March 3, 2016

U.S. Copyright Office
Docket No. 2015-8
Section 1201 Study:
Notice of Inquiry and Request for Public Comment
Comments of the Consumer Technology Association

The Consumer Technology Association (CTA) is pleased to respond to the Copyright Office's request for public comment[1] on the Office's interpretation and administration of Section 1201(a) of the Digital Millennium Copyright Act (DMCA) generally, and in particular with respect to the Register's recommendation, based on the Office's interpretation of Section 1201's "trafficking" provisions, to deny lawful user petitioners in "Class 21" the benefit of formal and informal assistance in exercising their rights under Section 1201(a). CTA believes that the correct recommendation was that of the Department of Commerce, which advised the Register to recommend an exemption to make repairs or modifications "by or *at the request of* the owner of the vehicle or machinery."[2] CTA believes the Office had no basis in law, policy, or procedure to decline to follow this sound and essential advice.

CTA is the preeminent technology trade association, promoting growth in the $285 billion U.S. consumer technology industry through market research, education and public policy representation. CTA members lead the consumer technology industry in the development, manufacturing and distribution of audio, video, mobile electronics, communications, information technology, multimedia, and accessory products, as well as related services sold to consumers.[3]

CTA members who offer services to consumers in the repair, replacement, and safety of automotive products should be free of DMCA constraints that have nothing to do with either their customers' or their own commercial exploitation of copyrighted works. The drafters of the DMCA did not consider it to be "trafficking" for another person or a company to provide specific, expert assistance to a consumer whose right to engage in lawful activity has been

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[1] U.S. Copyright Office Docket No. 2015-8, Section 1201 Study: Notice of Inquiry and Request for Public Comment, 80 Fed.Reg. No. 249, Dec. 29, 2015. ("NOI").

[2] Commerce Dept. Letter to the Register at 58 (emphasis added). The Librarian's October 28, 2015 "Final Rule," the October 8 Recommendations of the Register, and the Sept. 18 Letter of the Commerce Department to the Register on behalf of the Administration are all linked at http://www.copyright.gov/1201/.

[3] A complete list of CTA members is available at https://www.cta.tech/Membership/Membership-Directory.aspx.

confirmed by the Librarian, but who lacks the knowledge or wherewithal to exercise that right. Accordingly, CTA respectfully disagrees with the Register's recommendation that the Librarian lacks the power to exempt circumvention where expert help is required to gain lawful access to specific content or to software embedded in a device owned by the user. The DMCA does not say or imply this, nor does, as the Register also suggested, the Unlocking Act.[4]

In its NOI the Office poses questions in four categories. CTA comments on the first three – General issues pertaining to the Office's interpretation of the statute and the scope of its own authority and discretion; the Rulemaking process; and whether the anti-trafficking provisions of the DMCA have been properly interpreted and applied and / or require legislative amendment.

"General" Issues

The NOI recognizes that the number of exemption petitions has grown in step with the *in terrorem* use of the DMCA to impair or threaten users' access to their own devices:

> [I]t is … apparent that the prohibition on circumvention impacts a wide range of consumer activities that have little to do with the consumption of creative content or the core concerns of copyright. *** In the 2015 rulemaking, *some* of the proposed exemptions concerned the ability to access and make noninfringing uses of expressive copyrighted works …. *But others concerned the ability to circumvent access controls on copyrighted computer code in consumer devices.*[5]

This is a severe understatement. Of the 44 exemption petitions filed, the *majority* – 26 – had nothing to do with any user's desire to copy or "consume" creative, expressive content. Simply put, the Office has lagged behind the Administration[6] and Members of Congress, including drafters of the DMCA, in recognizing that the trend of using the DMCA as a vehicle of industrial protectionism is an unintended, unfortunate, and unnecessary imposition on users' rights. The drafters of the DMCA assured their congressional colleagues and the public that such abuse would *not* occur. Those still serving in Congress in 2014 labeled lawsuits brought on this basis as "abuse."[7] When the Librarian denied consumers an exemption to control the interoperability of their own phones, the Congress swiftly reversed this decision in the Unlocking Act.

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[4] Unlocking Consumer Choice and Wireless Competition Act, Pub. L. No. 113-144, 128 Stat. 1751 (2014).

[5] NOI at 12 (emphasis added).

[6] The Commerce Dept. letter uniformly supports user rights in the absence of copyright infringement. *See also* National Telecommunications and Information Administration, *NTIA Petition for Rulemaking on Unlocking of Mobile Devices*, Sept. 13, 2013, available at https://www.ntia.doc.gov/fcc-filing/2013/ntia-petition-rulemaking-unlocking-mobile-devices.

[7] *Chapter 12 of Title 17: Hearing Before the Subcomm. On Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. at 1, 64, 77 – 78 (2014) ("House Section 1201 Hearing").

In the 2015 round, the Librarian exceeded its authority in limiting the scope and period of a clearly deserved exemption for users to control the operation of their own autos, and erred in denying them the benefit of any expert assistance. These limitations and denials have no basis in the text of Sections 1201(a)(1), 1201(a)(2), or 1201(b)(1), and are contrary to the legislative history of these provisions.

1. The DMCA's legislative history requires the Librarian to presume that users who do not copy expressive copyrighted works have not violated the DMCA, instead of presuming that they have.

The drafters of Section 1201 emphasized that it was directed to the protection of specific copyrighted works from infringing replication, *not* to sheltering systems from being "hacked." Rep. Bob Goodlatte in 1998 emphasized this in his remarks on the House floor:

> I would like to state for the record my understanding that [Sections 1201(a) and (b)(1)] are not intended to address computer system security, such as devices used to crack into computer security systems such as firewalls or discover log-on passwords that protect an entire system. The ban contained in these provisions is intended to cover circumvention devices aimed at technological protection measures ***that protect particular works*** covered under Title 17 such as movies, songs or computer programs. Unauthorized hacking into computer programs is already covered by other laws.[8]

The Report of the Senate Judiciary Committee emphasized that Section 1201(a)(1), which addresses conduct of particular technology *users*, was even *more* narrowly targeted, toward *directly infringing* conduct, and *not* to potential consequences, or to secondary liability:

> Paragraph (a)(1) establishes a general prohibition against gaining unauthorized access to a work by circumventing a technological protection measure put in place by the copyright owner where such protection measure otherwise effectively controls access to a work protected under title 17 of the U.S. Code. This paragraph does not apply to the ***subsequent actions of a person once he or she has obtained authorized access*** to a copy of a work protected under title 17, even if such actions involve circumvention of other types of technological protection measures.[9]

The Report of the House Judiciary Committee, as presented by then-subcommittee chairman Howard Coble, employs much the same language, and states flatly and with particularity that *a user* is not liable for circumvention *under Section 1201(a)(1)* if the user is entitled to that access as a matter of fair use:

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[8] 144 Cong. Rec. H7095 (Aug. 4, 1998), Remarks of Rep. Goodlatte (emphasis added) ("Goodlatte").

[9] S. Rep. 105-90 at 29 (1998).

> Paragraph (a)(1) does not apply to the subsequent actions of a person once he or she has obtained authorized access to a copy of a work protected under Title 17, even if such actions involve circumvention of additional forms of technological protection measures. In a fact situation where the access is authorized, the traditional defenses to copyright infringement, including fair use, would be fully applicable. So, an individual would not be able to circumvent in order to gain unauthorized access to a work, but ***would be able to do so in order to make fair use of a work which he or she has acquired lawfully***.[10]

The drafters also emphasized, in legislative history, that the "trafficking" provisions were *not* meant to frustrate lawful and assisted user access when that access is targeted to works to which the user has lawful rights. All report and floor statements emphasize that the target of Sections 1201(a)(2) and (b)(1) was the potential commodification of "black box" technologies that are deployed for unlawful access to works. The House Judiciary Committee Report goes on to say of Section 1201(a)(2):

> It is drafted carefully to target ''black boxes,'' and to ensure that legitimate multipurpose devices can continue to be made and sold. For a technology, product, service, device, component, or part thereof to be prohibited under this subsection, one of three conditions must be met. It must: (1) be primarily designed or produced for the purpose of circumventing; (2) have only a limited commercially significant purpose or use other than to circumvent; or (3) be marketed by the person who manufactures it, imports it, offers it to the public, provides it or otherwise traffics in it, or by another person acting in concert with that person, for use in circumventing a technological protection measure that effectively controls access to a work protected under Title 17. This provision is designed to protect copyright owners, and simultaneously allow the development of technology.[11]

> The Report of the House Commerce Committee said:

> The Committee believes it is very important to emphasize that Section 102(a)(2) is aimed fundamentally at ***outlawing so-called ''black boxes''*** that are expressly intended to facilitate circumvention of technological protection measures for purposes of gaining access to a work. This provision is not aimed at products that are capable of commercially significant noninfringing uses, such as consumer electronics, telecommunications, and computer products—including videocassette

[10] H. Rep. 105-551 Pt 1 at 18 (1998) (emphasis added) ("House Judiciary Report").
[11] *Id.*

> recorders, telecommunications switches, personal computers, and servers—used by businesses and consumers for perfectly legitimate purposes.[12]

In presenting this Report, and the legislation, on the House floor, Commerce Committee Chairman Tom Bliley assured the house that *legitimate retailers were not among the "trafficking" targets*:

> Given our keen interest in the development of new products, in particular digital television monitors, the Committee is particularly concerned that the introduction of such measures not frustrate consumer expectations and that this legislation not be interpreted to in any way limit the authority of manufacturers ***and retailers*** to address the legitimate concerns of their customers.[13]

Chairman Bliley went on to address, specifically, concerns that overbroad application of "trafficking" provisions could impair interoperability and consumer convenience, and noted specifically that the DMCA should not impair assistance from "servicers":

> As advances in technology occur, consumers will enjoy additional benefits if devices are able to interact and share information. Achieving interoperability in the consumer electronics environment will be a critical factor in the growth of electronic commerce. In our view, manufacturers, consumers, ***retailers, and servicers*** should not be prevented from correcting an interoperability problem resulting from a protection measure causing one or more devices in the home or in a business to fail to ***interoperate with other technologies***.[14]

The denial of expert assistance from "retailers and servicers" was contrary to this explicit legislative history.

More generally, this legislative history explains the appalled reactions, 16 years later, of several of the House drafters of the DMCA, at a 2014 hearing called to review developments pertaining to Section 1201. Rep. Goodlatte, now Chairman of the House Judiciary Committee, observed:

> As someone who was very active in negotiating all of the DMCA, I am not sure that anyone involved in the drafting would have anticipated some of the TPM uses that have been litigated in court. Such as replacement printer toner cartridges and garage door openers.[15]

Judiciary Committee Ranking Member Conyers added:

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[12] H. rep. 105 – 551 Pt 2 at 38 (1998) (emphasis added) ("House Commerce Report").

[13] 144 Cong. Rec. H7094 – 7095 at 7094 (Aug. 4, 1998), Remarks of Rep. Bliley (emph. added) ("Bliley").

[14] *Id.* at 7095 (emphasis added).

[15] House Section 1201 Hearing at 64; *see also* statement of Rep. Farenthold at 77 – 78.

> For example, some critics contend that copyright owners use Section 1201, as a tool to stifle competition and repeatedly cite the laser printer cartridge replacement and garage door opener cases in support of their contention. Fortunately, courts in both these cases ruled against the companies who had attempted to use Chapter 12 to inhibit competition.[16]

Rep. Marino, in an opening statement on behalf of (1998 and 2014) Subcommittee Chairman Coble, said:

> As everyone knows, Mr. Coble has not been a fan of those who abuse the legal system using our Nation's intellectual property laws whether they are copyright, patent or trademark laws. And I concur with him. So we'd like to hear more about ways to ensure that Chapter 12 is used to protect copyrighted works rather than printer cartridges and garage door openers as has been attempted before.[17]

This review of statements of Members of Congress, then and now, shows that the drafters of Section 1201 have been more sensitive than the Copyright Office and the Register have been in assuring that the legitimate rights and expectations of users have been honored. As CTA discusses further below, the Office, in its recommendations by the Register, has conflated the individual and limited elements of Sections 1201(a)(1), (a)(2), and (b)(1) into a monolith, standing in the way of interoperability, that the DMCA's drafters explicitly did not intend to erect.

As the Office has repeatedly reminded the public, the Librarian is afforded discretion in interpreting the Act and in granting exemptions. But this discretion should be used to further the purposes of the Act. As is shown above, these purposes specifically did *not* include (1) denying exemptions to a user under *Section 1201(a)(1)*, where the object of circumvention was copyright fair use, and (2) labeling as "trafficking" assistance to a user *by a retailer or a servicer* to obtain lawful access to a specific work or to the user's own device for purposes of interoperability. Denial of such consumer rights and assistance was disclaimed by the DMCA's drafters at the time of its enactment. Reading the DMCA to deny consumers functional access to their own products has been bemoaned by the drafters in the ensuing years.

2. Section 1201 should neither advance nor constrain interests that lie outside core copyright concerns.

CTA applauds the Office for seeking comment on these and other of its recommendations and on whether it was correct in the Class 21 petitions to consider external, non-copyright factors so as to impair the utility of and shorten the statutory term of exemptions. CTA believes the Librarian was not granted the power to do this.

Just as Section 1201 should not be an instrument of private sector industrial protection where expressive works are not being infringed, it should also not be turned into an instrument of *public sector industrial policy* where such policy is at best orthogonal to copyright. Moreover,

[16] *Id.* at 4.
[17] *Id.* at 1 - 2.

even if it were appropriate to verge beyond copyright considerations in copyright exemption proceedings, Section 1201(a) places the responsibility to advise the Register only on the Department of Commerce, on behalf of the Administration. It was contrary to the statute's text and intent for the Register to seek and accept advice from other agencies of the Administration and to reject the advice of the Department of Commerce, which did not recommend any such limitations in scope or term of exemption.

Rulemaking Process

3. Previously granted exemptions should enjoy a presumption of renewal.

It should not take an act of Congress for the Office to be able to channel its discretion in favor of efficiency. A groundswell, including the past Register,[18] has supported this outcome. CTA is not persuaded that there is any obstacle to the Office taking this common-sense step on its own motion. There is no reason, however, to limit this presumption to unopposed petitions.

Additionally, the Office should consider extending the renewal presumption to product extensions, such as the use of tablets employing operating systems similar to those of phones whose users previously have enjoyed exemptions. Presumed renewal would free private sector and Office resources for more constructive contributions.

4. The Copyright Office should not impose a heavy burden on exemption proponents.

The legislative history and assurances of the drafters, reviewed above, do not support the Office's practice of imposing heavy, and in some cases apparently arbitrary or at least discretionary, burdens on proponents of exemptions. Nothing in the statute requires the imposition of such burdens. Where opponents are in a better position to come forward with evidence, they should be obliged to do so.

5. The Copyright Office should not credit opposition that is based on projections of secondary liability.

CTA respectfully asserts that the Office misapplied Section 1201(a) and additionally committed both legal and procedural error by denying to Class 21 an exemption for access to "infotainment" systems. The Office did so on the basis that a system, *after* circumvention, might be accessible to additional content from an infringing source. Yet it was plainly stated by the legislation's sponsors, as set forth above in CTA's response to question 1, that user liability *under Section 1201(a)* cannot be based on infringements occurring *after* circumvention.

As a matter of copyright law, the Office's rationale is also directly contrary to the law as established by the Supreme Court in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984). The Supreme Court held in *Sony* that it is lawful to provide consumers with a device that can store both infringing and non-infringing content, so long as there are

[18] NOI at 11 & n. 40.

commercially significant non-infringing uses for the stored content. In the Class 21 exemption discussion, it was only agricultural equipment provider John Deere that even suggested, without proof, that circumvention could result in infringing material being *imported* into vehicle infotainment storage.[19] Hence the only copyright interest or concern that the Office could have had would be about a closed storage system becoming open to storing infringing content. It was clearly established in *Sony* that allowing such capacity into the marketplace is not copyright infringement, even where accomplished by a third party with a commercial interest. Moreover, the courts have recognized that any such importation may occur as a form of lawful timeshifting[20] or placeshifting.[21]

Even if it were not error to consider consequential activity when evaluating user conduct under Section 1201(a), at the very least the Office should have placed the burden on exemption opponents to come forward with some evidence of a copyright law interest being encountered as a result of the circumvention. The Office's denial of infotainment access to users was thus procedural error as to burden, legal error in misapplying Section 1201(a) to post-circumvention conduct, and legal error in construing the copyright law.

Anti-Trafficking Provisions

6. The DMCA anti-trafficking provisions of Sections 1201(a)(2) and 1201(b)(1) should not have deterred the Register from recommending that the Librarian grant exemptions in favor of users who receive assistance in accomplishing exempt objectives.

Nothing in the trafficking provisions of the DMCA (Sections 1201(a)(2) and (b)(1)) or any other law requires that users be unable to receive expert assistance in accomplishing a lawful and exempt objective. As was explained in the legislative history quoted above, these "trafficking" provisions were drafted "carefully to target 'black boxes' …."[22] The legislative history is explicit that, unlike Sections 1201(a)(2) and 1201(b)(1), Section 1201(a)(1) pertains to particular users, particular uses, and particular works. The hardware or software "black box" scenario addressed in Sections 1201(a)(2) and 1201(b)(1) as "trafficking" was never meant to apply to a *user* seeking interoperable access to a work embedded in an automobile that she owns. Nor was it meant to apply to a user seeking access to a vehicle's *system*, because Section 1201(a)(1) was not meant to lock *users* out of systems.[23] Nor was it meant to deny retail and servicer-level direct assistance to a user in need of it.

[19] No claim of inducement, contributory, or vicarious liability was made – indeed it would be comical to suggest that a *user* is capable of inducement with respect to his or her own vehicle's radio.
[20] *Sony* 464 U.S. at 442 - 456.
[21] *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1079 (9th Cir. 1999).
[22] House Judiciary Report at 18; *see also* House Commerce Report at 38.
[23] Goodlatte.

In presenting the DMCA on the floor of the House, Commerce Committee Chairman Bliley was explicit that the DMCA was not meant to impair *retailer or servicer* assistance to consumers, nor was it meant to be construed as impairing device interoperability:

> [T]he Committee is particularly concerned that the introduction of such measures not frustrate consumer expectations and that this legislation not be interpreted to in any way limit the authority of manufacturers ***and retailers*** to address the legitimate concerns of their customers.[24] *** Achieving interoperability in the consumer electronics environment will be a critical factor in the growth of electronic commerce. In our view, manufacturers, consumers, ***retailers, and servicers*** should not be prevented from ***correcting an interoperability problem*** resulting from a protection measure causing one or more devices in the home or in a business to fail to interoperate with other technologies.[25]

The Unlocking Act became necessary only because the Librarian failed to renew previous exemptions that had been widely construed as authorizing assisted retail and servicer-level unlocking, so that phones could interoperate with new networks. The result of this departure from previous presumptions was a Presidential Petition and congressional reversal.[26] In the legislative history discussion of the Unlocking Act it was noted that servicer assistance in aid of interoperability was essential for many consumers.[27] Yet when prior phone unlocking exemptions were granted there had been no public or congressional concern expressed that specific permission for such assistance was necessary and had been withheld. Hence, there was no basis for the Office to assume that Congress, in specifying a right to such assistance, was under the impression that prior grants had excluded such a right. Indeed, in reporting out the final version[28] of the bill that reversed the Librarian's denial, the Senate Judiciary Committee was emphatic that it intended *no positive or negative inference* with respect to the Librarian's authority in other exemption proceedings:

> While there are larger ongoing debates about the scope and application of Section 1201 of the DMCA, as well as other aspects of phone unlocking, those issues are not addressed by the legislation, which makes no changes to Section 1201 of the DMCA. The bill respects the independence of the Library of Congress under existing law to conduct the triennial rulemakings set forth in Section 1201(a)(1) and does not alter the authority of the Librarian in future rulemakings.[29]

Thus the Register was simply incorrect, in the recommendation as to Class 21, in reading the Unlocking Act as containing any "negative pregnant" preventing the Librarian from allowing assistance to users in appropriate cases, in order to achieve interoperability. Given the explicit

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[24] Bliley at 7094 (emphasis added).
[25] Bliley at 7095 (emphasis added).
[26] *See* Senate Report No. 113-212 (Comm. On the Judiciary) at 3 & n. 9 ("Senate Unlocking Act Report").
[27] *Id.* at 4, 6.
[28] *See* 160 Cong. Rec. S4510 – 11 (2014) and 160 Cong. Rec. H6835-36.
[29] Senate Unlocking Act Report at 5.

intent of the DMCA's drafters that it should not be read to impair user interoperability for lawful purposes, the Unlocking Act could not and did not pose any barrier to the Librarian's following the Administration's specific advice to include a right to assistance in its Class 21 exemption, as it did for Class 11.

To the extent the Unlocking Act is relevant to autos it should have been understood by the Office as *furthering* the rights of users generally, rather than constraining them. The only caution and constraint cited by the drafters of the Unlocking Act was that the assistance must be rendered be for purposes of interoperability:

> [N]othing in the bill permits third parties to unlock devices independently of the device owner's direction, or for a purpose other than allowing the owner or a family member to connect to a new wireless network.[30] *** Unlike many other situations where an exemption from the circumvention prohibition may be sought or granted, unlocking a cell phone to connect to a wireless network typically does not facilitate copyright infringement.[31]

The rationale for the Unlocking Act simply recapitulates the rationale of the DMCA drafters in assuring that the DMCA would not impair device interoperability. The Unlocking Act should have been viewed by the Librarian as an additional reason to specifically approve assistance to users of owned devices in exemptions, not one for denying it.

7. Section 1201 should be clarified to confirm that expert assistance, whether formally or informally rendered, is not trafficking.

The fact that the Copyright Office and the NTIA, the expert agencies identified by the Congress to administer exemptions from Section 1201, have not agreed on whether expert assistance to consumers in aid of lawful access is "trafficking" suggests that legislative clarification of this important issue would be helpful. More generally, DMCA drafters have complained about lawsuits that would impair users' ability to repair, upgrade, or replace components or media of their own devices. Therefore CTA recommends that in addition to interpreting existing law as we propose, the Office should advocate for substantive, as well as procedural, reform of Section 1201.

First, the scope of Section 1201 should be clarified so as to comport with the drafters' intention that it should protect only access to and copying of expressive literary and musical works for the purpose of exploiting those works in ways that infringe copyright. Second, the text should reflect the drafters' intention that Section 1201(a)(1) constrains only user access to particular works, so it is not "trafficking" to assist such access so long as the user's objective is lawful. Third, the text should be clearer that access to a functional work embedded in a product that the user owns is lawful.

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[30] Senate Unlocking Act Report at 4.
[31] *Id*. at 6.

CTA appreciates this opportunity to provide its views.

Respectfully submitted,

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