

Questions for Morgan Reed
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?

ACT | The App Association agrees with the Copyright Office that the basic structure of section 1201 has worked well and should be retained. The greatest success of the Digital Millennium Copyright Act (DMCA) is how it enabled the rapid technological advances that continually produce new markets for digital products and devices that provide consumers with an array of options that improve their daily lives.

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 current circumvention exemptions in 1201 provide software developers with clearly defined rules within which to innovate new digital products and services. The App Association does not seek any additional exemptions and strongly encourages the Subcommittee to only consider legislative proposals to revise the DMCA based on proven—not theoretical—harms.

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 Copyright Office successfully conducted seven triennial rulemaking proceedings since the enactment of the DMCA. In each rulemaking, it granted several exemptions, including adopting 14 of these exemptions in the 2018 proceeding. These granted exemptions covered a broad range of copyrighted works, but each one has provided significant access to the exemption beneficiaries. And the App Association commends the Copyright Office for taking the initiative to improve the efficiency of the rulemaking process for all stakeholders by allowing exemption renewals where there is no meaningful opposition. The App Association does not have specific recommendations for further changes to the rulemaking process at this time.

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?

It is the position of the App Association that Section 1201 does not permit the “offering of assistance” to exemption beneficiaries, and we do not support changes to the anti-trafficking provisions currently in the DMCA. Releasing publicly available tools that break encryption puts healthcare, agricultural operations, and financial information at greater risk. Innovative app developers rely on firmware technological protection measures (TPMs) like authentication and encryption to allow legitimate uses of works and mitigate serious threats to user privacy. The use of digital rights management (DRM) or TPMs is critical to protection against unauthorized access to a copyrighted work but also against attempts to steal personal information. In fact, digital products and services developed for every industry must comply with federal, state, and international privacy laws to protect consumer privacy. The Children’s Online Privacy Protection Act (COPPA), the Health Insurance Portability and Accountability Act (HIPAA), the Fair Credit Reporting Act, the California Consumer Privacy Act (CCPA), and the EU’s General Data Protection Regulation (GDPR) are just some of the laws requiring tech developers to use technical means, including encryption, to protect consumer information. This technical protection, whether used for DRM or privacy, has the same underpinning. It is impossible to isolate the issue of whether to expand DMCA exemptions to only the copyright concerns. The vast personal information accessed through the mobile apps on cell phones today must be protected by law. The use of TPMs is crucial to maintaining the integrity of software, protecting end user data collected by consumer products with embedded software from nefarious actors, and upholding the obligation to protect end users’ privacy rights.

5. What do you members think about consumers having a right to repair devices that run on copyright-protected software?

It is the position of the App Association that broad exemptions to allow circumvention for vehicle and appliance repair will undermine the important incentives in the DMCA for creators and jeopardize the safety and privacy of consumers. App Association members, inventors and entrepreneurs themselves, understand and appreciate the desire to reconfigure the software on a device, create new functionalities, and repair hardware. However, the DMCA exemptions and those adopted by the Copyright Office’s triennial rulemaking process must maintain the balance of interests in protecting copyrighted works while allowing users to access and use those works. Before considering the further expansion of exemptions to cover broad categories of works, it is important to know that developers, inventors, tinkerers, and repair services who want to build their own solutions or fix their own device have plenty of options available to them. Both closed and open source systems are flourishing, giving innovators and consumers the ability to choose the ecosystem that works best

for them. For example, Apple Repair is a private industry solution that provides customers with flexible options and at the same time protects the content and the integrity of the software. Apple has set up a certification program for independent repair shops where providers can get trained and certified. The network of Apple Authorized Service Providers is nationwide, including in all Best Buys. Apple Repair is just one example of many where private industry is providing users with the tools to use and enjoy their products safely.

TPMs protect layers of software in devices. Licensed software is a part of most products with digital content embedded in them. The system of licensed software is a crucial component to the investment and distribution in existing products and future innovations. The benefits to consumers across a wide variety of products and services at every price point cannot be understated. Exemptions that allow the offering of tools to circumvent TPMs protecting embedded device software compromise the protections afforded to other licensed software, putting consumers and their personal information at risk when products malfunction. It also allows software competitors access to product codes, which is a disincentive to innovation. Fortunately, there are alternative options to address many of the concerns expressed regarding access to software. Notices to consumers about restrictions and allowable uses along with offering certified third-party repair services can protect consumers and software developers. Our members and those of other content and tech industries rely on licensed software to continue to offer low-cost, consumer friendly products across a growing range of business models.

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

“Are Reforms to Section 1201 Needed and Warranted?”

**Questions for the Record for Morgan Reed
ACT | The App Association
Submitted by Senator Richard Blumenthal
October 8, 2020**

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”)?

ACT | The App Association believes the triennial rulemaking process has proven to be an effective mechanism for dealing with the impact of Section 1201 on consumers, especially with respect to the expansion of the Internet of Things (IoT). The industry itself is proof of a flourishing marketplace of products and services that benefit consumers globally in virtually every area of daily life. In fact, since the enactment of the Digital Millennium Copyright Act (DMCA), consumers options to access and use innovate products and services in a variety of business models are vast. It is hard to identify real harms to users of IoT products.

- 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 App Association believes the Section 1201 rulemaking process is accessible to those who have a need for an exemption. In each of the past seven rulemakings, the Copyright Office granted several exemptions, 14 of which were adopted in the 2018 proceeding.

Section 1201 of the DMCA intentionally set a high bar for exemptions to circumvention that allow access to copyrighted works. The Librarian of Congress, upon recommendation of the Register of Copyrights following a rulemaking proceeding, to determine whether the prohibition on circumvention has, or is likely to have, an adverse effect on users’ ability to make non-infringing uses of particular classes of copyrighted works. This process is specifically designed to give the law flexibility to address actual harms to the lawful uses of copyrighted works based on evidence presented by users. The hurdle is proof of harm. Lowering the bar for temporary exemptions will recalibrate the balance intended in the DMCA and expose consumers to privacy risks and product safety concerns.

Innovative app developers rely on firmware technological protection measures (TPMs) like authentication and encryption to allow legitimate uses of works and mitigate serious threats to user privacy. The use of digital rights management (DRM) or TPMs is critical to protection against unauthorized access to a copyrighted work but also against attempts to steal personal information. In fact, digital products and services developed for every industry must comply with federal, state, and international privacy laws to protect consumer privacy. The Children’s Online Privacy Protection Act (COPPA), the Health Insurance Portability and Accountability Act (HIPAA), the Fair Credit Reporting Act, the California Consumer Privacy Act (CCPA), and the EU’s General Data Protection

Regulation (GDPR) are just some of the laws requiring tech developers to use technical means, including encryption, to protect consumer information. This technical protection, whether used for DRM or privacy, has the same underpinning. It is impossible to isolate the issue of whether to expand DMCA exemptions to only the copyright concerns. The vast personal information accessed through the mobile apps on cell phones today must be protected by law. The use of TPMs is crucial to maintaining the integrity of software, protecting end-user data collected by consumer products with embedded software from nefarious actors, and upholding the obligation to protect consumers' privacy rights.

In addition, App Association members, inventors and entrepreneurs themselves, understand and appreciate the desire to reconfigure the software on a device, create new functionalities, and repair hardware. However, the DMCA exemptions and those adopted by the Copyright Office's triennial rulemaking process must maintain the balance of interests in protecting copyrighted works while allowing users to access and use those works. Before considering the further expansion of exemptions to cover broad categories of works, it is important to know that developers, inventors, tinkerers, and repair services who want to build their own solutions or fix their own device have plenty of options available to them. Both closed and open source systems are flourishing, giving innovators and consumers the ability to choose the ecosystem that works best for them. For example, Apple Repair is a private industry solution that provides customers with flexible options and at the same time protects the content and the integrity of the software. Apple has set up a certification program for independent repair shops where providers can get trained and certified. The network of Apple Authorized Service Providers is nationwide, including in all Best Buys. Apple Repair is just one example of many where private industry is providing users with the tools to use and enjoy their products safely.

Senator Grassley's Written Questions for Senate Judiciary Intellectual Property Subcommittee Hearing "Are Reforms to Section 1201 Needed and Warranted?," September 16, 2020

Questions for Morgan Reed

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?

ACT | The App Association believes the Section 1201 exemptions have worked well over the past 22 years. The 1201 prohibition and its exemptions have proven to be effective and flexible tools that enable continued innovation in the tech sector and

promote consumer choice. The exemptions operate like safety valves—intended to balance copyright right with the public interest in accessing and using copyright protected content—do actually work. Developers rely on these exemptions to innovate which in turn provides consumers with access to a wide range of products and services in a variety of business models. The App Association is not requesting any more or fewer exemptions in Section 1201 and strongly encourages the Subcommittee to only initiate legislative proposals that are responsive to proven—not theoretical—harms.

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?

It is the position of The App Association that Section 1201 does not permit the “offering of assistance” to exemption beneficiaries and we do not support changes to the anti-trafficking provisions currently in the DMCA. Releasing publicly available tools that break encryption puts healthcare, agricultural operations, and financial information at greater risk. Before considering legislative changes to permit third-party assistance “at the direction” of the exemption beneficiary, it is important to know that developers, inventors, tinkerers, and repair services who want to build their own solutions or fix their own device already have plenty of options available to them. Both closed and open source systems are flourishing, giving innovators and consumers the ability to choose the ecosystem that works best for them. For example, Apple Repair is a private industry solution that provides customers with flexible options and at the same time protects the content and the integrity of the software. Apple has set up a certification program for independent repair shops where providers can get trained and certified. The network of Apple Authorized Service Providers is nationwide, including in all Best Buys. Apple Repair is just one example of many where private industry is providing users with the tools to use and enjoy their products safely.

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?

The App Association commends the Copyright Office for taking the initiative to improve the efficiency of the rulemaking process for all stakeholders. The App Association does not have specific recommendations for further changes to the rulemaking process at this time.

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 App Association is not able to provide meaningful input about the ability of other stakeholders to easily participate in the Section 1201 proceedings. The Copyright Office has always done a thorough and efficient rulemaking process. Our association's experience is that the Copyright Office has always provided public notice, ease of filing, appropriate time for requests and reply comments, and thorough analysis in developing its recommendations.

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?

Section 1201 of the DMCA prohibits the circumvention of technological protection measures, or TPMs, used by copyright owners to control access to their works. It is the position of the App Association that broad exemptions to allow circumvention for vehicle and appliance repair will undermine the important incentives in the DMCA for creators and jeopardize the safety and privacy of consumers.

TPMs protect layers of software in devices. Licensed software is a part of most products with digital content embedded in them. The system of licensed software is a crucial component to the investment and distribution in existing products and future innovations. The benefits to consumers across a wide variety of products and services at every price point cannot be understated. Exemptions that allow the offering of tools to circumvent TPMs protecting embedded device software compromise the protections afforded to other licensed software, putting consumers and their personal information at risk when products malfunction. It also allows software competitors access to product codes, which is a disincentive to innovation. Fortunately, there are alternative options to address many of the concerns expressed regarding access to software. Notices to consumers about restrictions and allowable uses along with offering certified third-party repair services can protect consumers and software developers. Our members and those of other content and tech industries rely on licensed software to continue to offer low-cost, consumer friendly products across a growing range of business models.

In addition, federal courts are best situated to interpret the DMCA according to the specific cases presented. For example, in *Lexmark v. Static Control Components*, the 6th Circuit ruled in favor of a third-party product manufacturer of a competing replacement part. Exemptions to the critically important protections the DMCA provides to digital industries like the mobile app industry should be narrow and based on actual harm.

