are, or are likely to be ~~in the succeeding 3-year period,~~ adversely affected by virtue of such prohibition in their ability to make noninfringing uses of that particular class of works under this title, as determined under subparagraph (C).

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<sup>1</sup> KEI is grateful for the assistance of Gina Colarusso, 2L at American University Washington College of Law, in the preparation of this comment.

~~(C) During the 2-year period described in subparagraph (A), and during each succeeding 3-year period, t~~[T]he Librarian of Congress, upon the recommendation of the Register of Copyrights, who shall consult with the Assistant Secretary for Communications and Information of the Department of Commerce and report and comment on his or her views in making such recommendation, shall make the determination, **based upon the totality of the available evidence**, in a rulemaking proceeding for purposes of subparagraph (B) of whether persons who are users of a copyrighted work are, ~~or are likely to be in the succeeding 3-year period,~~ adversely affected by the prohibition under subparagraph (A) in their ability to make noninfringing uses under this title of a particular class of copyrighted works. In conducting such rulemaking, the Librarian shall examine--

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

(D) The Librarian shall publish any class of copyrighted works for which the Librarian has determined, pursuant to the rulemaking conducted under subparagraph (C), that noninfringing uses by persons who are users of a copyrighted work are, or are likely to be, adversely affected, and the prohibition contained in subparagraph (A) shall not apply to such users with respect to such class of works ~~for the ensuing 3-year period~~ **until the Librarian issues a contrary finding.**

~~(E) Neither the exception under subparagraph (B) from the applicability of the prohibition contained in subparagraph (A), nor any determination made in a rulemaking conducted under subparagraph (C), may be used as a defense in any action to enforce any provision of this title other than this paragraph. An exception granted under subparagraph (a)(1)(B) from the applicability of the prohibition contained in subparagraph (A), and any determination made in a rulemaking conducted under subparagraph (a)(1)(C), shall also provide a person with an exception under subparagraph (a)(2) and paragraph (b), so as to ensure that the intended beneficiaries of exemptions are able to engage in the permitted circumvention activities.~~

**(F) The Librarian shall request public comments at least every three years on the rules that have been adopted in the past, on revisions proposed for such rules, and on new rules that may be appropriate.**

(2) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that--

(A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;

(B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or

(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.

(3) As used in this subsection--

(A) to "circumvent a technological measure" means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner; and

(B) a technological measure "effectively controls access to a work" if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.

(b) Additional violations.

(1) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that--

(A) is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof;

(B) has only limited commercially significant purpose or use other than to circumvent protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof; or

(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof.

(c) Other rights, etc., not affected.

(1) Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.

(2) Nothing in this section shall enlarge or diminish vicarious or contributory liability for copyright infringement in connection with any technology, product, service, device, component, or part thereof.

(3) Nothing in this section shall require that the design of, or design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure, so long as such part or component, or the product in which such part or component is integrated, does not otherwise fall within the prohibitions of subsection (a)(2) or (b)(1).

(4) Nothing in this section shall enlarge or diminish any rights of free speech or the press for activities using consumer electronics, telecommunications, or computing products.

## **I. Explanation of Proposed Amendments to Rulemaking Procedure Under § 1201**

The Copyright Office has asked for public response on whether § 1201 should be adjusted to provide for presumptive renewal of previously granted exemptions, or otherwise be modified to streamline the process of continuing an existing exemption.

As written, the rulemaking provisions of section 1201 place an undue burden upon individual users and the general public interest, and should be amended to ensure a more equal balance between the interest of authors and the public. In order to facilitate a more equal balance, KEI calls for amendments to section 1201 that would provide (1) presumptive renewal of previously granted exemptions, (2) a review process that mandated a totality of the evidence rather than *de novo*, and (3) a removal of the sunset provisions which currently force granted exemptions to expire after only three years.

### Presumptive Renewal

KEI believes that § 1201 should be adjusted to provide for presumptive renewal of previously granted exemptions. Once an exemption is granted the burden should shift to the copyright owner to prove an infringement.

Currently § 1201(a)(1)(D) states that when noninfringing uses by persons who are users of a copyrighted work are provided an exemption (by the Librarian of Congress) from the prohibition under subparagraph (A), that exemption shall apply for “the ensuing 3-year period.”

To further ensure access for lawful purposes the statute should be amended to change the language found at the end of 1201(a)(1)(D). Rather than “that exemption shall apply for the ensuing 3-year period” it should read “that exemption shall apply until otherwise proven to be an infringing use of a copyrighted work.” This would allow for a presumptive renewal of granted exemptions, rather than the exemption expiring at the end of three years, and for the burden to shift onto the copyright owner to prove infringement once an exemption is granted.

Several times throughout the triennial rulemaking process there has been no opposition to proposed exemptions, yet the exemption must still be petitioned for every three years. For

example, the petition to permit circumvention so that literary works distributed electronically could continue to be accessed by persons who are blind, visually impaired, or print disabled were unopposed.<sup>2</sup> This is an arbitrary procedure that leads to a waste of resources. Enabling a presumptive renewal of exemptions, especially those that were unopposed, would lessen the burden placed upon the individual

To add to the burden of procedural complexity placed upon the general public, each rulemaking process has seen the classes of exemptions only become longer and more textually complex. For example, the 752-word exemption for audiovisual works in 2013 is far more difficult for educators to use than the 100-word exemption in 2010, despite some of the broader aspects of the 2013 exemption. Such complexities dissuade members of the general public from participating in the rulemaking process all together. Balance must be found.

The complexity of the 1201 statute has provided an over abundance of hardship upon individuals who are without the sophisticated resources that the industry benefits from. An amendment to the statute which levels the playing field among individual consumers and industry elites is overdue, and necessary. Furthermore, the exceptions authorized to the prohibition of 1201(a)(1) should not remain limited to circumvention of access controls. Rather, the exception should extend to the necessary devices, those which are needed to enable lawful circumvention, but are prohibited under 1201(a)(2) and 1201(b)(1).

#### Totality of the Evidence Review, Rather than *De Novo*

However, even if the Librarian of Congress fails to implement this adjustment, we believe there are other modifications necessary to streamline the process of continuing an existing exemption. The Librarian of Congress should no longer review petitions *de novo*, but rather, assess all of the evidence available at the time of petition, therefore including evidence brought by petitioner at a previous round of rulemaking.

Although the legislative history indicates that the assessment of adverse impacts on particular categories of works (under 1201(a)(1)(B)-(C)) be determined *de novo*, the statute itself does not explicitly mandate such review.<sup>3</sup> It is therefore within the power of the Librarian of Congress to interpret the statute in a way that is more equitable to the overburdened individual, who, thus far under the rulemaking process, has been forced to bring a case every three years for (often) the same exact exemption(s) she had previously been granted.

The legislative history also highlights the concern that was associated with providing an additional right against circumvention to copyright holders. Such concern was in overly restricting access to copyrighted materials, which are important to education, scholarship, and other socially vital endeavors. The waiver of prohibition outlined in 1201(a)(1) was meant to

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<sup>2</sup> 80 Fed. Reg. 81369, 81371 (Dec. 29, 2015).

<sup>3</sup> H.R. Rep. No. 105-551, pt. 2, at 37 (1998)[hereinafter the Commerce Comm. Report].

ensure access for lawful purposes was not unjustifiably diminished.<sup>4</sup> However, this goal has not adequately been met. Not requiring *de novo* review of the adverse impacts would ensure better compliance with the intent of the triennial review process.

Short of eliminating *de novo* review, or a shift in the burden of proof, language should be added under 1201(a)(1)(C) to require the Librarian of Congress to consider the totality of available evidence when assessing whether to waive the prohibition for an individual. This would, at least partially, mitigate the burden on the individual by allow evidence that has been previously provided (during a past triennial rulemaking) to be used again, rather than forcing the individual to start from scratch at each triennial rulemaking.

## **II. Explanation of Proposed Amendments to § 1201 Regarding Anti-Trafficking Provisions**

The Copyright Office has asked for public comment on the role of the anti-trafficking provisions of sections 1201(a)(2) and 1201(b) in deterring copyright infringement, and to address whether any amendments may be advisable.

As written, the anti-trafficking provisions exceed the scope of the WIPO treaties that mandated the existence of a anti-circumvention law, and thus place an undue burden upon individual users and the general public. In order to ensure that § 1201 strikes a balance between the rights of authors and the larger public interest, as the WIPO treaties also require, KEI calls for amendments that would extend exemptions to the general prohibition of circumvention on technology protection measures to both of the anti-trafficking provisions: 1201(a)(2) and 1201(b).

While the two anti-trafficking provisions address tools of circumvention, each one provides a separate and distinct protection for the copyright owner. According to the Ninth Circuit Court of Appeals, § 1201(a)(2) “prohibits the circumvention of a measure that ‘effectively controls access to a work protected under this title,’” whereas the prohibition in 1201(b)(1) is “aimed at circumventions of measures that protect the copyright itself: it entitles copyright owners to protect their existing exclusive rights under the Copyright Act.”<sup>5</sup> The Court continued, “historically speaking, preventing ‘access’ to a protected work in itself has not been a right of a copyright owner arising from the Copyright Act.”<sup>6</sup>

Essentially, § 1201 of the DMCA provides a new right to copyright owners to protect access to a work, where it traditionally did not exist,<sup>7</sup> and under 1201(b)(1), it “reinforces copyright owners’

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<sup>4</sup> *Id.*

<sup>5</sup> *MDY Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 997 (9th Cir. 2010).

<sup>6</sup> *Id.* (citing 17 U.S.C. § 106).

<sup>7</sup> *Id.*; See also Jay Dratler, *Cyberlaw: Intellectual Prop. in the Digital Millennium*, § 1.02 (2009).

traditional exclusive rights (under § 106) by granting them an additional cause of action against those who traffic in circumventing devices that facilitate infringement.”<sup>8</sup>

In order to allow users to engage in lawful circumvention, § 1201(a)(2) should be amended to allow the granted exemptions to the general prohibition on circumvention to extend to the anti-trafficking prohibitions in both 1201(a)(2) and 1201(b)(1). Violation of 1201(a)(2), which prohibits trafficking in devices that facilitate circumvention of access control measures, will not always be a violation of 1201(b), which prohibits trafficking in devices that facilitate circumvention of measures that protect against copyright infringement.<sup>9</sup> Thus, an extended exemption should apply to both of these paragraphs. Such an amendment would ensure that intended beneficiaries of exemptions are able to engage in the permitted circumvention activities.

While 1201(a)(1) enables the Librarian of Congress to create exemptions to prohibition on circumvention of access controls, the statute does not authorize additional exemptions to the device prohibition of sections 1201(a)(2) and 1201(b)(1). Therefore, a person may be granted permission to engage in circumvention, but not be able to lawfully use the device necessary, or seek out a capable service provider, to perform such circumvention.

For example, a vehicle owner may require assistance from an auto mechanic technician to take advantage of an exemption that allows the circumvention of access controls on automobile software to make a repair.<sup>10</sup> However, under 1201(a)(2) an auto mechanic technician may not offer circumvention services to the vehicle owner, despite the exception that the vehicle owner was granted. After going through the lengthy process of petitioning for the exception, the vehicle owner now faces the obstacle of figuring out how to actually use the exception without violating a separate provision of § 1201.

Not only does this obstacle, created by the statute, impose an even greater burden upon the vehicle owner, but it also unnecessarily goes beyond the original intent of the legislation. Section 1201 was enacted in order to adhere to our international obligation under two WIPO treaties, both of which simply require that “contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.”<sup>11</sup>

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<sup>8</sup> *MDY Indus., LLC*, 629 F.3d at 997.

<sup>9</sup> *MDY Indus., LLC*, 629 F.3d at 997.

<sup>10</sup> 80 Fed. Reg. 81369, 81372 (Dec. 29, 2015) (citing U.S. Copyright Office, Section 1201 Rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights 4 n.13 (2015), <http://copyright.gov/1201/2015/registers-recommendation.pdf>).

<sup>11</sup> World Intellectual Property Organization Copyright Treaty (1996), Art. 11; World Intellectual Property Organization Performances and Phonograms Treaty (1996), Art. 18.

These WIPO treaties do not require a prohibition on devices used for circumvention, but rather speaks only to the act of circumvention. Furthermore, the language in the treaties indicates that there should be protection against unlawful circumvention. However, section 1201 prohibits any device “primarily designed or produced for the purpose of circumventing” which effectively prohibits legitimate devices used for lawful circumvention, which exceeds the obligations set forth in the WIPO treaties.

Finally, the Preamble of the WIPO Copyright Treaty recognizes, “the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention . . . .”

Unfortunately, the legislation which incorporates these WIPO treaty obligations has overlooked the need for this balance of rights. While there are some permanent exemptions that were seemingly incorporated to strike a balance, they have failed to do so, as the groups representing the categories of exemptions have had to waste time and resources in continuously petitioning for broader exceptions every three years.

### **III. Proposed Amendment to §1201 Regarding Permanent Exemption Provisions:**

The provisions of § 1201 that provide “permanent exemptions” are complex, and in the opinion of some users, effectively worthless. The Copyright Office has asked if the existing categories of permanent exemptions are necessary, relevant, and/or sufficient, to which we respond, no, the existing categories are not sufficient. The exemptions should be rewritten to enable broader use of noninfringing circumvention by the groups mentioned in 1201(d)-(j). Furthermore, a permanent exemption for the blind or visually impaired should be added.

While we support the notion that previously granted and unopposed exemptions should receive a presumptive renewal, such renewal will not go far enough to ensure adequate access of digital works to blind, or visually impaired persons. The Copyright Office should amend section 1201 to include a provision which provides a permanent exemption for blind or visually impaired persons. Such an exemption should at least encompass:

“Literary works, distributed electronically, that are protected by technological measures which either prevent the enabling of read aloud functionality or interfere with screen readers or other applications or assistive technologies, when a copy of such a work is lawfully obtained by a person who is blind or has a visual impairment.”<sup>12</sup>

A permanent exemption would implement the obligations set forth in the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or

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<sup>12</sup> See 77 Fed. Reg. 65,260, 65,262 (Oct. 26, 2012) (to be codified at 37 C.F.R pt. 201).



Otherwise Print Disabled (Marrakesh Treaty for the Blind).<sup>13</sup> Article 4 of the Marrakesh Treaty for the Blind requires that

“[c]ontracting parties shall provide in their national copyright laws for a limitation or exception to the right of reproduction, the right of distribution, and the right of making available to the public as provided by the WIPO Copyright Treaty (WCT), to facilitate the availability of works in accessible format copies for beneficiary persons. The limitation or exception provided in national law should permit changes needed to make the work accessible in the alternative format.”

Article 7 directly addresses obligations concerning technological measures, requiring contracting parties to

“take appropriate measures, as necessary, to ensure that when they provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures, this legal protection does not prevent beneficiary persons from enjoying the limitations and exceptions provided for in this treaty.”

A permanent exception to the prohibitions under section 1201 for beneficiary persons, as defined by the Marrakesh Treaty for the Blind,<sup>14</sup> would comply with the treaty obligation.

#### **IV. Suggestion to Require Fee for Registration of a Technological Protection Measure**

The Copyright Office has asked for comment on any additional issues that should be of consideration in conducting its study.

KEI believes that the Copyright Office should consider ending the system where all TPM/DRM systems are automatically protected and subject to government enforcement actions. Technical measures to protect data and works have been used before the DCMA, and can work without any protection under the law.

There do exist cases where the government should extend a legal status the regimes that is associated also with government enforcement actions. However, this should be based upon (a) the registration of the DRM/TPM seeking legal protection, (b) an application process that addresses the standards that are appropriate for obtaining legal protection, and (c) fees sufficient to cover at least some of the costs associated with managing the system of legal protection.

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<sup>13</sup> Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (June 27, 2013) *available at* [http://www.wipo.int/edocs/lexdocs/treaties/en/marrakesh/trt\\_marrakesh\\_001en.pdf](http://www.wipo.int/edocs/lexdocs/treaties/en/marrakesh/trt_marrakesh_001en.pdf). [hereinafter Marrakesh Treaty for the Blind].

<sup>14</sup> Marrakesh Treaty for the Blind, art. 3, June 27, 2013 (defining “beneficiary persons”).

The standards associated with legally protected DRM/TPM systems should include an obligation to show how the DRM/TPM system proposes to address, where appropriate and consequential:

1. The public's legitimate use or access when there are limitations and exceptions to the rights of copyright holders,
2. The preservation and archiving of works,
3. The privacy of users, and
4. Any other issues relevant to the context of the use of the DRM/TPM.