

**United States Senate Judiciary Committee
Subcommittee on Intellectual Property
“Are Reforms to Section 1201 Needed and Warranted?”**

**Questions for the Record for
Ms. Regan A. Smith
United States Copyright Office
October 7, 2020**

Submitted by Chairman Thom Tillis

- 1. How has the Copyright Office responded to participant input regarding the 1201 rulemaking? What has the Copyright Office done to improve the functioning of the 1201 rulemaking? How is it working?**

The Copyright Office is committed to thoughtfully considering participant input when conducting the 1201 rulemaking. The rulemaking considers public input contributed through multiple rounds of public comment as well as public hearings, and the Register’s recommendation to the Librarian of Congress has consistently reflected careful analysis of the many perspectives received in the rulemaking.

The Office’s 2017 study on the operation of section 1201 considered ways to improve the functioning of the rulemaking. Most notably, the study revealed a broad consensus from stakeholders in support of a streamlined process to renew previously-adopted exemptions where the prior administrative record continues to obtain. The Office successfully implemented this process in the seventh and eighth rulemaking cycles.

In addition, the Office implemented a procedure for participants to engage in informal communications with the Office during the post-hearing phase of the rulemaking to discuss targeted issues related to the merits of the rulemaking. To ensure that such communications are governed by transparent and consistent procedures, the Office issued *ex parte* guidelines providing for public disclosure of material raised during such discussions. The Office also committed to simplifying regulatory language where possible while retaining fidelity to the administrative record. For example, the seventh rulemaking was able to cut the exemption language concerning uses of short portions of motion pictures in half while expanding the available uses under the exemption. The 2017 policy report also provided additional guidance concerning the factors that the Office considers in evaluating potential exemptions.

To educate the public on this new process and section 1201 in general, the Office launched a webpage, www.copyright.gov/1201 (also accessible from www.copyright.gov/dmca), that includes video tutorials and slides on the rulemaking, and links to all past rulemaking administrative materials as well as the Office’s study. The Office offers live public webinars on the 1201 rulemaking, and its Public Information Office is available to field questions about section 1201 and other copyright matters.

The Office is committed to making the rulemaking processes accessible to all who are interested in participating, and to soliciting input from a diversity of perspectives. To facilitate public engagement

in the rulemaking, prior to initiating a rulemaking cycle, the Office has engaged in outreach with parties or entities that participated in the immediately preceding rulemaking.¹ This outreach, coupled with public education initiatives, has helped the Office to consider public viewpoints with respect to the timing and operation of the 1201 rulemaking.

Overall, the Office believes that these adjustments have significantly improved the functioning of the section 1201 rulemaking. The Office continues to believe that legislative attention would be appropriate to adjust the statutory authorities of the rulemaking and expand the availability of permanent exemptions, which would promote efficiencies in the rulemaking as well as the general operation of the statute. In the meantime, the changes discussed above have allowed the rulemaking to accommodate increased public demand as the use of technological protection measures, particularly in computer programs, continues to grow.

2. In recent years, the Copyright Office has proposed some new permanent exemptions in section 1201. For each new permanent exemptions that the Copyright Office currently supports, how would you recommend tailoring the exemption so that it is neither under- nor over-inclusive?

The Office has not proposed specific legislative language for its recommended new exemptions, but it has suggested a number of ways to help ensure an appropriate balance between the interests of copyright owners and users. In general, the Office believes that the current temporary exemptions in these areas, which were developed based on extensive evidentiary records and stakeholder input, may serve as useful starting points in tailoring balanced legislation. For example:

- The exemption permitting circumvention to facilitate the use of assistive technologies by visually impaired persons has been readopted without opposition in the past several rulemakings. It thus appears to reflect a stakeholder consensus that the exemption strikes an appropriate balance among relevant interests.² In particular, to avoid interference with author compensation, the exemption is limited to “lawfully obtained” e-books and requires that “the rights owner is remunerated, as appropriate, for the price of the mainstream copy of the work as made available to the general public through customary channels.”³ The Office has noted, however, Congress may wish to consider whether the remuneration language is necessary in light of the “lawfully obtained” requirement.⁴
- The Office has recommended that a permanent exemption for diagnosis, repair, and maintenance of computer programs not be limited to “specific technologies or devices, such as motor vehicles, as any statutory language would likely be soon outpaced by technology.”⁵

¹ See *Public Engagement in Rulemaking*, ADMIN. CONFERENCE OF THE U.S. (Dec. 14, 2018), <https://www.acus.gov/sites/default/files/documents/Recommendation%202018-7%20%28Public%20Engagement%20in%20Rulemaking%29.pdf> (recommending this general approach).

² In the current proceeding, the Office is considering a petition to amend the exemption to reflect the requirements of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled. See Marrakesh Treaty art. 7, June 27, 2013, 52 I.L.M. 1312; ACB, Petition for New Exemption Under 17 U.S.C. § 1201 (2020). Petitions for newly proposed exemptions in the current rulemaking proceeding are available at <https://www.copyright.gov/1201/2021/petitions/proposed/>.

³ 37 C.F.R. § 201.40(b)(3).

⁴ U.S. COPYRIGHT OFFICE, SECTION 1201 OF TITLE 17 87 (2017), <https://www.copyright.gov/policy/1201/section-1201-full-report.pdf>.

⁵ SECTION 1201 OF TITLE 17 at 94–95.

This broad-based framework would facilitate a greater range of repair activities than can be accommodated through the rulemaking, which the Office has noted is a “somewhat ill-fitting regulatory approach” for these purposes because it “anticipates exemptions only for ‘a particular class of works.’”⁶ At the same time, to ensure that the exemptions do not sweep too broadly, the current regulations regarding repair of software-enabled motor vehicles and devices are limited to “lawfully acquired” products and require that circumvention not be “accomplished for the purpose of gaining access to other copyrighted works.”⁷ In addition, the exemption for repair of smartphones, home appliances, and home systems seeks to clarify the scope of permissible “maintenance” and “repair” activities by defining those terms in accordance with the definitions provided in section 117(d).⁸

- Similarly, the exemption for unlocking wireless devices is limited to “lawfully acquired” devices and applies only where circumvention is undertaken “solely in order to connect to a wireless telecommunications network and such connection is authorized by the operator of such network.”⁹
- As discussed below in response to question 3, the current regulatory exemption for security research is technology neutral to ensure that it remains applicable to a broad range of legitimate research activities. In addition, it omits certain requirements of the permanent exemptions for security testing and encryption research that researchers have found unduly limiting. To ensure that the exemption is appropriately limited to legitimate research activities, it provides that circumvention is permitted only when undertaken “solely for the purpose of good-faith security research and does not violate any applicable law, including without limitation the Computer Fraud and Abuse Act of 1986.”¹⁰ And it includes a definition of “good-faith security research” providing, among other requirements, that such activity must be carried out in an environment designed to avoid harm to individuals or the public, and that the information derived from the activity not be used or maintained in a manner that facilitates copyright infringement.¹¹

3. The Copyright Office has supported refining some of the existing permanent exemptions, particularly security testing encryption research because the exemption has not fared well in light of technological changes. What do you think is the best way to refine this exemption so that it is not outmoded by future technological changes?

In the 2017 policy study on section 1201, the Office concluded that certain aspects of the current exemption for security testing are insufficient to meet the needs of modern security research. Specifically, the definition of “security testing” in section 1201(j), which is limited to “accessing a computer, computer system, or computer network,”¹² fails to account for the fact that security

⁶ *U.S. Copyright Office: Hearing Before the Subcomm. on Courts, the Internet, and Intell. Prop. of the H. Comm. on the Judiciary*, 107th Cong. 12 (2001) (statement of Marybeth Peters, Register of Copyrights and Dir., U.S. Copyright Office) (“2001 Hearing”) (citing Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 Fed. Reg. 64,556, 64,565 (Oct. 27, 2000)).

⁷ 37 C.F.R. § 201.40(b)(9), (10).

⁸ *Id.* § 201.40(b)(10).

⁹ *Id.* § 201.40(b)(5).

¹⁰ *Id.* § 201.40(b)(11)(i).

¹¹ *Id.* § 201.40(b)(11)(ii).

¹² 17 U.S.C. § 1201(j)(1).

research today often involves “testing software or the actual access controls protecting a copyrighted work,” as opposed to merely testing the security of a computer system.¹³ The Office continues to believe that the security research exemption adopted in the most recent triennial rulemaking could provide a starting point for legislation to address this issue. To more flexibly accommodate a broader range of research activities, it permits circumvention “undertaken on a lawfully acquired device or machine on which [a] computer program operates, or . . . on a computer, computer system, or computer network on which the computer program operates with the authorization of the owner or operator of such computer, computer system, or computer network.”¹⁴ In addition, the exemption is not limited to specific types of devices or machines, as the Office concluded that good-faith security research on lawfully acquired devices, or on larger-scale computer systems with the authorization of the owner, is likely to be noninfringing, regardless of the type of physical product in which the program is located.¹⁵ This technology-neutral approach helps to ensure that the exemption will remain useful even as technologies and industry practices continue to evolve.

Submitted by Senator Chuck Grassley

- 1. I’ve heard from a number of constituents concerned that they will be charged with violating copyright law because they’ve circumvented TPMs in order to fix their tractor, farm equipment or other kind of machinery. Is that true, that they could be violating copyright law and be subject to penalties? What about the scenario where owners direct a third party to fix their tractor, car, farm equipment or other kind of machinery, is that a copyright violation?**

Section 1201 generally makes it unlawful to “circumvent a technological measure that effectively controls access to” a copyrighted work.¹⁶ Because computer programs are copyrightable works, a person who circumvents a technological measure to gain access to a program without the authorization of the copyright owner may be in violation of the statute unless an exemption applies. Given the growing prevalence of software in all types of everyday devices—vehicles, farm equipment, home appliances, medical devices, and many others—some stakeholders have expressed concern that section 1201 could be applied to activities that have little to do with traditional copyright interests, such as repair of personal devices. Although the Copyright Office is not aware of any specific cases where a court has found liability for circumventing a TPM for purposes of repair, it is possible that such activity could implicate the statute absent an exemption.¹⁷

In response to these concerns, the Copyright Office has recommended, and the Librarian has granted, exemptions for repair activities in the past two triennial rulemakings. The current regulations include

¹³ SECTION 1201 OF TITLE 17 at 75.

¹⁴ 37 C.F.R. § 201.40(b)(11).

¹⁵ U.S. COPYRIGHT OFFICE, SECTION 1201 RULEMAKING: SEVENTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION, RECOMMENDATION OF THE ACTING REGISTER OF COPYRIGHTS 292–98 (2018), https://cdn.loc.gov/copyright/1201/2018/2018_Section_1201_Acting_Registers_Recommendation.pdf (“2018 Recommendation”).

¹⁶ 17 U.S.C. § 1201(a)(1)(A).

¹⁷ In a few circumstances, courts have considered whether complaints alleging section 1201 violations in the context of repair were sufficient to survive motions to dismiss. Compare *Ford Motor Co. v. Autel US Inc.*, No. 14-13760, 2016 U.S. Dist. LEXIS 85875, at *9 (E.D. Mich. 2016) (dismissing anticircumvention and anti-trafficking claims because plaintiff failed to allege access to a copyrighted work), and *Navistar, Inc. v. New Balt. Garage, Inc.*, No. 11-cv-6269, 2012 U.S. Dist. LEXIS 134369, at *9–15 (N.D. Ill. 2012) (dismissing claims in password-sharing dispute due to failure to

an exemption allowing circumvention to access software in a “motorized land vehicle such as a personal automobile, commercial vehicle, or mechanized agricultural vehicle” for purposes of “diagnosis, repair, or lawful modification of a vehicle function.”¹⁸ Another exemption permits circumvention for diagnosis, maintenance, or repair of smartphones, home appliances, and home systems.¹⁹ The Office concluded that these activities are likely to be fair use because “repair supports—rather than displaces—the purpose of the embedded programs.”²⁰ The Office has received petitions to renew these exemptions in the current rulemaking, which were unopposed, as well as petitions to expand the exemptions to additional types of devices.

Regarding circumvention by third-party repair services, the law is currently unclear whether that activity is barred by the statute’s anti-trafficking provisions. Sections 1201(a)(2) and (b) make it unlawful to “offer to the public, provide, or otherwise traffic in any . . . service . . . or part thereof” that is primarily designed for the purpose of circumvention, has only limited commercially significant purpose other than circumvention, or is marketed for use in circumvention.²¹ Courts have not resolved whether third-party circumvention activities could constitute prohibited “service[s]” even if their ultimate purpose is repair or maintenance. The Office has provided detailed analyses of this issue in its 2017 policy study on section 1201 and in its recommendation in the 2018 rulemaking.²²

Under the present statute, the Librarian is not authorized to adopt exemptions to the anti-trafficking provisions. In the 2015 rulemaking, the Office recommended an exemption to the anticircumvention provision for repair of vehicles, but in light of the uncertainty regarding the scope of the anti-trafficking provisions, it limited the eligible users to vehicle owners.²³ In the 2018 rulemaking, following requests by stakeholders (including representatives of farmers and ranchers), the Office removed that limitation, concluding that repair activity engaged in by third parties at the direction of a device owner is likely to be noninfringing.²⁴ But the Office expressed no view on whether third-party services might separately violate the anti-trafficking provisions, and it cautioned that “[g]iven the legal uncertainty in this area, services electing to proceed with circumvention activity pursuant to the exemption do so at their peril.”²⁵ As noted in my written statement, the Office has recommended a legislative update that would grant the Librarian

sufficiently allege acts of circumvention or trafficking), *with GM LLC v. Dorman Prods.*, No. 15-12917, 2017 U.S. Dist. LEXIS 28434, at *10–14 (E.D. Mich. 2017) (allowing anticircumvention and anti-trafficking claims to proceed that alleged circumvention of TPM to access vehicle software to develop repair tool).

¹⁸ 37 C.F.R. § 201.40(b)(9).

¹⁹ *Id.* § 201.40(b)(10).

²⁰ 2018 Recommendation at 203 (quoting U.S. COPYRIGHT OFFICE, SOFTWARE-ENABLED CONSUMER PRODUCTS 40 (2016)). The Office had previously reached the same conclusion in two policy studies, where it noted that “there is no market for the [device-enabling] programs themselves” and therefore “repairing these programs is not likely to interfere with any market likely exploited by the copyright owner.” SOFTWARE-ENABLED CONSUMER PRODUCTS at 41; *see also* SECTION 1201 OF TITLE 17 at 90, 92–95 (recommending statutory exemption to allow circumvention for diagnosis, repair, and maintenance).

²¹ 17 U.S.C. § 1201(a)(2), (b).

²² *See* 2018 Recommendation at 222–25; SECTION 1201 OF TITLE 17 at 58–60.

²³ U.S. COPYRIGHT OFFICE, SECTION 1201 RULEMAKING: SIXTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION, RECOMMENDATION OF THE REGISTER OF COPYRIGHTS 246–47 (2015), <https://cdn.loc.gov/copyright/1201/2015/registers-recommendation.pdf>.

²⁴ 2018 Recommendation at 222–25; *see also* SECTION 1201 OF TITLE 17 at 61–62 (noting that section 1201(a)(1)(C)’s reference to permitting “users of a copyrighted work” to engage in circumvention, as opposed to “owners” of a work, suggests that, in at least some cases, a party other than the owner of a copy of a work may be within the class of persons covered by an exemption).

²⁵ 2018 Recommendation at 225.

discretion to adopt temporary exemptions permitting third-party assistance “at the direction of” an intended user.

- 2. In your opinion, is the law clear that farmers and other consumers can fix their vehicles, equipment, and other machinery without being in violation of copyright law? Is it clear that there is no copyright violation if farmers and other consumers direct a third party to fix their items?**

Please see the response to the previous question.

- 3. In your opinion, would it be better for this exemption to be spelled out in the law and made permanent? Or do you believe that it’s better for the exemption to be considered every few years under the Section 1201 rulemaking? Why or why not?**

The Office has recommended adoption of a permanent exemption for diagnosis, repair, and maintenance of computer programs, including with respect to obsolete access controls. As noted, the Office has concluded that these activities typically are noninfringing under one or more provisions of copyright law, including the fair use doctrine and section 117.²⁶ The Office has received petitions for repair of software-enabled devices in the past three rulemakings, with many stakeholders expressing “frustration at the notion that copyright should prevent owners of devices from repairing, tinkering with, or otherwise exercising control over their own property.”²⁷ And as noted above, the Librarian’s authority to adopt exemptions for these activities is limited by the statutory rulemaking standard, which restricts the inquiry to “particular class[es] of copyrighted works” for which there is evidence of adverse effects on noninfringing uses.²⁸ In the 2018 rulemaking, the Office refined the proposed class to those types of devices for which there was a cognizable record, recommending a relatively broad exemption covering repair of many device types, including vehicles, home appliances and home systems, and smartphones.²⁹

Although the rulemaking is serving its purpose of responding to marketplace developments, due to the repeat adoption of repair-related regulatory exemptions, the broad-based reach of this category,

²⁶ See SECTION 1201 OF TITLE 17 at 90.

²⁷ 2018 Recommendation at 3; *see also, e.g.*, 2015 Recommendation at 218; AFBF, Petition to Renew a Current Exemption Under 17 U.S.C. § 1201 (2020) (petitioning for renewal of repair exemption for motor vehicles, including farm equipment); EFF, Repair Assoc. & iFixit, Petition to Renew a Current Exemption Under 17 U.S.C. § 1201 (2020) (petitioning for renewal of repair exemption for smartphones, home appliances, and home systems). Renewal petitions in the current rulemaking proceeding are available at <https://www.copyright.gov/1201/2021/petitions/renewal/>.

²⁸ 17 U.S.C. § 1201(a)(1)(C).

²⁹ 2018 Recommendation at 192–93. *See History*, REPAIR ASSOC., <https://repair.org/history> (“As of 2018, Copyright Law allows for nearly all repair.”); Jason Koebler, *In Groundbreaking Decision, Feds Say Hacking DRM to Fix Your Electronics Is Legal*, MOTHERBOARD (Oct. 25, 2018), <https://www.vice.com/en/article/xw9bwd/1201-exemptions-right-to-repair> (“The new exemptions . . . give consumers wide latitude to legally repair the devices they own.”); Chaim Gartenberg, *New Copyright Exemptions Let You Legally Repair Your Phone or Jailbreak Voice Assistants*, THE VERGE (Oct. 25, 2018), <https://www.theverge.com/circuitbreaker/2018/10/25/18024332/us-copyright-office-right-to-repair-dcma-exemptions> (“The final ruling . . . enacts broad new protections for repairing devices.”). The Office will be evaluating proposals to further expand the regulatory exemption in the current rulemaking. *See, e.g.*, EFF, Petition for New Exemption Under 17 U.S.C. § 1201 (2020) (petitioning for an exemption for “non-infringing repair, diagnosis, or modification of a software-enabled device”); iFixit & Repair Assoc., Petition for New Exemption Under 17 U.S.C. § 1201 (2020) (petitioning for an expanded exemption to permit “diagnosis, repair, maintenance, or modification” of “any lawfully acquired devices”).

and attendant questions related to provision of repair services, the Office believes this issue is ripe for consideration of a statutory exemption. In its 2017 policy study, the Office concluded that “a limited permanent exemption for repair activities could provide greater certainty to users across classes of works, including software-enabled products.”³⁰ This recommendation echoed the recommendation of former Register Peters in 2001 that the rulemaking process is a “somewhat ill-fitting regulatory approach” with respect to the need to circumvent obsolete technological measures which are employed across various classes of works.³¹

4. The Copyright Office streamlined the triennial rulemaking in 2018. What improvements are still needed? Is legislation necessary or can these improvements be made by the Copyright Office without legislation?

Following the 2017 policy report to Congress, the Copyright Office implemented a number of improvements to the section 1201 rulemaking process. Most significantly, as the question notes, the Office streamlined the procedures for renewals of previously-adopted exemptions where the prior administrative record continues to obtain. In addition, the Office initiated a process for *ex parte* post-hearing communications subject to transparent disclosure guidelines, increased its public outreach and engagement activities, adjusted its rulemaking timing to facilitate public participation, engaged in review that resulted in simplified regulatory language, and maintained or improved the visual and audio accessibility of its materials. Going forward, the Office expects to be able to implement virtual hearings for this current rulemaking cycle, a prior request that was previously limited by technological constraints. All rulemaking materials are accessible through the Office’s website, including videos.

While these adjustments have improved the rulemaking, the Office believes that legislative updates would be appropriate in a few areas that are beyond the agency’s existing regulatory authority. *First*, the Office recommends expanding the rulemaking authority to allow the adoption of exemptions “at the direction of” an intended beneficiary, and considering the relationship of the rulemaking in connection with section 1201(a)(2)’s prohibition on trafficking in circumvention services. This change would have the benefit of making exemptions more workable for persons who may require assistance to circumvent a technological protection measure for favored purposes (*e.g.*, a farmer may lack the personal know-how required to bypass encryption to repair malfunctioning software in an agricultural vehicle). *Second*, the Office has long supported legislation to provide for burden-shifting or presumptive renewal of exemptions adopted in the previous rulemaking cycle. While the streamlined procedures have reduced burdens on participants and the Office, a statutory change could introduce even greater efficiencies and provide users with greater predictive certainty. *Third*, the Office has recommended updating existing statutory exemptions for security testing and encryption research to reflect those modern disciplines, as well as adopting certain regulatory exemptions by statute where there is a broad-based need or for uses that have repeatedly received exemptions in past rulemakings.

³⁰ SECTION 1201 OF TITLE 17 at 92–93.

³¹ 2001 Hearing at 12 (statement of Marybeth Peters, Register of Copyrights and Dir., U.S. Copyright Office) (citing 65 Fed. Reg. at 64,565).

5. Do you believe that stakeholders are able to easily participate in the Section 1201 proceedings? How has the Copyright Office ensured that users and their positions are adequately represented at the proceedings? How has the Office reduced the burdens on rulemaking participants?

Yes, the Copyright Office believes that the section 1201 rulemaking is accessible to interested members of the public, compared to agency rulemakings in general. The Office maintains an open door to all copyright stakeholders (subject to rulemaking *ex parte* guidelines noted below) and is dedicated to facilitating public engagement. In recent years, the Office has engaged in a number of public outreach and education activities to draw attention to the rulemaking and answer questions from the public. For example, the Office offers live webinars, video tutorials, and a catch-all page on section 1201 (www.copyright.gov/1201), and its Public Information Office is available to field questions about section 1201 and other copyright matters. The net result has been that the Office regularly heard from many different perspectives, with a particular emphasis on views from users and their positions, during the course of the section 1201 rulemakings.

The Office uses regulations.gov to intake public comments, and the section 1201 rulemaking routinely receives brief short-form comments as well as longer comments from individuals or entities representing users. While the Office has found this platform to be quite user-friendly, the Office will also work with members of the public who lack internet access or otherwise need to submit materials through an alternate format. In the past, the Office has held public hearings in Washington, D.C. and California to facilitate public input, including an open call for members of the audience who may not have signed up for a panel to offer their views. This rulemaking cycle, the Office will conduct virtual hearings, as well as potentially in-person hearings. Public rulemaking documents as well as material on copyright.gov is generally made accessible for those who are visually impaired, and the Office offers various accessible alternatives for hearing impaired persons, including live sign language interpretation, transcripts, and closed captioning.

In addition, in 2018 the Office implemented a procedure for participants to engage in informal communications (by telephone or in-person or video meeting) with the Office during the post-hearing phase of the rulemaking, to discuss targeted issues related to the merits of the rulemaking. To ensure that such communications are governed by transparent and consistent procedures, the Office issued *ex parte* guidelines providing for public disclosure of material raised during such discussions. The Office also committed to simplifying regulatory language where possible while retaining fidelity to the administrative record. For example, the seventh rulemaking was able to cut the exemption language concerning uses of short portions of motion pictures in half, while expanding the available uses under the exemption. The Office's 2017 policy report also provided additional guidance concerning the factors that the Office considers in evaluating potential exemptions, to aid members of the public in providing written comments.

Before commencing a new section 1201 rulemaking cycle, members of the Office have engaged in informal outreach with parties or entities that participated in the immediately preceding rulemakings. For example, before initiating the eighth triennial rulemaking, the Office solicited views as to whether or how pandemic concerns had affected the academic calendars of law clinics that have historically participated in this rulemaking, and made adjustments to its intended timing to accommodate these user-based interests. This outreach, coupled with other public education

initiatives, helped the Office to consider public viewpoints with respect to the timing and operation of the 1201 rulemaking.

As question 4 notes, in 2018, the rulemaking process was significantly improved by the Office's determination to streamline the process for renewals of previously-adopted exemptions where the prior administrative record continues to obtain. For two cycles now, the Office has directly contacted proponents of previously-adopted exemptions to make them aware of this option and relevant timing considerations. These changes allowed users to submit a simple form attesting to the continued need for a previously-adopted exemption and continued reliability of the administrative record, alleviating the need to participate in additional rounds of notice and comment for these non-controversial classes of works. As a result of these changes, the Office received positive user feedback noting the reduced burdens on rulemaking participants.

Finally, when publishing the Register's recommendation and the Library of Congress's final rule, the Office typically creates FAQs or executive summaries, as well as email and social media summaries, to ensure that members of the user community and others understand the scope of the new exemptions.

Submitted by Senator Richard Blumenthal

- 1. In creating Section 1201's anti-circumvention measures, Congress recognized the need for exemptions. For example, Congress codified permanent exemptions to allow reverse engineering for the purposes of achieving interoperability of computer programs, and to allow for encryption research. Congress also acknowledged that the need for exemptions may evolve, and tasked the Library of Congress with granting temporary exemptions in accordance with the triennial rulemaking process proscribed in the statute.**
 - a. Has the triennial rulemaking process proven to be an effective mechanism for dealing with the new and developing impacts Section 1201 is having on consumers, particularly as it relates to the expansion of the Internet of Things ("IoT")?**

The triennial rulemaking has resulted in exemptions to facilitate a wide variety of noninfringing uses by consumers involving IoT and other software-enabled devices. These include exemptions for "unlocking" of cellular phones and other wireless devices to enable consumers to connect them to a different telecommunications network; "jailbreaking" of smartphones, tablets, smart televisions, and voice assistant devices to make them interoperable with new software applications or to remove software; repair and maintenance of motor vehicles, smartphones, home appliances, and home systems; the use of alternative feedstock in 3-D printers; and access by patients to data generated by medical devices and personal monitoring systems. Indeed, in the sixth, seventh, and eighth triennial rulemakings, many of the exemptions considered during the administrative process concern uses connected with the increased application of technological protection measures in conjunction with the expansion of IoT.

Moreover, the recent changes to streamline the rulemaking have made the process more effective for consumers by eliminating the need to resubmit evidence when seeking renewal of an existing exemption. Instead, these users can focus their energies on proposals for new or expanded exemptions. Thus, in the current rulemaking, the Office has received renewal petitions for all of the exemptions noted above, and none were opposed. And the Office is now considering petitions to expand several of these exemptions—for example, by extending them to additional categories of software-enabled devices. In this respect, the rulemaking has succeeded in providing a flexible method of responding to changes in technology and consumer needs, as Congress intended.

b. Is the rulemaking process accessible to those who have a need for an exemption? What hurdles might the current process pose to particular parties seeking an exemption, including consumers seeking to repair or otherwise legitimately use a product?

In brief, while the Copyright Office has engaged in a number of initiatives to make the rulemaking accessible for those who have a need for an exemption, the existing statutory authority cabins the Office's ability to craft exemptions that address the needs of users who may be unable to engage in circumvention activities themselves. The Office has recommended legislative consideration of expanding this authority to accommodate these needs, such as the needs of consumers to have their product repaired but, whether by preference or necessity, may wish to have the repair serviced rather than engage in self-help.

Regarding the accessibility of the section 1201 rulemaking, the Office has engaged in a number of public outreach and education activities to draw attention to the rulemaking and answer questions of the public. For example, the Office offers live webinars, video tutorials, and a catch-all page on section 1201 (www.copyright.gov/1201), and its Public Information Office is available to field questions about section 1201 and other copyright matters. The net result has been that the Office regularly receives from many different perspectives, with a particular emphasis on views from users seeking exemptions, during the course of the section 1201 rulemakings.

Feedback indicates that most users find the Office's communications technology to be accessible, namely regulations.gov and copyright.gov. The Office routinely works with individuals who may need assistance with the platforms or to submit materials in an alternate manner, and works to make its section 1201 written and audio materials available in accessible formats. In the past, the Office has held public hearings in Washington, D.C. and California to facilitate public input, including an open call for members of the audience who may not have signed up for a panel to offer their views. This rulemaking cycle, the Office will conduct virtual hearings, as well as potentially in-person hearings.

In addition, in 2018 the Office implemented a procedure for participants to engage in informal communications (by telephone or in-person or video meeting) with the Office during the post-hearing phase of the rulemaking, to discuss targeted issues related to the merits of the rulemaking. To ensure that such communications are governed by transparent and consistent procedures, the Office issued *ex parte* guidelines providing for public disclosure of material raised during such discussions. This mechanism allows the Office to gather additional input from users needing exemptions and others interested in the rulemaking subjects.

The Office also committed to simplifying regulatory language where possible while retaining fidelity to the administrative record. For example, the seventh rulemaking was able to cut the exemption language concerning uses of short portions of motion pictures in half, while expanding the available uses under the exemption. The Office’s 2017 policy report also provided additional guidance concerning the factors that the Office considers in evaluating potential exemptions to aid members of the public in providing written comments.

In addition, when publishing the Register’s recommendation and the Library of Congress’s final rule, the Office typically creates FAQs or executive summaries, as well as email and social media summaries, to ensure that members of the user community and others understand the scope of the new exemptions.

Regarding hurdles in the current process, the Copyright Office has recommended expanding the rulemaking authority to allow the adoption of exemptions “at the direction of” an intended beneficiary, and considering the relationship of the rulemaking in connection with section 1201(a)(2)’s prohibition on trafficking in circumvention services. This change would have the benefit of making exemptions more workable for persons who may require assistance to circumvent a technological protection measure for favored purposes (*e.g.*, a farmer may lack personal know-how required to bypass encryption to repair malfunctioning software in an agricultural vehicle). The Office has also recommended adopting a statutory presumption of renewal and expanding or updating the set of statutory permanent exemptions, changes that would have the benefit of removing the need for certain users to rely upon the triennial rulemaking.

Finally, some user groups have raised questions whether the bar on trafficking in circumvention tools serves as a hurdle for users in need of an exemption. In 2017, after soliciting public comments and examining the relevant legal materials, the Office concluded section 1201(a)(2) should not be interpreted to prohibit the development or obtaining of a tool for purposes of self-help, as Congress did not intend to apply the manufacturing bar to exemption beneficiaries from producing their own circumvention tools for personal use. The Office did not recommend legislative amendment on this issue.

- 2. Once a company integrates copyrightable computer code into a product, Section 1201 can dramatically limit a consumer’s ability to use it. Although the Copyright Office has granted exemptions to remedy the right to repair, many consumers remain unable to repair or otherwise edit products for purposes of fair use.**
 - a. What policy solutions might more appropriately balance interests in consumers’ right to repair (or otherwise legitimately use a product that they have purchased) and the need to prevent copyright infringement? Would requiring a nexus between copyright infringement and liability under Section 1201 be a solution, and why or why not?**

The Office has recommended that consumers’ legitimate interests in repairing and otherwise making use of lawfully acquired products be addressed through reliance upon existing statutory limitations, adjacent doctrines addressing anticompetitive behavior, and updates to the permanent exemptions or expansion of the Office’s rulemaking authority. In particular, as discussed above, the Office believes that a permanent exemption to facilitate diagnosis, repair, and maintenance of software-enabled devices would provide valuable certainty to consumers who may be unsure as to the potential

relationship such activities may have to section 1201. In addition, the Office has recommended that the Librarian be afforded discretion to adopt temporary exemptions permitting third parties to provide assistance in circumvention at the direction of an exemption beneficiary. This change would greatly benefit consumers and other users who may lack the technical knowledge to circumvent TPMs on their own.

The Office did not recommend amending the statute to require a “nexus” between circumvention and copyright infringement. As discussed in our policy study, one of Congress’s main purposes in adopting section 1201 was to provide remedies for conduct that harmed the value of copyrighted works but that was not covered by existing copyright law:

“Descrambling or decrypting only enables someone to watch or listen to a work without authorization, which is not necessarily an infringement of a copyright owner’s traditional exclusive rights under § 106.” Yet this activity unquestionably harms the value of the work, and the damage compounds exponentially when the dissemination of circumvention tools enables it to occur on a vast scale. Limiting section 1201(a) to circumvention or trafficking activity undertaken for the purpose of infringing or facilitating infringement could place such conduct beyond the statute’s reach.

This outcome would seem especially ill-advised now that access-based platforms have come to represent a major component of the copyright marketplace. The dramatic growth of streaming services like Netflix, Spotify, Hulu, and many others suggests that for both copyright owners and consumers, the offering of access—whether through subscriptions, *à la carte* purchases, or ad-supported services—has become a preferred method of delivering copyrighted content.³²

Moreover, if Congress were to consider adopting a nexus requirement, it would need to consider the effect of such a change on U.S. international obligations. The DMCA’s legislative history indicates that Congress believed that a separate anticircumvention right was necessary to comply with the WIPO Internet Treaties.³³ In addition, several U.S. free trade agreements require that the anticircumvention right provide a separate cause of action independent from copyright infringement.³⁴

b. Is the solution to this problem simple enough to be remedied by a clear “fair use” exception to Section 1201? What downsides might come from this approach? If you oppose such an exception, how should fair use be addressed instead?

Fair use is critical to ensuring that users are able to make socially beneficial uses of copyrighted works, and it plays a key role under section 1201. Most of the exemption requests received in the rulemaking rely on claims of fair use, and the Office regularly recommends exemptions on that basis.

³² SECTION 1201 OF TITLE 17 at 45–46 (quoting *MDY Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 945 (9th Cir. 2010)); see also Brief for United States as Amicus Curiae Supporting Rehearing at 8–9, *MGE UPS Sys., Inc. v. GE Consumer and Indus., Inc.*, 622 F.3d 361 (5th Cir. 2010) (No. 08-10521) (“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.”).

³³ See H.R. REP. NO. 105-551, pt. 1, at 9–10 (1998).

³⁴ See, e.g., United States-Mexico-Canada Agreement, U.S.M.C.A. art. 20.66.3, Nov. 30, 2018.

At the same time, it is important to note that the statutory framework adopted by Congress does not provide exemptions that track the exceptions to copyright infringement. For example, the section 1201 exemption for library purchasing is different from the section 108 copyright exceptions for reproduction and distribution of works by libraries and archives.³⁵ In addition, section 1201(a)(1)(E) notes that neither statutory nor regulatory exemptions may be asserted as defenses to copyright infringement claims, and section 1201(c)(1) states that nothing in chapter 12 shall affect limitations or defenses to copyright infringement, including fair use.

This reflects the fact that, as noted, Congress created a new and independent anticircumvention right to cover harmful activities that are not necessarily infringing under copyright law. In addition, it reflects Congress's determination that exemptions for fair uses beyond those covered by the permanent exemptions should be adopted via the triennial rulemaking, rather than through a catch-all fair use exemption. Thus, such an exemption would constitute a fundamental departure from the basic structure Congress established in enacting section 1201.³⁶

If Congress were to consider a broad exemption for fair use, it would need to consider how to account for the types of activities discussed in response to question 2a—acts of unauthorized access that do not necessarily involve an infringing reproduction, public distribution, public performance, or public display of a copyrighted work, but that can result in comparable harm to the work's value. As noted, providing legal remedies against this type of conduct was one of Congress's central purposes in enacting section 1201, and the law should continue to provide such protection.

³⁵ Compare 17 U.S.C. § 1201(d) with *id.* § 108.

³⁶ SECTION 1201 OF TITLE 17 at 102–04.