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**Before the  
Subcommittee on Intellectual Property  
Committee on the Judiciary  
United States Senate  
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Chairman Tillis, Ranking Member Coons, and Members of the Subcommittee,

Thank you for the opportunity to appear before you today to provide the U.S. Copyright Office's perspective on section 1201 of title 17. Enacted in 1998 as part of the Digital Millennium Copyright Act ("DMCA"), section 1201 protects against the circumvention of technological measures used by copyright owners to prevent unauthorized access to or use of their works. Over the past two decades, this provision has largely operated as originally envisioned by Congress, discouraging piracy and infringement, facilitating innovation, and providing consumers with a wide range of content delivery options at a variety of price points. It is also true, however, that the technological landscape has changed dramatically since 1998. The increasing prevalence of technological measures applied to computer code embedded in consumer devices has connected section 1201 to a wide range of activities, from accessing personal data in medical devices to tractor repair, not previously implicated by copyright.

Since section 1201's enactment, the Copyright Office has had unique insight into how the law has operated, and how it relates to technological advances. By statute, the Office is responsible for administering the triennial rulemaking proceeding through which members of the public may obtain temporary exemptions to the prohibition on circumvention. In 2017, the Office completed a comprehensive public study for Congress on section 1201, in which we considered comments from stakeholders throughout the copyright ecosystem. Based on that input and analysis, the Office implemented improvements to its administration of the rulemaking process that have significantly eased burdens on both participants and the Office, creating a more user-friendly process. The study also recommended several legislative updates for

Congress's consideration. The Office welcomes the opportunity to share these perspectives and recommendations with the Subcommittee.

## I. Background and Statutory Framework

### A. Overview

Copyright owners who distribute works in digital form (whether over the internet or on physical media) often employ "technological protection measures," or "TPMs," to protect those works from unauthorized access or use. Common examples include password systems that prevent nonsubscribers from accessing streaming services, computer code that prevents DVDs from playing on unauthorized devices, and code that prevents a purchaser from copying text from an ebook or sending the file to others.

Congress enacted section 1201 to provide copyright owners with new legal tools to prevent the circumvention of TPMs and the manufacture and dissemination of devices designed for that purpose.<sup>1</sup> It did so in part to implement two international treaties adopted by the United States and other members of the World Intellectual Property Organization ("WIPO") in December 1996.<sup>2</sup> Congress also sought to encourage the development of a lawful online market for copyrighted works, recognizing that "copyright owners will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy."<sup>3</sup> By providing specific legal protection for TPMs, Congress aimed to "creat[e] the legal platform for launching the global digital on-line marketplace for copyrighted works."<sup>4</sup>

Section 1201 provides three different prohibitions, which differ based on the type of TPM involved. First, it prohibits the conduct of circumventing a TPM used to prevent unauthorized access to a copyrighted work, known as "access controls."<sup>5</sup> Second, it prohibits "trafficking" in devices or services primarily designed or marketed for use in circumventing access controls, or that have only a limited commercially significant

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<sup>1</sup> Pub. L. No. 105-304, 112 Stat. 2860 (1998).

<sup>2</sup> The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (collectively, the "WIPO Internet Treaties") both require member countries to provide "adequate legal protection and effective legal remedies" against the circumvention of TPMs. WIPO Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65; WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 36 I.L.M. 76.

<sup>3</sup> S. REP. NO. 105-90, at 8 (1998).

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

<sup>5</sup> 17 U.S.C. § 1201(a)(1).

purpose or use other than circumvention.<sup>6</sup> Third, it prohibits trafficking in devices or services used to circumvent TPMs known as “copy controls” —*i.e.*, those that prevent unauthorized copying, distribution, or other activities that are the subject of a copyright owner’s exclusive rights under section 106 of the Copyright Act.<sup>7</sup>

Section 1201 contains several “permanent” statutory exceptions for circumvention and, in some cases, trafficking activities. The exemptions cover circumstances involving nonprofit libraries, archives, and educational institutions;<sup>8</sup> law enforcement, intelligence, and other government activities;<sup>9</sup> reverse engineering to facilitate the development of interoperable computer programs;<sup>10</sup> encryption research;<sup>11</sup> protection of minors;<sup>12</sup> protection of personally identifying information;<sup>13</sup> and security testing.<sup>14</sup>

## **B. The Triennial Rulemaking**

In addition to the permanent exceptions, the prohibition on circumvention of access controls is subject to any temporary exemptions that may be adopted by the Librarian of Congress following a statutorily prescribed rulemaking. These exemptions apply *only* to the conduct of circumvention of access controls. The statute does not authorize the Librarian to adopt exemptions to the anti-trafficking provisions.

The triennial section 1201 rulemaking is a key part of the statutory scheme, striking a balance between copyright and digital technologies. Characterized as a “fail-safe” mechanism,<sup>15</sup> the rulemaking proceeding is intended to ensure that the bar on circumvention does not unjustifiably diminish otherwise lawful access to categories of copyrighted works by members of the public, beyond those uses covered by the permanent exemptions.<sup>15</sup> The statute directs the Librarian, upon the recommendation

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<sup>6</sup> *Id.* § 1201(a)(2) (“No person shall manufacture, import, offer to the public, provide, or otherwise traffic in” circumvention devices or services).

<sup>7</sup> *Id.* § 1201(b). Section 1201 contains no prohibition against the *conduct* of circumventing a copy control. Congress believed that prohibiting the act of circumventing a copy control was unnecessary because such conduct ordinarily “will occur in the course of conduct which itself implicates the copyright owner[']s rights under title 17.” S. REP. NO. 105-190, at 29.

<sup>8</sup> 17 U.S.C. § 1201(d).

<sup>9</sup> *Id.* § 1201(e).

<sup>10</sup> *Id.* § 1201(f).

<sup>11</sup> *Id.* § 1201(g).

<sup>12</sup> *Id.* § 1201(h).

<sup>13</sup> *Id.* § 1201(i).

<sup>14</sup> *Id.* § 1201(j).

<sup>15</sup> H.R. REP. NO. 105-551, pt. 2, at 36 (1998).

of the Register of Copyrights following a rulemaking proceeding, to determine “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 . . . in their ability to make noninfringing uses under this title of a particular class of copyrighted works.”<sup>16</sup> In making the recommendation, the Register consults with the Assistant Secretary for Communications and Information of the Department of Commerce.<sup>17</sup>

The rulemaking is administered by the Copyright Office, which solicits exemption proposals from the public and develops a comprehensive administrative record using information submitted by interested parties.<sup>18</sup> Based on the evidence submitted, the Register provides a written recommendation to the Librarian as to which exemptions are warranted, along with proposed regulatory text.<sup>19</sup> Upon the Librarian’s approval, the exemptions are published in the Federal Register and remain in effect for three years. This structure was intended to facilitate consideration of whether enforcement of the prohibition on circumvention should be temporarily waived with respect to particular categories of works on the basis of real marketplace developments.<sup>20</sup> We currently are engaged in the eighth triennial rulemaking, which was initiated in June 2020 and is expected to be completed in October 2021.

## II. The Copyright Office’s Policy Study

In April 2015, then-House Judiciary Committee Ranking Member John Conyers, Jr., requested that the Office conduct a study and prepare a report on the policy issues associated with section 1201.<sup>21</sup> As part of this process, we received written comments from several dozen stakeholders and held public roundtables in Washington, D.C., and

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<sup>16</sup> 17 U.S.C. § 1201(a)(1)(C).

<sup>17</sup> *Id.*

<sup>18</sup> See H.R. REP. NO. 105-796, at 64 (1998) (Conf. Rep.) (“It is the intention of the conferees that . . . the Register of Copyrights will conduct the rulemaking, including providing notice of the rulemaking, seeking comments from the public, consulting with the Assistant Secretary for Communications and Information of the Department of Commerce and any other agencies that are deemed appropriate, and recommending final regulations in the report to the Librarian.”); see also H.R. REP. NO. 106-464, at 149 (1999) (Conf. Rep.) (“[T]he Copyright Office shall conduct the rulemaking under section 1201(a)(1)(C) . . .”).

<sup>19</sup> See H.R. REP. NO. 105-796, at 64.

<sup>20</sup> H.R. REP. NO. 105-551, pt. 2, at 36.

<sup>21</sup> See *Register’s Perspective on Copyright Review: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 49 (2015) (statement of Rep. John Conyers, Jr., Ranking Member, H. Comm. on the Judiciary) (“[T]here are policy issues that warrant studies and analysis, including . . . section 1201. . . . I would like the Copyright Office to conduct and complete reports on those policy issues . . .”).

San Francisco, California. The resulting report, delivered to Congress in June 2017, announced changes to the Office’s administration of the rulemaking proceeding and recommended a number of legislative updates.<sup>22</sup>

The report noted the rapid transformation of the digital marketplace since the DMCA’s enactment. During the study, many stakeholders credited the subsequent explosion of legitimate digital dissemination models to the protections established by section 1201 in 1998, years before the introduction of the iPod, let alone the streaming platforms that now dominate how people access creative works. At the same time, the growing ubiquity of software-enabled products in American life—automobiles, refrigerators, medical devices, and so on—has raised concerns that section 1201 may be operating with an unintended reach that the permanent exemptions and the triennial rulemaking only partially address. The Office took all these perspectives seriously and proposed targeted reforms that would improve the system while preserving the overall framework, seen by many as a cornerstone to modern distribution models. We also addressed the need to engage in legitimate circumvention activities to avoid overly burdensome restrictions on uses not traditionally implicated by the copyright laws outside of digital environments. Those specific reforms are discussed in turn below.

### **A. Changes to the Rulemaking Process**

Section 1201 requires the Librarian to determine “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 bar on circumvention of access controls.<sup>23</sup> This language thus requires a determination in each proceeding regarding current or likely adverse effects. For that reason, the Office historically required parties seeking renewals of previously granted exemptions to submit supporting evidence during subsequent proceedings, even if the conditions justifying the originally-adopted exemption had not changed or renewal was unopposed. During the study, many rulemaking participants expressed concern over the burdens and inefficiencies associated with this requirement, particularly for law school clinics and public interest organizations with limited resources.

In response to these concerns, the Office reexamined the statutory language and legislative history and determined that the law provides some flexibility for the Office to implement a more streamlined renewal process. While the statute does not permit

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<sup>22</sup> U.S. COPYRIGHT OFFICE, SECTION 1201 OF TITLE 17 (2017), <https://www.copyright.gov/policy/1201/section-1201-full-report.pdf> (“SECTION 1201 REPORT”).

<sup>23</sup> 17 U.S.C. § 1201(a)(1)(C).

exemptions to be renewed automatically or presumptively, the Office concluded that it does “permit determinations to be based upon evidence drawn from prior proceedings, but only upon a conclusion that this evidence remains reliable to support granting an exemption in the current proceeding.”<sup>24</sup>

The Office accordingly implemented new streamlined procedures to facilitate the renewal of previously adopted exemptions to which there is no meaningful opposition. Under this process, a party seeking re-adoption of a current exemption may petition for renewal by submitting a form available on our website. The form requires the petitioner to provide a signed declaration that there has been no material change in the facts, law, or other circumstances set forth in the prior rulemaking record. The Office then provides an opportunity for parties to submit written comments in opposition to the renewal. Opposition must be meaningful, such that, from the evidence provided, it would be reasonable for the Office to conclude that the prior rulemaking record and any further information provided in the renewal petition are insufficient to support recommending renewal of an exemption.

If there is no meaningful opposition, and the Office agrees that the petition satisfies the standards for renewal, the Office will recommend that the Librarian renew the existing exemption based on existing evidence, including evidence submitted in prior proceedings. If there is meaningful opposition, the Office will evaluate the request to renew the exemption through the more comprehensive rulemaking procedures, allowing for full consideration and briefing of the issues. This more comprehensive notice and comment phase also considers proposals for exemptions for new categories of works, or expansions to previously-adopted exemptions.

These changes have greatly improved the efficiency of the rulemaking process. In the 2017–2018 rulemaking, stakeholders were able to easily seek renewal of several noncontroversial exemptions, such as the exemptions for cellphone unlocking and the use of assistive technologies by visually impaired persons. To illustrate the effect of the change, in 2015, the American Foundation for the Blind participated in three rounds of comments and sent two affiliates to a hearing regarding an unopposed exemption to facilitate assistive technology for e-books. In the subsequent proceeding, the same exemption was renewed through a brief four-paragraph statement. Similarly, after first considering and recommending an exemption to permit access to data generated by personal medical devices in the 2014-2015 rulemaking, the Office recommended

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<sup>24</sup> SECTION 1201 REPORT at 143.

renewal in the subsequent cycle without requiring members of the public to supplement the original administrative record. In fact, the Office was able to recommend renewal of all the exemptions granted in the preceding rulemaking through this streamlined mechanism, which enabled participants to concentrate their energies on new proposals.<sup>25</sup>

These changes have been well received by stakeholders, and the Office has maintained them in the current rulemaking cycle, the eighth triennial review. As with the past cycle, the current rulemaking includes requests to renew of all previously adopted exemptions through the streamlined procedure. For the second time, nearly all of these requests were unopposed.<sup>26</sup> The Office is currently examining the public comments received so far in connection with the preparation of a forthcoming notice of proposed rulemaking this fall.

## **B. Legislative Recommendations**

During the study, the Office invited and received public comments on a broad range of policy issues, including section 1201's effect on consumer interests, the role of the anti-trafficking provisions, and the adequacy of the permanent exemptions for activities such as reverse engineering and security research. The Office's recommendations regarding possible legislation in these areas are set forth in detail in the report and are briefly summarized below.

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<sup>25</sup> In the first rulemaking, completed in 2000, the Office recommended only two exemptions. In contrast, the most recently completed rulemaking yielded a set of exemptions covering fourteen types of uses of various breadths, ranging from use of motion pictures for educational, documentary, and noncommercial purposes, to jailbreaking mobile devices, to accessing computer programs for purposes of diagnosis, repair, and modification of vehicles, to security research. Meanwhile, institution of the streamlined renewal procedure allowed the Office to decrease the number of proposed classes of works considered from 27 in the sixth triennial review to 12 in the last rulemaking. The current exemptions are available at <https://www.copyright.gov/title37/201/37cfr201-40.html>. The Office notes that some of the prior testimony provided to the Subcommittee may not have reflected the regulatory process adjustments or current exemption language. See Statement of Rebecca Tushnet, Professor, Harvard Law School, *The Digital Millennium Copyright Act at 22: What Is It, Why Was It Enacted, and Where Are We Now: Hearing Before the Subcomm. on Intellectual Property of the S. Comm. on the Judiciary*, at 24–29 (Feb. 11, 2020), <https://www.judiciary.senate.gov/imo/media/doc/Tushnet%20Testimony.pdf> (describing alleged limitations in prior exemptions relating to security research, educational and filmmaking uses, as well as perceived burdens to participants in the rulemaking process, but the concerns identified were amended or alleviated by the 2018 rulemaking and institution of the streamlined renewal process).

<sup>26</sup> Some statements maintain that certain renewal requests also comprise requests for adjusted regulatory language, and that such changes should be properly aired in the upcoming notice and comment phase.

Any consideration of proposed amendments to section 1201 must include an analysis of any potential implications on the United States' international trade obligations. Multiple free trade agreements to which the United States is a party require signatory countries to provide legal protections against circumvention and trafficking,<sup>27</sup> and most limit permitted exceptions and limitations to specified categories.<sup>28</sup> The Office expresses no view on whether the changes discussed below may bear on these agreements.

## 1. Basic Framework

The Office did not propose altering the basic framework of section 1201, concluding that its overall structure and scope remain sound in light of the DMCA's purpose.<sup>29</sup> The Office, however, is sensitive to the concerns expressed by some stakeholders about the expanded role of TPMs in everyday life, including those used to restrict access to copyrighted software embedded within everyday consumer products such as refrigerators and thermostats. In their view, by prohibiting circumvention of those TPMs, section 1201 could operate to prevent consumers from engaging in otherwise lawful activities, such as repair and modification of devices, that do not ordinarily implicate traditional copyright concerns.<sup>30</sup> Some stakeholders contend that Congress should address this issue by providing that it is not a violation to circumvent an access control if the user's purpose is to engage in any noninfringing activity. By requiring a "nexus" between circumvention of an access control and infringement of copyright, this approach would eliminate the need for statutory or regulatory exemptions for specific lawful uses.

The Office carefully considered this proposal but, in evaluating the operation of section 1201 in light of the DMCA's aims, ultimately recommended against adding an infringement nexus requirement to section 1201. It noted that gaining unauthorized access to a copyrighted work (*e.g.*, by circumventing a paywall on a streaming service) may not always constitute copyright infringement, but can cause a comparable degree

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<sup>27</sup> See, *e.g.*, United States-Mexico-Canada Agreement, U.S.M.C.A. art. 20.66, Nov. 30, 2018.

<sup>28</sup> See SECTION 1201 REPORT at vi, 35, 104.

<sup>29</sup> *Id.* at iii.

<sup>30</sup> In its report on Software-Enabled Consumer Products, the Office said that it "recognizes the value of allowing the public to freely repair defective consumer products and tinker with products to improve their function. . . . Properly understood, existing copyright law doctrines—including the idea/expression dichotomy, fair use, merger, *scènes à faire*, and section 117—should continue to facilitate these types of activities." U.S. COPYRIGHT OFFICE, SOFTWARE-ENABLED CONSUMER PRODUCTS at ii (2016), <https://www.copyright.gov/policy/software/software-full-report.pdf>.



of harm to the work's value. Looking to the DMCA's legislative history, the Office concluded that Congress intended to create an independent anticircumvention right to foster the "development of online content delivery platforms in which the consumer pays for *access* to copyrighted material rather than for possession of a copy."<sup>31</sup> Congress also determined that a separate anticircumvention right is required by the WIPO Internet Treaties.<sup>32</sup> The Office concluded that enacting an infringement nexus could weaken the right of copyright owners to exercise meaningful control over the terms of access to their works online—a right that both Congress and the Executive Branch have properly recognized as essential to the development of the digital marketplace for creative content. The Office therefore concluded that stakeholders' concerns are more properly addressed through a reliance upon existing statutory limitations, adjacent doctrines addressing anticompetitive behavior, as well as targeted updates to the permanent exemptions or expansion of the Office's rulemaking authority, as discussed below.<sup>33</sup> To the extent Congress would like to explore enacting an infringement nexus, it may want to consider whether this adjustment should apply across the board, or be limited to circumvention of technological measures protecting computer software.

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<sup>31</sup> SECTION 1201 REPORT at 43–44; *see also MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928, 950 (9th Cir. 2010) (rejecting argument that section 1201(a) requires an infringement nexus and noting that such a requirement "would deprive copyright owners of the important enforcement tool that Congress granted them to make sure that they are compensated for valuable non-infringing access—for instance, copyright owners who make movies or music available online, protected by an access control measure, in exchange for direct or indirect payment"); Brief for United States as Amicus Curiae Supporting Rehearing at 8–9, *MGE UPS Sys., Inc. v. GE Consumer & Indus., Inc.*, 622 F.3d 361 (No. 08-10521) (5th Cir. 2010) ("The entire point of that provision was to provide a federal prohibition against bypassing . . . technologies that regulate access to a copyrighted work in circumstances in which the act of obtaining access would not by itself violate the copyright laws.").

<sup>32</sup> SECTION 1201 REPORT at 43. *See* H.R. REP. NO. 105-551, pt. 1, at 10 (1998) ("To comply with the treaties, the U.S. must make it unlawful to defeat technological protections used by copyright owners to protect their works."); S. REP. NO. 105-190, at 8–9, 11–12 (stating that anticircumvention legislation is necessary "to adhere to the WIPO treaties" and that "prior to this Act, the conduct of circumvention was never before made unlawful").

<sup>33</sup> *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 546–47, 549 (6th Cir. 2004) (dismissing section 1201(a) claim on the ground that defendant had not circumvented an effective TPM); *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1202 (Fed. Cir. 2004) (affirming the district court holding that acts of circumvention were not unauthorized under the relevant terms of service); SECTION 1201 REPORT at 49 ("Indeed, principles underlying existing doctrines of antitrust law or misuse, and the permanent exemptions, such as section 1201(f)'s exception for interoperability, may accommodate many anti-competitive concerns.").

## 2. Anti-Trafficking Provisions

The Office agreed that the anti-trafficking provisions provide critical enforcement tools against digital piracy. We heard from several copyright owners who noted that these provisions have succeeded in preventing circumvention tools from being sold in mainstream outlets such as Amazon or Best Buy, and, in general, stemming the development of a marketplace for circumvention tools and minimizing mass piracy.<sup>34</sup> At the same time, stakeholders pointed to potential ambiguities in two aspects of the anti-trafficking language. We concluded that one of these provisions would benefit from legislative clarification, and we provided interpretive guidance as to the other.

First, stakeholders expressed concern that the prohibition against circumvention “service[s]” may prevent third parties from offering assistance to exemption beneficiaries, out of a concern that such assistance exceeds the boundaries of permitted circumvention activities and constitutes trafficking activity.<sup>35</sup> While many of the permanent exemptions extend to the anti-trafficking provisions as appropriate, the Office’s rulemaking authority is constrained to evaluation of the anti-circumvention bar, limiting the scope of relief that may be adopted through regulation.<sup>36</sup> The Office agrees that this language may have the effect of limiting the usefulness of exemptions for many users who lack the technical knowledge to circumvent TPMs themselves. For example, testimony from farmers and ranchers provided in the last rulemaking demonstrated a “need [for] local expert assistance” to modify original equipment manufacturer (“OEM”) software and repair tractors and other agricultural vehicles, including to perform “routine and simple maintenance or [to] control vehicle operating modes after repair.”<sup>37</sup> In studying this issue, the Office noted a relative dearth of litigation in this area but concluded that there was, at a minimum, substantial uncertainty as to whether there are types of third-party assistance that would fall outside the reach of the “service” bar. We therefore recommended that Congress amend the statute to grant the Librarian discretion to adopt temporary exemptions that permit third-party assistance “at the direction of” an intended user. As a model, Congress may wish to consider the Unlocking Consumer Choice and Wireless

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<sup>34</sup> SECTION 1201 REPORT at 50–51.

<sup>35</sup> *See id.*

<sup>36</sup> *See* 17 U.S.C. § 1201(e) (law enforcement activities), (f) (reverse engineering for the purpose of enabling interoperability between computer programs), (g) (encryption research), (j) (security testing).

<sup>37</sup> 2018 Rulemaking, Farmers Class 7 Initial Comments at 7,

<https://cdn.loc.gov/copyright/1201/2018/comments-121817/class7/class-07-initialcomments-afbf-ncganfu.pdf>.

Competition Act, which provides that exemptions for unlocking wireless devices may be exercised by “the owner of any such . . . device, by another person at the direction of the owner, or by a provider of a commercial mobile radio service or a commercial mobile data service at the direction of such owner or other person.”<sup>38</sup>

Second, some commenters suggested that the bar on the “manufacture” of circumvention tools could be read to prohibit users from developing tools to engage in permitted circumvention activity.<sup>39</sup> The Office agrees that exemption beneficiaries should be permitted to develop necessary tools solely for their own use in carrying out exempted circumventions. The existing statutory language, however, does not appear to prohibit such activity. The statutory text and structure indicate that the manufacturing provision was intended to apply only in connection with trafficking conduct, and not to exemption beneficiaries engaging in self-help. The Office is not aware of any court that has construed the statute otherwise. Therefore, we are not currently recommending legislative change as to this provision.

### 3. Permanent Exemptions

The Office concluded that existing permanent exemptions for security testing (section 1201(j)) and encryption research (section 1201(g)) are not sufficiently flexible to keep pace with evolving technologies and the needs of good-faith researchers.<sup>40</sup> As the study noted, the existing “statutory exemption for security testing is both a testament to Congress’ foresight in accommodating the relationship between copyright and good-faith security research, and the product of a time when the current digital landscape could not possibly have been anticipated.”<sup>41</sup> Consistent with the Office’s longstanding position,<sup>42</sup> our report recommended consideration of several changes to these provisions, including expanding the types of permitted activities, easing the requirements to seek authorization from the owner of the relevant system or technology, and eliminating or clarifying the multifactor eligibility tests for certain statutory exemptions. While the report did not propose specific legislative language, it

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<sup>38</sup> Pub. L. No. 113-144, 128 Stat. 1751 (2014).

<sup>39</sup> See 17 U.S.C. § 1201(a)(2).

<sup>40</sup> SECTION 1201 REPORT at iv–v, 71–82.

<sup>41</sup> *Id.* at 71–72.

<sup>42</sup> See *Register’s Perspective on Copyright Review*, 114th Cong. 29 (statement of Maria A. Pallante, Register of Copyrights and Dir., U.S. Copyright Office); U.S. COPYRIGHT OFFICE, RECOMMENDATION OF THE REGISTER OF COPYRIGHTS IN RM 2008-8; RULEMAKING ON EXEMPTIONS FROM PROHIBITION ON CIRCUMVENTION OF COPYRIGHT PROTECTION SYSTEMS FOR ACCESS CONTROL TECHNOLOGIES 205–06 (2010), <https://cdn.loc.gov/copyright/1201/2010/initialed-registers-recommendation-june-11-2010.pdf>.

suggested that the exemption for security research adopted in the triennial rulemaking could provide a useful starting point for discussion.<sup>43</sup>

Finally, the Office provided interpretive guidance regarding section 1201(f), which provides exemptions for reverse engineering activities to facilitate the development and distribution of interoperable computer programs. In prior rulemakings, the Office had found section 1201(f) unclear as to whether a person may circumvent for purposes of enabling interoperability, or whether the exemption covers only the more limited conduct of “identifying and analyzing” program elements to achieve interoperability.<sup>44</sup> After reviewing the text and legislative history, however, the Office concluded that 1201(f) should be understood to permit legitimate user acts of creating, distributing, and using circumvention tools for interoperability purposes, while maintaining important safeguards to protect the legitimate interests of copyright owners.<sup>45</sup> In particular, the Office found it significant that section 1201(f) was intended to preserve the effect of existing case law in this area, including specifically the Ninth Circuit’s decision in *Sega Enterprises Ltd. v. Accolade, Inc.*, which held that certain uses of software to achieve interoperability constituted fair use.<sup>46</sup> To the extent, however, that stakeholders continue to find the exemption ambiguous, the Office noted that legislative clarification of the circumstances under which persons may (or may not) engage in circumvention for interoperability purposes may be appropriate.

The Office also proposed new permanent exemptions for noninfringing activities that have repeatedly received exemptions in past triennial rulemakings, or where there is a particularly broad-based need. These include:

- An exemption to enable blind, visually impaired, or print disabled persons to utilize assistive technologies;<sup>47</sup>

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<sup>43</sup> SECTION 1201 REPORT at 74. For the text and an analysis of the security research exemption adopted in 2018, see U.S. COPYRIGHT OFFICE, SECTION 1201 RULEMAKING: SEVENTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION 283–314 (2018), [https://cdn.loc.gov/copyright/1201/2018/2018\\_Section\\_1201\\_Acting\\_Registers\\_Recommendation.pdf](https://cdn.loc.gov/copyright/1201/2018/2018_Section_1201_Acting_Registers_Recommendation.pdf).

<sup>44</sup> 17 U.S.C. § 1201(f)(1).

<sup>45</sup> SECTION 1201 REPORT at 69.

<sup>46</sup> See S. REP. NO. 105-190, at 13 (“The objective is to ensure that the effect of current case law interpreting the Copyright Act is not changed by enactment of this legislation for certain acts of identification and analysis done in respect of computer programs. See, *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510[] (9th Cir. 1992).”); H.R. REP. NO. 105-551, pt. 2, at 42; 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, 14 (Comm. Print 1998).

<sup>47</sup> SECTION 1201 REPORT at v, 84–87.

- An exemption for unlocking used mobile devices;<sup>48</sup> and
- An exemption to allow diagnosis, repair, or maintenance of a computer program, including to circumvent obsolete access controls.<sup>49</sup>

#### **4. Renewal of Temporary Exemptions**

The Office has long supported legislation to provide for burden-shifting or presumptive renewal of exemptions adopted in the previous rulemaking cycle.<sup>50</sup> As discussed above, after study, the Office concluded that the statute itself provides that exemptions cannot be renewed automatically, presumptively, or otherwise, without a fresh determination concerning the next three-year period. While the streamlined procedures discussed above have done much to reduce burdens on renewal proponents and the Office, a statutory change could introduce even greater efficiencies and provide users with greater predictive certainty by eliminating the need for the public to submit, and the Office to evaluate, petitions to readopt uncontested exemptions.<sup>51</sup>

### **III. Conclusion**

Section 1201 has played a key role in fostering a thriving online marketplace by ensuring that copyright owners have adequate legal protections when making their works available in digital formats. The Copyright Office has been honored to work on these important issues for over two decades. Our experience has provided us with unique insight into how section 1201 works and how it might be improved. Through our research and administration of the rulemaking, we are confident that the basic statutory framework remains sound. At the same time, the specific statutory updates described here would help to eliminate ambiguities in the current law and ensure that it appropriately reflects the technological changes of the past two decades, while retaining the general framework of providing the Office with flexibility to accommodate changes in the marketplace through the statutorily-directed rulemaking.

The Copyright Office thanks the Subcommittee for its consideration of this important topic and stands ready to assist Congress as it considers further action.

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<sup>48</sup> *Id.* at v, 97–99.

<sup>49</sup> *Id.* at v, 88–97.

<sup>50</sup> See *Register's Perspective on Copyright Review*, 114th Cong. 21 (statement of Maria A. Pallante, Register of Copyrights and Dir., U.S. Copyright Office).

<sup>51</sup> SECTION 1201 REPORT at 141.