

**United States Senate Judiciary  
Subcommittee on Intellectual Property**

**“Are Reforms to Section 1201 Needed and Warranted?”**

**Answers to Questions for the Record from  
Vanessa P. Bailey**

**QUESTIONS FROM CHAIRMAN TILLIS**

- 1. The Copyright Office did not propose altering the basic framework of section 1201 but made numerous recommendations to improve it. Do you agree with the Copyright Office’s conclusion that the basic structure of section 1201 has worked well and should be retained? What has been the greatest success of section 1201? What has been the biggest downside?*

The Copyright Office’s assessment that Section 1201 has worked well for 22 years is correct and the Section does not need major revision. The greatest success of Section 1201 has been its blending of stable statutory protections for copyrighted digital content and a flexible regulatory process to facilitate non-infringing uses. These two features set the stage for the explosion of digital content creation and consumption in the 21<sup>st</sup> century.

The statutory protections of Section 1201 create confidence that digital content can be distributed broadly without fear that such distribution will leave it open to easy and widespread infringement due to future hacking of Technological Protection Measures (“TPMs”). While the hacking of TPMs is inevitable, Section 1201’s robust anti-circumvention and anti-trafficking provisions prevent such hacks from entering the mainstream marketplace and disrupting the demand for legitimate content. Along with the protections provided by TPMs, these provisions assure content creators that their expressive copyrighted works will be safe in the integrated digital content ecosystem. Relying upon the combined protections of Section 1201 and industry-standard TPMs, the motion picture, consumer electronics, and IT industries have been able to create and maintain a digital content ecosystem that delivers low-cost, high-quality content into the homes of nearly every American with the click of a button.

Section 1201’s triennial regulatory process has also been broadly successful. The process promotes evidence-based evaluation of exemption requests, and the Copyright Office’s recent streamlining of the renewal process for existing exemptions goes a long way toward reducing the burden on petitioners. However, additional changes to the renewal process could further aid petitioners and limit the chance of unnecessary conflict between petitioners and opponents. The Copyright Office should use its regulatory authority to make certain changes it previously chose not to make. For example, the Copyright Office could grant continuing exemptions after a

temporary exemption has been successfully renewed. Additional renewal petitions should not be required for such continuing exemptions, unless the exemption draws objections in later triennials.<sup>1</sup> Additionally, the Copyright Office could remove the requirement that an initial renewal petition contain a detailed justification for the renewal from the petitioner. Such justifications often lead to debate regarding whether the petition actually seeks a more expansive interpretation of an existing exemption. This debate is largely unnecessary and unproductive. It often pits parties against each other who would otherwise agree that renewal of an exemption is appropriate. With these tweaks to the rulemaking process, Section 1201 will continue to effectively serve the needs of the American public for years to come.

2. *Fair use is not a defense to an act of circumvention in violation of section 1201, but the statute has mechanisms for allowing certain acts of circumvention, including several permanent exemptions. Do you think the statute currently has the right permanent exemptions – both in terms of the categories and their scope? Would you like to see any new permanent exemptions?*

The substance of the existing permanent exemptions seems appropriate. However, additional permanent exemptions are unnecessary. Congress intended not to have a blanket fair use exemption because the very nature of fair use is case specific. Fair use, like Section 1201, relies on flexibility and constant re-evaluation to maintain its relevance. Permanent exemptions, whether legislated or regulated, hinder the ability of Section 1201 to adapt to future circumstances in light of the changing technological landscape. Exemptions that draw broad consensus today, and there are certainly some candidates, may look different in another ten years. Evolving needs in the creative marketplace may make them unnecessary; or, with time, it may become apparent that they create greater opportunities for infringement than once thought. The purpose of the triennial regulatory process is to allow for a careful and continuous evaluation of data by subject matter experts in the Copyright Office. This evaluation cannot effectively occur with permanent exemptions.

The problem caused by permanent exemptions is evident in the Copyright Office's 2017 report. In over 20 pages of its report, the Copyright Office suggested modifications to two of the existing permanent exemptions, and noted substantial ambiguities created by several others.<sup>2</sup> However, because the exemptions were codified in statute, rather than regulation, the Copyright Office was not able to enact its proposed modifications or provide anything more than interpretive guidance

---

<sup>1</sup> Such objections are rare. In the Seventh triennial rulemaking, petitioners sought renewals of 16 existing exemptions. All but 4 of these renewals were uncontested.

<sup>2</sup> UNITED STATES COPYRIGHT OFFICE, *Section 1201 of Title 17: A Report of the Register of Copyrights* at 62-82 (June 2017) (suggesting several amendments Section 1201(j), which creates a permanent exemption for security testing, as well as amendments to Section 1201(g), which creates a permanent exemption for encryption research).

regarding its identified ambiguities. The fact that modifications were seen to be required in permanent exemptions is not evidence that those exemptions were flawed upon enactment, but rather that they failed to keep up with the pace of technological evolution. This is a danger for all permanent exemptions, and demonstrates why further permanent exemptions are unwarranted.

3. *How has the triennial rulemaking conducted by the Copyright Office and adopted by the Librarian of Congress benefited the public? How would a more streamlined process help?*

The triennial process benefits the public in two primary ways. First, it encourages active participation by both industry groups and the public; therefore, it ensures that exemptions strike the appropriate balance between fair use and content protection. Not only does this benefit the public by facilitating non-infringing uses of content, it also safeguards the digital content ecosystem from improvidently-granted exemptions that could endanger the public's safe and easy access to legitimate digital content. The rulemaking process recognizes that steps taken to promote fair use can also create risk of infringing use, and only grants exemptions upon a showing of true need. This careful balance redounds to the benefit of the American public.

Second, the rulemaking process benefits the public by reducing conflict between petitioners and objectors and building consensus around exemptions. The Copyright Office and the triennial process have been remarkably effective at creating consensus among initially-opposing parties. In the Seventh Triennial, the Copyright Office received renewal petitions for sixteen classes of exemptions. Many of those exemptions were the subject of rigorous argument in the preceding triennials, yet only four of the renewals were contested in the Seventh Triennial. This remarkable achievement shows the impact of the Copyright Office's dedication to careful, evidence-based analysis of petitions and tailoring of exemptions.

The stability of existing exemptions, and the knowledge that further exemptions will not be granted without evidence of need, encourages investment in digital infrastructure. This investment overwhelmingly benefits the public and is the reason why digital content can be viewed in homes across the country seamlessly and without security concerns.

Further streamlining of the renewal process may be beneficial both to petitioners and content creators. In my testimony, I propose additional streamlining through the granting of continuing exemptions and removing the requirement that petitioners justify the need for renewals. These changes would make the regulatory process less burdensome for petitioners, reduce the potential for conflict, and further promote stability in existing exemptions.

4. *Section 1201 does not permit third-party assistance for circumvention, even where circumvention is allowed. What are your thoughts on when third-party assistance should be permitted?*

This question assumes that amending Section 1201 is needed to allow third-party assistance. In fact, under the existing legislative and regulatory framework, the Copyright Office has already crafted flexible anti-circumvention exemptions that facilitate use by non-technical beneficiaries. For example, the education exemptions have permitted technical or library staff to perform circumvention on behalf of classroom teachers and professors. Also, accessibility exemptions have permitted school disability service officers to engage in circumvention on behalf of disabled or visually-impaired students.

Even where regulatory exemptions do not exist, industry members and consumer groups have been successful in reaching compromises around permissible third-party assistance. This private ordering reflects the market's ability to self-regulate even in the absence of government intervention. In the automobile context, for example, automakers reached a compromise with consumer groups and third-party repair facilities to permit third-party repair of vehicles. Through a national Memorandum of Understanding (MOU), vehicle owners and independent repair facilities continue to have access to the same diagnostic and repair information provided to franchised dealers. Similarly, in the context of digital audiovisual content (motion pictures, television shows, etc.), the content protection organizations have expressed a willingness to aid non-technical users with exempted acts of circumvention.

Through carefully crafted exemptions and private ordering, the American public can access third-party assistance for acts of circumvention without opening the floodgates to runaway infringement.

5. *Your written testimony mentioned that many Americans currently rely on section 1201 to protect their copyrighted works when they put them into digital format. Where do you think we would be without section 1201? How important has this provision been to the growth of digital content – and with it the increased accessibility of content?*

Section 1201 has been critical to the growth of digital content and is particularly important to the viability of subscription delivery models for digital content. The combined protections of industry-standard TPMs and Section 1201 have been responsible for an explosion in both the amount of content available and the means in which that content is presented to consumers. It has facilitated the safe dissemination of billions of copies and streams of copyrighted digital content and has prevented the emergence of a legitimate market for circumventing devices.

Because it allows content creators to feel secure in the protection provided by industry standard TPMs, Section 1201 has also been effective in providing American consumers with a broad range of choices in the content they consume, the devices they purchase, and the manner in which they consume such content. Consumers generally do not have to worry about whether their new Blu-ray players will play their existing DVDs. Nor do they have to worry that a Sony Blu-ray player will only be able to play content from Sony Pictures Studios. The use of industry-standard TPMs backed by Section 1201 protections ensures that protected content can be played on nearly all home networks, and that playback devices can communicate seamlessly with one another to deliver protected content to the consumer.

TPMs and the legal protections afforded by Section 1201 have served as the foundation for growth in digital content consumption choices, from ownership of a copy, to rental, to pay-per-view to subscription streaming services. As the United States transitions from a digital content ecosystem that is reliant on ownership of physical media—in the form of DVDs and Blu-ray Discs—to one that delivers content via subscription to online content aggregators, TPMs are becoming even more important to protecting consumer choice. Subscription services are able to provide consumers with access to thousands of copyrighted works. Many do so for less than ten dollars a month. This broad variety of content delivery choices would simply not be possible if content creators lacked confidence in the ability of TPMs to protect their content from infringement. Section 1201 provides this confidence.

Without Section 1201, the robust, integrated digital content ecosystem could not have emerged or endured. That ecosystem relies on industry standard TPMs to protect digital content while ensuring that content can be played on nearly any device without compatibility concerns. Section 1201's anti-trafficking and anti-circumvention provisions encourage the use of industry-standard TPMs by preventing the creation and distribution of hacking tools. In the absence of Section 1201 content creators would have been forced to increase the technological protection they provide for their content to compensate for a lack of legal protection. The likely result would be content protected by proprietary TPMs that could only be played on a sub-set of authorized devices. Such a fragmented ecosystem would force American consumers either to buy multiple playback devices or to limit themselves only to content that is compatible with their own devices. Not only would this siloing be harmful to consumer choice, it would incumber the free exchange of ideas and expression.

**United States Senate Judiciary  
Subcommittee on Intellectual Property**

**“Are Reforms to Section 1201 Needed and Warranted?”**

**Answers to Questions for the Record from  
Vanessa P. Bailey**

**QUESTIONS FROM SENATOR GRASSLEY**

1. *Section 1201’s prohibition on circumvention has several permanent exemptions set out in the statute. How well have these worked over the past 22 years? Do you believe that there should be fewer or more exemptions to Section 1201? What are they?*

Statutory permanent exemptions provide no greater benefit to non-infringing users than temporary exemptions—particularly under my streamlined proposal for continuing exemptions—and their inflexibility has hampered the Copyright Office’s ability to keep Section 1201 up to date. Permanent exemptions, even when they reflect the best judgment of their time, are unnecessary and could even be counterproductive. Section 1201’s greatest strength is that it allows for a flexible rulemaking process that can craft exemptions to meet the needs of the moment without sacrificing the ability to adapt to future changes in technology and consumer needs. This flexibility avoids a scenario where antiquated permanent exemptions that serve no purpose in the creative marketplace linger in statute and create opportunities for infringement with no benefit to the public.

Statutory permanent exemptions do not relieve the burden on the Copyright Office. The Copyright Office still receives petitions in the triennial rulemaking process that seek modifications of the permanent exemption. The Copyright Office must wrestle with the legal issues regarding whether it can and should consider exemption requests that would undo or expand what Congress has already provided with the statutory permanent exemptions. In some instances where the Copyright Office finds that it cannot act on an exemption petition, the Copyright Office has suggested that Congress must make the changes in order to accommodate the requests. Nevertheless, the statute has not been modified and time has proven that the requests were not sufficiently weighty to merit Congressional action. In contrast, the marketplace, technology, and even the circumstances of the allegedly adversely affected non-infringing use somehow all march on successfully. As the current statutory permanent exemptions have not resolved questions for these allegedly non-infringing uses, creating new statutory permanent exemptions will not fare any better. Accordingly, to keep up with a rapidly-evolving technological marketplace and the practices of non-infringing uses, Section 1201 should maintain the process of granting new exemptions using the Copyright Office’s triennial proceedings.

2. *Does Section 1201 permit third-party assistance for circumvention where circumvention is allowed? Is the rule clear? What are your thoughts on whether and when third-party assistance should be permitted?*

Section 1201 does not prevent the beneficiaries of regulatory exemptions from soliciting assistance from third-parties within their organizations or from receiving assistance from licensed servicers. The Copyright Office has been effective at crafting exemptions that allow non-technical users to obtain assistance from others within their organizations. For teachers and professors who are the beneficiaries of educational exemptions, circumvention can be accomplished by school technical staff. Similarly, those with disabilities can receive circumvention assistance from disability resource officers to take advantage of accessibility exemptions.

Relevant industry groups have also demonstrated a willingness to license third-party servicers to engage in permitted acts of circumvention and to provide direct circumvention assistance where necessary. Automakers now uniformly license third-party mechanics to engage in acts of circumvention for the repair and maintenance of customer vehicles. In addition, the licensors of the encryption methods protecting content on DVDs and Blu-ray Discs have offered to aid the beneficiaries of audiovisual exemptions in circumventing their encryption. This private ordering will expand in the coming years as industries adapt and reach consensus around enabling non-infringing uses. In light of the regulatory alternative and the successes of private ordering, legislation to expand third-party assistance is unnecessary and could provide avenues for infringement.

3. *In 2018, the Copyright Office streamlined the Section 1201 triennial rulemaking process. In your opinion, did the changes improve the process? Do you believe that other changes/improvements are still needed? Is legislation necessary?*

I am sensitive to the desire for stability in existing regulatory exemptions and the need to reduce the burden on non-technical petitioners. The Copyright Office's new streamlined process for renewing existing exemptions has improved the process and is a large step in the right direction towards both of these goals. In this streamlined process, proponents of an existing exemption can petition to have the exemption renewed by certifying that they are not aware of material changes in fact, law, or other circumstances that would justify reevaluating the basis for the exemption. These petitions are easily submitted and seldom are longer than a few paragraphs. If the Copyright Office does not receive an objection outlining relevant new circumstances, the exemption is renewed without going through the traditional three-step commenting process. In the absence of changing market conditions, the streamlined process creates continuing exemptions requiring only the filing of a short renewal petition in each triennial. In this way, the Copyright Office is able to create stability for consensus exemptions while preserving flexibility.

The regulatory process can be further streamlined to benefit both petitioners and content creators. Such streamlining could include removing the requirement that petitioners justify the need for renewals of existing exemptions unless objections are raised to such renewals, and creating continuing exemptions after an existing exemption is renewed. These changes would promote further stability and accessibility in the regulatory process.

The changes proposed here—and in my written and oral testimony—would require the Copyright Office to modify the rulemaking process; however, such modifications may be accomplished under the Copyright Office’s existing authority after consultation with all interested parties. In implementing Section 1201’s rulemaking provisions, including the most recent streamlined renewal process, the Copyright Office has relied on the House Commerce Report for its mandate to conduct the rulemaking and the contours of the Office’s authority. The report explains, “the assessment of adverse impacts on particular categories of works is to be determined *de novo*.” While this legislative history may be helpful to the Copyright Office, the agency’s rulemaking is not limited by the designs of a committee report but by principles of administrative law, which permit an agency to change its interpretation of a statute upon providing a reasoned explanation. While the Copyright Office correctly concluded the *de novo* requirement does not prevent it from renewing exemptions based on evidence submitted in prior triennials, it has been more circumspect on the question of continuing exemptions or presumptive renewals and concluded that such changes were out of reach in light of the *de novo* language. Consequently, the rulemaking process still requires proponents to file a petition for a streamlined renewal in every triennial proceeding. Roundtable discussions with stakeholders could persuade the Copyright Office to further modify the rulemaking to remove the need to justify renewal petitions and create continuing exemptions in cases of sustained consensus.

4. *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? In what ways can the process be made less burdensome for rulemaking participants?*

The existing rulemaking process is accessible to all and allows easy participation by stakeholders. In my written and oral testimony, I outline a proposal for further streamlining the regulatory process to aid petitioners, thus making a good system better. These changes include granting continuing exemptions and removing the requirement that petitioners justify renewal petitions. However, the existing regulatory process, especially in light of the Copyright Office’s new streamlined approach, already ensures adequate representation of competing viewpoints. Though the triennial process is open to all interested parties (and some do participate in their individual capacities), in the limited number of cases where there is a legitimate need to circumvent TPMs, collective action organizations and institutional actors ensure that the need is met and that individual circumventors are not burdened.



Petitioners are often represented by consumer and electronic rights groups like the Consumers Union and the Electronic Frontier Foundation. Content creators and the content protection industry are likewise represented by consolidated interest groups. In the educational context, universities have the technical know-how and legal expertise to advocate on behalf of students and educators. This type of collective participation ensures the viewpoints of all interested parties are adequately represented by organizations with experience in the rulemaking process.

Those advocates who object to the regulatory process often point to the fact that the rulemaking has not authorized circumvention for all non-infringing uses as evidence that the regulatory process is broken or burdensome. This is simply not true. The Copyright Office is only empowered to promulgate an exemption after receiving a petition showing that the exemption is required to facilitate an appropriate non-infringing use. Such petitions indicate that there is a demand in the digital marketplace for the requested use. The fact that some potential fair uses are not currently covered by an exemption reflects either the lack of a petitioner demand for the exemption, or the failure of the proposed exemption to meet the statutory criteria.

5. *What is your understanding of how Section 1201 specifically handles TPM circumvention for repairs of vehicles, farm equipment, machinery and other products? Do you think that it is adequate? In your opinion, should the way Section 1201 exemptions handle repairs be modified? If you believe Section 1201 exemptions should be modified with respect to the ability to repair products, how would you like to see them modified?*

In the most recent triennial rulemaking process in 2018, after careful consideration of evidence, the Copyright Office granted temporary exemptions that permit circumvention for lawful, non-infringing uses to repair vehicles, farm equipment, and other products. At least in the case of automobiles, the DMCA's legal framework - including the existing exemption relating to the diagnosis, repair, or lawful modification of vehicle software - is more than sufficient to enable automobile owners to repair their vehicles. It is important to understand that access controls to vital vehicle software protect the safety and security of drivers and passengers, and help ensure compliance with regulatory standards. Furthermore, through a national Memorandum of Understanding (MOU), vehicle owners and independent repair facilities continue to have access to the same diagnostic and repair information provided to franchised dealers. Under current law, vehicle owners are fully able to repair their own vehicles and take their vehicle to an independent repair servicer that has access to all the same diagnostic and repair tools and information available to the dealer. That is why, today, roughly 70% of vehicle warranty repairs are done by independent repair shops.<sup>3</sup>

---

<sup>3</sup> See, e.g., Auto Repair: Should You Use a Dealer or Independent Shop? available at <https://www.autoblog.com/2008/05/28/dealer-vs-repair-shop/> (last visited Oct. 6, 2020).

The current framework—which includes a dispute resolution process to address any complaints, including complaints about cost—is more than adequate for automotive repair purposes. Weakening the current DMCA protections for vehicle software is not only unnecessary, but also risks undermining efforts by automotive companies to maintain and strengthen vehicle security to help protect against cyberattacks consistent with cybersecurity best practices and the National Highway Traffic Safety Administration’s guidance. Therefore, the current right to repair exemption is adequate and does not need modification.

**United States Senate Judiciary  
Subcommittee on Intellectual Property**

**“Are Reforms to Section 1201 Needed and Warranted?”**

**Answers to Questions for the Record from  
Vanessa P. Bailey**

**QUESTIONS FROM SENATOR 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?*

The triennial rulemaking process has shown itself to be remarkably flexible in the face of an evolving digital content ecosystem and changing technology. The flexibility of the rulemaking process and the stability of Section 1201 have created an environment where digital content can be broadly distributed under a variety of different business models that afford a wide array of consumer choice without fear of runaway infringement. The resultant explosion in digital content creation and consumption adds more than one trillion dollars to U.S. GDP<sup>4</sup> and provides billions of hours of entertainment and enrichment to the lives of Americans.

The rise of the internet of things is just the latest in a long string of technological evolutions faced by the triennial rulemaking process. Over the past 22 years the rulemaking process has proven adept at adapting to such evolutions. For example, the process has successfully facilitated the rise of alternative delivery models for digital content in the last two decades—from the physical delivery of content on DVDs and Blu-ray discs to the electronic delivery via download and now to the rise of subscription models that provide streaming access to thousands of

---

<sup>4</sup> UNITED STATES DEPARTMENT OF COMMERCE, NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, *Digital Economy Accounted for 6.9 Percent of GDP in 2017* (April 5, 2019), <https://www.ntia.doc.gov/blog/2019/digital-economy-accounted-69-percent-gdp-2017>.

digital works for a single fee. Through carefully-crafted exemptions, the rulemaking process has safeguarded the evolution of the digital content ecosystem while ensuring that individuals can still access copyrighted work for permissible non-infringing uses. The regulatory process is well-equipped to apply the same careful, evidence-based approach to the internet of things.

The internet of things is still a relatively new development in the digital space, but the Copyright Office has begun to craft exemptions that allow acts of circumvention on connected devices (including cell phones, tablets, automobiles, farm equipment, and other products) where necessary to facilitate non-infringing uses. Petitions for additional exemptions are currently before the Copyright Office in the Eighth Triennial. While Congress is appropriately interested in how the rulemaking process adapts to the internet of things, it can trust in the Copyright Office's expertise to strike the appropriate balance between the need for non-infringing uses and the security of digital content.

*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?*

The rulemaking process is accessible to those who have a proven need for an exemption. Like most regulatory processes, participation in triennial rulemakings is primarily through collective action organizations and institutional actors. These groups ensure that the viewpoints of American consumers and content creators are represented by those with subject matter expertise and regulatory experience. I am not aware of any examples where a viable, evidence-backed exemption request was denied or not petitioned-for because of burdens imposed by the regulatory process.

Nonetheless, I have proposed changes aimed at making a good system better. These changes include removing the requirement that petitioners justify the need for renewals of existing exemptions and creating the rebuttable presumption of renewability for existing exemptions. This additional streamlining of the regulatory process would make it even more accessible to those in need of exemptions.