

**Before the  
Copyright Office  
Library of Congress  
Washington, D.C. 20024**

In the Matter of

Section 1201 Study: Notice and  
Request for Public Comment

Docket No. 2015-8

**COMMENTS  
OF  
THE SOCIETY OF AMERICAN ARCHIVISTS**

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The Society of American Archivists (SAA) congratulates the Copyright Office on its desire to assess and improve the operation of section 1201 of Title 17, including the triennial rulemaking process.

SAA is the oldest and largest organization of archivists in North America. It serves the education and information needs of its members, including more than 6,200 individual archivists and institutions, and provides leadership to help ensure the identification, preservation, and use of the nation's historical record. To fulfill this mission, SAA exerts active leadership on significant archival issues by shaping policies and standards, and serves as an advocate on behalf of both professionals who manage archival records and the citizens who use those records.

SAA is convinced that section 1201 has the potential to harm archivists' ability to identify, acquire, and preserve records that ensure the rights of individuals and document American culture. Section 1201's impediments are particularly troublesome given the absence of any empirical evidence that section 1201 has lessened the incidence of piracy or "been useful in expanding consumer choice and the avenues for dissemination of creative works," as the notice suggests.

SAA's responses to the specific subjects posed by the Copyright Office follow.

### **General**

1. *Please provide any insights or observations regarding the role and effectiveness of the prohibition on circumvention of technological measures in section 1201(a).*

It is SAA's understanding that the measures intended to outlaw the circumvention of access control tools had two major goals: the elimination of "piracy" of copyrighted content and the encouragement of new business models for the distribution of digital content. SAA cannot speak to either of these issues; it does not have the data that the Copyright Office needs. SAA does, however, encourage the Copyright Office to undertake a careful empirical study to determine if the anti-circumvention measures in section 1201 have led to a decrease in "piracy" and the development of consumer-desired new digital distribution channels. Until one has a clear sense of any benefits from the implementation of section 1201, it is difficult to know how to evaluate the section in light of its real costs (detailed below).

2. *How should section 1201 accommodate interests that are outside of core copyright concerns, for example, in cases where circumvention of access controls protecting computer programs implicates issues of product interoperability or public safety?*

SAA fears that the more the copyright statute moves away from core copyright concerns, the harder it becomes to understand and enforce basic copyright principles. Just as copyright should not be used as a mechanism to enforce the privacy interests of individuals, so too should it not be used to endorse and enforce particular business practices. The Copyright Office should focus on the core copyright concerns of reproduction, distribution, public performance, public display, and, for sound recordings, public performance by means of digital audio transmission utilized in support of the public good. Issues of product interoperability and public safety should be left to agencies (and laws) that are better able to evaluate the competing interests involved.

### **Rulemaking Process**

3. *Should section 1201 be adjusted to provide for presumptive renewal of previously granted exemptions—for example, when there is no meaningful opposition to renewal—or otherwise be modified to streamline the process of continuing an existing exemption? If so, how?*

Streamlining the renewal of existing exemptions is an excellent idea. In material submitted to the House Judiciary Committee's Subcommittee on Courts, Intellectual Property, and the Internet as part of its comprehensive review of the nation's copyright law, the Library Copyright Alliance proposed that after an exemption is granted, the burden in subsequent rulemakings "should be on those opposed to renewal to demonstrate why the exemption should not be renewed or should be modified in some manner. Moreover, if a second renewal is granted, the exemption should become permanent."<sup>1</sup> These are excellent suggestions that should be implemented.

4. *Please assess the current legal requirements that proponents of an exemption must satisfy to demonstrate entitlement to an exemption. Should they be altered? If so, how? In responding, please comment on the relationship to traditional principles of administrative law.*

Archivists preserve a wide variety of primary sources for the benefit of future generations. Preserving materials is a means to this end, not an end in itself. Archival materials provide surrogates for human memory, both individually and collectively, and when properly maintained, they serve as evidence against which individual and social memory can be tested. Archivists know that materials that are password-protected, encrypted, or otherwise encumbered with access control mechanisms are going to come into their collections. We have heard from some who have received this material and have been able to secure "keys" or other mechanisms that can, with the permission of the content owner, unlock the content. Other archivists may have received such material and used anti-circumvention tools to bypass the technical protection measures on the files in order to make non-infringing uses of the material. These archivists are understandably unwilling to go on record as to their potentially infringing actions.

The requirement that future adverse impact during any three-year period must be proven through "concrete evidence, examples and data supporting their responses" has therefore impeded SAA's participation in the rule-making process.<sup>2</sup> Furthermore, in many cases the three-year window is too long. A grant-funded preservation project that encounters protected digital files may not have enough funding to allow the archivists to wait for the next triennial rulemaking process and seek permission to bypass the measures that are preventing them from making lawful use of the files. By the time SAA will have assembled a portfolio of "concrete evidence, examples and data," it may be too late for many critical preservation actions. Given the rapid pace of technical change, it may no longer be possible to bypass an anti-circumvention mechanism.

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<sup>1</sup> *Chapter 12 of Title 17: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet of the H. Comm. on the Judiciary*, 113<sup>th</sup> Cong. (2014) ("Chapter 12 of Title 17 Hearing") at 24.

<sup>2</sup> *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, Notice of Inquiry, 64 FR 66139 (Nov. 24, 1999), at 66142.

The second major barrier has been the narrow definition of what constitutes a “particular class of copyrighted works.” Often digital archival material is donated by heirs or successor business executives who may not be aware that the collection contains encrypted content and often are not in possession of the encryption keys or passwords. Protected or encrypted material could be in any of the section 1201 categories. What defines them is not their content but rather where they are being stored and the kinds of uses that are being made of them. The recent recommendation from the Copyright Office that a “class of works” may be defined by reference to the particular type of use and/or user to which the exemption should apply is an important and welcome first step in addressing this problem.<sup>3</sup> The proper approach would be to provide a blanket exemption for archives engaging in non-infringing activities. At a minimum, the blanket exemption would encompass all acts authorized in section 108 of the Copyright Act. Even better would be a blanket exemption for any lawful use. It makes no sense to have the Copyright Act restrict in any way acts that are non-infringing.

5. *Please provide additional suggestions to improve the rulemaking process.*

There is inherent in the entire 1201 rulemaking process a fundamental flaw: The rulemaking should not apply to anti-circumvention actions undertaken to accomplish a non-infringing use. At a minimum, more reasonable permanent exemptions should be adopted (as discussed below in the response to question 8) to minimize the effort we all must expend on this procedure.

### ***Anti-Trafficking Prohibitions***

6. *Please assess the role of the anti-trafficking provisions of sections 1201(a)(2) and 1201(b) in deterring copyright infringement, and address whether any amendments may be advisable.*

SAA is not aware that the anti-trafficking provisions of section 1201(a)(2) and 1201(b) have had any impact in deterring copyright infringement. We do know, however, that the provisions have created an absurd, Catch-22 situation for any archives that sought to adhere to the letter of the law. Imagine that an archives petitioned successfully for an exemption to allow it to bypass an anti-circumvention measure on a file in its collection. It would then have to develop the technology that would allow for the anti-circumvention. But digital preservation is a community-based activity. No one institution can afford to develop all of the software tools needed to ensure the accessibility of digital materials over the long term. Instead, our work is conducted using software that is shared among institutions. For many years, the Library of Congress itself maintained a repository of shared digital preservation tools.<sup>4</sup> That role has now been assumed by the Community Owned Digital Preservation Tool Registry (COPTR).<sup>5</sup> It lists 410 shared tools that can be used in digital preservation. Yet because of the prohibition on trafficking in anti-circumvention tools, few of the available tools can assist archives in

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<sup>3</sup> U.S. Copyright Office, Recommendation of the Register of Copyrights in RM 2005-11, Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies 9-10 (Nov. 17, 2006), [http://www.copyright.gov/1201/docs/1201\\_recommendation.pdf](http://www.copyright.gov/1201/docs/1201_recommendation.pdf).

<sup>4</sup> <http://www.digitalpreservation.gov/tools/>.

<sup>5</sup> [http://coptr.digipres.org/Main\\_Page](http://coptr.digipres.org/Main_Page).

circumventing technical protection measures even when the purpose for circumventing the measure is non-infringing. Without the ability to acquire and use anti-circumvention tools from third parties, the 1201 rulemaking process is pointless.

7. *Should section 1201 be amended to allow the adoption of exemptions to the prohibition on circumvention that can extend to exemptions to the anti-trafficking prohibitions, and if so, in what way? For example, should the Register be able to recommend, and the Librarian able to adopt, exemptions that permit third-party assistance when justified by the record?*

As the Copyright Office's notice notes, it is often impossible for an individual or an agency to carry out anti-circumvention activities even if authorized through the rulemaking. SAA suggests that the normal principles of agency should apply to anti-circumvention. If it is legal for an archives to undertake an activity, it should also be legal for the agents of that archives to conduct that activity for the repository.

### **Permanent Exemptions**

8. *Please assess whether the existing categories of permanent exemptions are necessary, relevant, and/or sufficient. How do the permanent exemptions affect the current state of reverse engineering, encryption research, and security testing? How do the permanent exemptions affect the activities of libraries, archives, and educational institutions? How might the existing permanent exemptions be amended to better facilitate such activities?*

There are a number of elements in the 1201 rulemaking process that seem to have been designed merely to encourage contempt of copyright law. None, however, is as ridiculous as the permanent exemption found in section 1201(d). No library or archives asked for this exemption and none would ever use it. If an institution wished to gain access to a commercially exploited, copyrighted work in order to make a good-faith determination of whether to acquire such a work, it would simply ask the vendor for test access. The idea that a repository would instead develop tools to allow it hack into a commercial system is simply absurd.

A reasonable permanent exemption is possible. Section 1201(d) should be amended to allow archives and libraries to circumvent technical protection measures restricting access when the purpose is non-infringing, such as when it is authorized by sections 107, 108, 109, 110, or 117 of the Copyright Act. Further, the prohibition against trafficking in tools that enable the circumvention should be lifted for such purposes.

9. *Please assess whether there are other permanent exemption categories that Congress should consider establishing—for example, to facilitate access to literary works by print-disabled persons?*

All archives face the difficult challenge of providing equal access to people with disabilities, including those individuals with visual or hearing impairments as well as those whose physical disabilities may make it difficult for them to travel to a repository. Anything that can be done to make archival resources more available to all citizens is welcomed and encouraged.

**Other**

10. *To what extent and how might any proposed amendments to section 1201 implicate the United States' trade and treaty obligations?*
11. *Please identify any pertinent issues not referenced above that the Copyright Office should consider in conducting its study.*