

Before the United States Senate
Committee on the Judiciary
Subcommittee on Intellectual Property

Are Reforms to Section 1201 Needed and Warranted?¹

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Chairman Tillis, Ranking Member Coons, and Members of the Subcommittee:

Thank you for inviting me to discuss the need for substantial reforms to Section 1201 to address its widespread chilling effects on noninfringing activities. Congress should pass legislation codifying the Federal Circuit’s sensible conclusion that Section 1201 prohibits circumvention of access controls only when it is intended to facilitate copyright infringement.³ Failing that, Congress should make a variety of procedural and substantive improvements⁴ to the unnecessarily burdensome and adversarial triennial procedure administered by the Library of Congress and the Copyright Office.⁵

I have worked for the past dozen years to represent clients before the Library and the Office seeking exemptions from Section 1201. Though the views presented here are my own, I believe my experience provides a useful basis for a brief recount of:

1. The wide array of ordinary people affected by Section 1201 in their efforts to engage in noninfringing activities;
2. The chilling, burdensome nature of the regulatory process with which they must engage in the triennial review; and
3. Suggested approaches to reforming Section 1201.

¹ <https://www.judiciary.senate.gov/meetings/are-reforms-to-section-1201-needed-and-warranted>.

² Affiliations listed for identification purposes only.

³ Chamberlain Grp. v. Skylink Techs., 381 F.3d 1178, 1204 (Fed. Cir. 2004). Legislation previously has been introduced to impose a “nexus requirement” that would limit violations of Section 1201(a), 17 U.S.C. § 1201(a)(1)(A), (2), to acts of circumvention with a nexus to copyright infringement. Unlocking Technology Act of 2015, H.R. 1587, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/house-bill/1587/text?q=H.R.+1587>.

⁴ See discussion *infra*, Part III.

⁵ See 17 U.S.C. § 1201(a)(C)-(D).

I. Section 1201 hinders a wide array of good-faith, non-infringing activity by ordinary people.

Section 1201 is routinely debated in terms of its role in intermediating power struggles between large corporate rightsholders and technology companies. However, my testimony today focuses instead on the ordinary people who were left out of Section 1201's development and who have been most impacted by its provisions over the past two decades.

Through the course of five triennial reviews, I have encountered and worked with people and organizations from all walks of life and from all corners of America. These people and organizations have had to seek permission to engage in a wide array of indisputably valuable, noninfringing activities that Section 1201 has perniciously discouraged. Though a complete recount of the people and activities impacted by Section 1201 is beyond the scope of this testimony, the experiences of three communities with whom I have worked—people who are blind, visually impaired, or print-disabled, educational disability services professionals, and security researchers—exemplify the harsh, unintended chilling effects of Section 1201 on activities that Congress has sought, and should seek, to promote.

People who are blind, visually impaired, or print disabled repeatedly have had to seek permission to circumvent digital locks so they can read electronic books with text-to-speech software.⁶ In 2003, the American Foundation for the Blind (AFB) first asked the Library and the Office for an exemption that would permit people with disabilities to read the ever-expanding array of books delivered in electronic format when access was denied by publishers, asking: “Are we expected to simply pay our money up front in the vain hope that sometimes we will be allowed to read?”⁷

The importance of ensuring that all people can engage with the cultural, educational, economic, and democratic benefits of reading is so self-evident and uncontroversial that in 2017, Acting Register Karyn Temple noted that she could not identify “a substantive value to keeping th[e] exemption in the rulemaking cycle, particularly in light of the burdens placed upon proponents.”⁸ Yet AFB, the American Council of the Blind (ACB),

⁶ See generally Blake E. Reid, *Copyright and Disability*, ___ CALIF. L. REV. ___, draft at 7, 29-30 & n.38 (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3381201.

⁷ Comments of American Foundation for the Blind at 7 (2002), <https://cdn.loc.gov/copyright/1201/2003/comments/026.pdf>.

⁸ Copyright Office, *Section 1207 of Title 17: A Report of the Register of Copyrights* at 85 (June 2017), <https://www.copyright.gov/policy/1201/section-1201-full-report.pdf> (“2017 Study Report”). Acting Register Temple’s characterization stood in contrast to Register Marybeth Peters’ earlier efforts to abolish the exemption, during which she criticized AFB for being “unwillin[g] or [u]nabl[e]” to broadly survey the market for e-books to assess accessibility. Register of Copyrights, *Recommendation of the Register of Copyrights in RM 2008-9* at 260 (June 11, 2010), <https://www.copyright.gov/1201/2010/initialed-registers-recommendation-june-11-2010.pdf> (“2010 Register’s Recommendation”) Register Peters personally criticized the testimony of AFB’s representative Mark Richert, 2010 Register’s Recommendation at 260, whom Copyright Office General Counsel David Carson had berated during an in-person hearing for

and other organizations have had to return to the Copyright Office six more times,⁹ including during the current triennial review, to seek renewal of an exemption simply aimed at protecting the basic human right to read.¹⁰

Educational disability services professionals have had to seek permission to add closed captions and audio description to classroom videos to ensure that students with disabilities can watch them on equal terms with their classmates, as required under disability laws including the Americans with Disabilities Act, the Rehabilitation Act of 1976, and the Individuals with Disabilities Education Act (IDEA).¹¹ Advocates for this exemption have sought only to ensure that they can perform that necessary work to ensure that the long-standing civil rights of students with disabilities to education and the resulting economic, democratic, and cultural opportunities are realized.

However, this straightforward exemption faced alarming opposition during the 2018 triennial review from a coalition of rightsholder trade associations. Though the civil rights of students with disabilities to participate in school on equal terms have been sacrosanct for many decades, the rightsholder associations argued that educational

“ignor[ing]” Register Peters’ demands for more evidence of the need for the exemption. See Library of Congress, *Rulemaking Hearing, Section 1201* at 0011-0020 (May 8, 2009), <https://www.copyright.gov/1201/hearings/2009/transcripts/1201-5-8-09.txt>, also available in audio form at <https://www.copyright.gov/1201/hearings/2009/transcripts/5809am1.mp3>. Register Peters’ recommendation was later rejected by Librarian of Congress James Billington, who noted that the Copyright Office had failed to issue post-hearing questions to clarify its concerns and had overruled the recommendation of the NTIA, and “urge[d] Congress to work with the Copyright Office to consider accessibility beyond the contours of [the] 1201 rulemaking.” 75 Fed. Reg. 43,825, 43,838-39 (July 27, 2010).

⁹ 2Comments of the American Foundation for the Blind (2005), https://cdn.loc.gov/copyright/1201/2006/comments/discipio_afb.pdf; Comments of the American Foundation for the Blind (2008), <https://cdn.loc.gov/copyright/1201/2008/comments/american-foundation-blind.pdf>; Joint Comments of the American Council of the Blind and the American Foundation for the Blind (2011), https://www.copyright.gov/1201/2011/initial/american_foundation_blind.pdf; Petition of American Foundation for the Blind and American Council of the Blind (2014), https://cdn.loc.gov/copyright/1201/2014/petitions/American_Foundation_for_the_Blind_et_al_1201_Initial_Submission_2014.pdf; Petition of the American Foundation for the Blind, American Council of the Blind, and Library Copyright Alliance (2017), <https://cdn.loc.gov/copyright/1201/2018/petitions-073117/Renewal%20Pet.%20-%20Assistive%20Tech.%20-%20AFB%20et%20al..pdf>; Petition of the American Council of the Blind, American Foundation for the Blind, National Federation of the Blind, Library Copyright Alliance, Benetech/Bookshare, and HathiTrust (2020), <https://www.copyright.gov/1201/2021/petitions/Renewal%20Pet.%20-%20Assistive%20Technologies%20-%20ACB%20et%20al.pdf>.

¹⁰ See Convention on the Rights of Persons with Disabilities, prov. 30(1), (3), <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-30-participation-in-cultural-life-recreation-leisure-and-sport.html>.

¹¹ See generally *Section 1201 Rulemaking, Recommendation of the Acting Register of Register of Copyrights* at 89-111 (October 2018), https://cdn.loc.gov/copyright/1201/2018/2018_Section_1201_Acting_Registers_Recommendation.pdf (“2018 Recommendation”) (discussing the disability services exemption). The exemption has been proposed for renewal and expansion

institutions complying with federal disability law by captioning and describing videos for classroom use could be liable for infringement.¹² The rightsholders advanced these arguments despite the well-established understanding that accessibility efforts are not only required under disability law but a non-infringing fair use under copyright law.¹³ When disability services advocates travelled to Washington to testify in favor of the exemption, the rightsholders did not appear at public hearings to explain their positions.¹⁴

Security researchers have had to seek permission to engage in good-faith investigation of security vulnerabilities. Although Section 1201 includes statutory exceptions that were intended to avoid entangling reverse engineering, encryption research, and security testing with circumvention liability,¹⁵ the lack of clarity and other shortcomings with those exceptions has led researchers to seek a broader exemption from the Copyright Office to identify, diagnose, and communicate to the public software vulnerabilities in a range of contexts. Vulnerabilities covered by the temporary exemption granted by the Copyright Office began with surreptitious software distributed by vendors of audio CDs¹⁶ and video games¹⁷ that caused security vulnerabilities in their users' computers. The exemption was later expanded to software on consumer devices, voting machines, vehicles, and implantable medical devices.¹⁸ The exemption, however, was riddled with limitations that sought to limit and micromanage the disclosure of security vulnerabilities, and in subsequent litigation a federal court upheld the possibility that the application of Section 1201 to security researchers violates the First Amendment.¹⁹

¹² Comments of the Motion Picture Association of America, et al. at 13-18 (Feb. 2018), [https://cdn.loc.gov/copyright/1201/2018/comments-021218/class2/Class 02 Opp'n Joint Creators I.pdf](https://cdn.loc.gov/copyright/1201/2018/comments-021218/class2/Class%20Opp'n%20Joint%20Creators%20I.pdf).

¹³ See *Authors Guild v. HathiTrust*, 755 F.3d 87, 101-03 (2d Cir. 2014)

¹⁴ See Copyright Office, *Section 1201 Roundtable*, Agenda at 5 (Apr. 2, 2018), <https://cdn.loc.gov/copyright/1201/2018/1201-proposed-hearing-agenda.pdf>. The rightsholder organizations later pressed their arguments during a closed-door *ex parte* meeting with the Copyright Office. Letter from J. Matthew Williams to Regan Smith (July 24, 2018), <https://www.copyright.gov/1201/2018/>. Proponents were afforded a separate opportunity to respond to these arguments after receiving notice of the *ex parte* meeting. See Letter from Blake E. Reid to Kevin Amer and Anna Chauvet (Aug. 24, 2018), <https://www.copyright.gov/1201/2018/ex-parte/Class%202%20ex%20parte%20letter%20--%20ATSP%20LCA.pdf>.

¹⁵ See 17 U.S.C. § 1201(f), (g), & (j) (limited exemptions for reverse engineering, encryption research, and security testing, respectively).

¹⁶ See 71 Fed. Reg. 68,472, 68,477 (Nov. 27, 2006) (describing the temporary security research exemption for audio CDs).

¹⁷ See 75 Fed. Reg. 43,825, 43,832–33 (July 27, 2010) (describing the temporary security research exemption for video games).

¹⁸ See 80 Fed. Reg. 65,944, 65,955–56 (Oct. 28, 2015) (describing the temporary device-focused security research exemption).

¹⁹ *Green v. DOJ*, 392 F. Supp. 3d 68, 96 (D.D.C. 2019).

The most recent iteration of the exemption expanded the permissible scope of security research to software on a wider array of computers, systems, and networks²⁰ after concerns about the impact of the exemption on national cybersecurity policy rapidly accumulated. Those concerns came to a head when the Computer Crimes and Intellectual Property Section of the Department of Justice, the agency responsible for prosecuting computer crime and criminal intellectual property cases,²¹ intervened in the 2017–2018 triennial review to criticize the existing exemption as incoherent and unduly narrow.²² However, the exemption still contains numerous burdensome limitations that are now under review for a fifth time.²³

* * *

People with disabilities, disability services professionals, and security researchers engaged in indisputably beneficial activities that advance accessibility, education, and cybersecurity are just a part of the large group of people whose noninfringing activities are chilled by Section 1201. The current temporary exemptions to Section 1201 address more than a dozen distinct categories of people who have had to seek permission from the Copyright Office to engage in beneficial, noninfringing uses, including:

- Documentary filmmakers who seek to use video clips for parody or biographical or historical significance;²⁴
- Ordinary Internet users making noncommercial remix videos;²⁵
- Authors who use video clips in non-fiction multimedia e-books, such as books that engage in historical analysis of film;²⁶

²⁰ See 83 Fed. Reg. 54,010, 54,025–26 (Oct. 26, 2018) (describing the current temporary research exemption). The exemption is currently pending renewal and expansion. See Petition of J. Alex Halderman, the Center for Democracy and Technology, and the U.S. Technology Policy Committee of the Association for Computing Machinery (July 22, 2020), <https://www.copyright.gov/1201/2021/petitions/Renewal%20Pet.%20-%20Security%20Research%20-%20Halderman,%20CDT,%20ACM.pdf> (seeking renewal of the existing exemption); Petition of Matt Blaze and Steve Bellovin (July 22, 2020), <https://www.copyright.gov/1201/2021/petitions/Renewal%20Pet.%20-%20Security%20Research%20-%20Blaze%20&%20Bellovin.pdf> (same).

²¹ See DOJ, *About the Computer Crime & Intellectual Property Section*, <https://www.justice.gov/criminal-ccips> (last visited Sept. 14, 2020).

²² Letter from John T. Lynch, Jr. to Regan Smith at 4 (June 28, 2018), [https://cdn.loc.gov/copyright/1201/2018/USCO-letters/USDOJ Letter to USCO.pdf](https://cdn.loc.gov/copyright/1201/2018/USCO-letters/USDOJ%20Letter%20to%20USCO.pdf).

²³ Petition of J. Alex Halderman, the Center for Democracy and Technology, and the U.S. Technology Policy Committee of the Association for Computing Machinery (Sept. 8, 2020), <https://www.copyright.gov/1201/2021/petitions/proposed/New%20Pet.%20-%20J.%20Alex%20Halderman%20et%20al.pdf> (urging the Library and Office to remove limitations in the exemption).

²⁴ 37 C.F.R. § 201.40(b)(1)(i)(A).

²⁵ See 37 C.F.R. § 201.40(b)(1)(i)(B).

²⁶ See 37 C.F.R. § 201.40(b)(1)(i)(C).

- K-12 and university students and teachers using video clips in class projects²⁷ or media literacy programs offered by libraries and museums;²⁸
- Faculty of massive open online courses (MOOCs) seeking to use video clips in their lectures;²⁹
- Patients seeking to extract their own data from implantable medical devices;³⁰
- Customers of phone companies trying to navigate carrier lock-in systems to switch their cell phones from one network to another;³¹
- Users of smartphones and tablets, smart televisions, voice assistants, and 3D printers who wish to install their own software or use their own feedstock;³²
- Independent mechanics, farmers, car owners, repair technicians, and homeowners who seek to repair their own vehicles³³ and household appliances;³⁴ and
- Librarians and museum curators seeking to preserve abandoned video games and other computer software.³⁵

During the current triennial review, more than 30 petitions to renew existing exemptions³⁶ and more than two dozen petitions to expand existing exemptions or grant new exemptions³⁷ have been filed with the Copyright Office.

II. The triennial review is unduly and unfairly burdensome to the people who need exemptions from Section 1201.

Section 1201's triennial review was never intended to serve as a catch-all regulatory regime for the daily activities of people with disabilities, security researchers, teachers, students, authors, video creators, patients, phone customers, computer users, mechanics, farmers, technicians, car owners, homeowners, and librarians. Yet the triennial review regularly imposes an unnecessary and unfair burden on decent, hard-working people who play by the rules and who merely seek to go about their livelihoods and serve their

²⁷ See 37 C.F.R. § 201.40(b)(1)(ii)(A).

²⁸ 37 C.F.R. § 201.40(b)(1)(ii)(C).

²⁹ 37 C.F.R. § 201.40(b)(1)(ii)(B).

³⁰ 37 C.F.R. § 201.40(b)(4).

³¹ 37 C.F.R. § 201.40(b)(5).

³² 37 C.F.R. § 201.40(b)(6), (7), (8), & (14) (smartphones and tablets, smart TVs, voice assistant devices, and 3D Printers, respectively).

³³ 37 C.F.R. § 201.40(b)(9).

³⁴ 37 C.F.R. § 201.40(b)(10).

³⁵ See 37 C.F.R. § 201.40(b)(12) & (13) (video games and non-video game computer programs, respectively).

³⁶ <https://www.copyright.gov/1201/2021/petitions/> (last visited Sept. 13, 2020).

³⁷ <https://www.copyright.gov/1201/2021/petitions/proposed/> (last visited Sept. 13, 2020).

communities without fear of breaking a law that could subject them to ruinous liability in federal court litigation³⁸ or even criminal charges.³⁹

Receiving assurance that they can go about their activities lawfully is not a matter of consulting with an attorney to ensure that a particular activity is reasonably likely to be within the scope of fair use or a statutory exception. Instead, exemption proponents must wait for a brief window that opens just once every three years.⁴⁰ They must secure specialized legal assistance, typically provided by a handful of pro bono law clinics, including the one I direct, with expertise at the intersection of digital copyright and administrative law. Developing the case for a single exemption can take more than 500 hours of legal work across a triennial review.⁴¹ At the prevailing market rate,⁴² advocacy for a single exemption under the triennial review might cost an individual proponent or advocate more than \$100,000 even if performed entirely by law clerks,⁴³ or potentially more than \$375,000 if performed by a senior attorney⁴⁴—a prohibitive cost for many non-profit organizations. As a practical matter, the limited capacity of tech clinics to provide pro bono services means that some would-be exemption proponents likely never even get the chance to plead their case to the Copyright Office. This dynamic is exacerbated by the Office’s decision not to investigate exemptions on its own motion, as an agency might typically do in the context of a notice-and-comment rulemaking like the one prescribed by Section 1201.⁴⁵

When an exemption proponent does obtain legal help, their task has only just begun. A proponent must work with their counsel to compile dozens of pages of detailed justifications across numerous filings in a process that takes up to a full year, and in many cases travel to Washington to undergo questioning from government officials in hearings that can go for hours. Specifically, exemption proponents in the 2018 rulemaking were required to prepare:

³⁸ Section 1203 provides for injunctive relief and statutory damages of up to \$2500 per act of circumvention. 17 U.S.C. § 1203(b)-(c).

³⁹ Section 1204 makes initial willful offenses for purposes of commercial advantage or private financial gain a five-year felony. 17 U.S.C. § 1204(a)(1).

⁴⁰ Section 1201(a)(1)(C) obliges the Librarian of Congress and the Register of Copyrights to conduct the triennial review at least every three years. 17 U.S.C. § 1201(a)(1)(C). The Register has typically operated the triennial review on a three-year cadence.

⁴¹ See 1201 Study Report, *supra* note 8

⁴² See generally Laffey Matrix, <http://www.laffeymatrix.com/history.html> (last visited Sept. 13, 2020) (explaining the use of the so-called “Adjusted Laffey Matrix” for calculating the hourly rates of attorneys).

⁴³ See Laffey Matrix, <http://www.laffeymatrix.com/see.html> (last visited Sept. 13, 2020) (specifying a \$206 hourly rate for paralegals and law clerks).

⁴⁴ See *id.* (specifying a \$759 hourly rate for attorneys with 11-19 years of experience).

⁴⁵ See 17 U.S.C. § 1201(a)(1)(C).

- A petition to renew an existing exemption;⁴⁶
- A separate petition to request expansion of an existing exemption;⁴⁷
- Detailed long-form comments;⁴⁸
- Detailed long-form reply comments;⁴⁹
- Hearing testimony⁵⁰ and, in some cases, elaborate multimedia hearing exhibits;⁵¹
- In some cases, additional responses to post-hearing questions posted by the Copyright Office;⁵²
- In some cases, further additional responses to post-hearing correspondence submitted to the Copyright Office by the Department of Justice;⁵³ and
- In some cases, even further responses to post-hearing *ex parte* communications by exemption opponents.⁵⁴

Exemption proponents also must face opposition from professional lobbyists and corporate attorneys who in some cases impugn their character⁵⁵ and reflexively criticize their proposals⁵⁶ without seriously reviewing or even attempting to understand them.⁵⁷ This dogmatic opposition materializes even though in two decades of rulemaking, I cannot recall an opponent of an exemption presenting any evidence of a renewed or expanded exemption being abused.

⁴⁶ <https://www.copyright.gov/1201/2018/petitions-091317/> (last visited Sept. 13, 2020).

⁴⁷ <https://www.copyright.gov/1201/2018/petitions-091317/> (last visited Sept. 13, 2020).

⁴⁸ <https://www.copyright.gov/1201/2018/comments-121817/> (last visited Sept. 13, 2020)

⁴⁹ <https://www.copyright.gov/1201/2018/comments-031418/> (last visited Sept. 13, 2020).

⁵⁰ <https://www.copyright.gov/1201/2018/hearing-transcripts/> (last visited Sept. 13, 2020).

⁵¹ <https://www.copyright.gov/1201/2018/exhibits-043018/> (last visited Sept. 13, 2020).

⁵² <https://www.copyright.gov/1201/2018/post-hearing/answers/> (last visited Sept. 13, 2020).

⁵³ <https://www.copyright.gov/1201/2018/additional-correspondence/> (last visited Sept. 13, 2020).

⁵⁴ <https://www.copyright.gov/1201/2018/ex-parte-communications.html> (last visited Sept. 13, 2020).

⁵⁵ See, e.g., Comments of Dominion Election Systems, et al. at 4 (Feb. 2018),

https://cdn.loc.gov/copyright/1201/2018/comments-021218/class10/Class_10_Opp'n_Election_System_Providers.pdf (characterizing a request by decorated academic security researchers for broader latitude to help ensure the security of election systems as “[g]iving anonymous hackers a license to attack critical infrastructure”).

⁵⁶ Outside counsel and other representatives of rightsholder trade organizations filed lengthy comments opposing nearly every request for new and expanded exemption filed in the 2018 triennial review. See <https://www.copyright.gov/1201/2018/comments-021218/> (last visited Sept. 13, 2020).

⁵⁷ Compare, e.g., Opposition Comments of MPAA, et al. at 10 (Feb. 2018)

https://cdn.loc.gov/copyright/1201/2018/comments-021218/class2/Class_02_Opp'n_Joint_Creators_I.pdf (accusing disability services professionals of “not explain[ing] precisely the conduct in which they seek to engage” in a proposed exemption) with Comments of Association of Transcribers and Speech-to-Text Providers (ATSP) (Dec. 2017), <https://cdn.loc.gov/copyright/1201/2018/comments-121817/class2/class-02-initialcomments-atsp-et-al.pdf> (providing a detailed, 8000-word description of the proposed exemption).

As a result, the Office routinely recommends exemptions riddled with vague and ambiguous language and caveats that preclude the certainty proponents seek.⁵⁸ Although the Office has undertaken laudable work to streamline the process for renewing existing exemptions over the past two rulemakings⁵⁹ and make them more accessible to the clinics that provide pro bono assistance to proponents,⁶⁰ the routine need for changes to narrowly-drawn exemptions means that existing exemptions must repeatedly be rehashed through the exhaustive process for new exemptions. Adding insult to injury, the exemptions expire after three years,⁶¹ requiring proponents to repeat the process in a regulatory version of Groundhog Day.

III. Section 1201 must be reformed.

The foregoing is just a brief sampling of the challenges faced by people with disabilities, security researchers, teachers, students, authors, video creators, patients, phone customers, computer users, mechanics, farmers, technicians, car owners, homeowners, and librarians in contending with the chilling effects of Section 1201 on legitimate, noninfringing activities far outside the heartland of copyright. Nevertheless, even this abbreviated glimpse into the thousands of pages of record materials compiled over eight triennial reviews across more than two decades should suggest to the Subcommittee what is obvious to the hardworking people who have been repeatedly punished by the burdensome regulatory impact of the triennial review: Section 1201 is broken and needs to be reformed.

Section 1201's scope has crept like a fast-growing weed over the past two decades, transforming what Congress intended as a narrow effort to facilitate the distribution of digital works into a large-scale regulatory regime of a wide array of ordinary activities far outside the intended focus of the DMCA. Section 1201 has placed the Office at the center of a wide array of technical policy disputes, entangling agencies ranging from the Environmental Protection Agency to the Food and Drug Administration to the Department of Transportation in the triennial review and leading the Office to opine on environmental, traffic, and health policy concerns which have little to do with copyright and on which the Office has little institutional expertise.⁶²

During the Copyright Office's 2017 study of Section 1201, it was confronted with a resounding chorus that Section 1201 needed reform, and it acknowledged that the

⁵⁸ The current exemptions occupy more than 2600 words in the Code of Federal Regulations. See 37 C.F.R. § 201.40(b).

⁵⁹ See generally 85 Fed. Reg. 37,399, 37,400–401 (June 22, 2020) (describing the “streamlined” renewal process).

⁶⁰ See 1201 Study Report, *supra* note 8, at vii.

⁶¹ See 17 U.S.C. § 1201(D).

⁶² See generally Paul Ohm & Blake Reid, *Regulating Software When Everything Has Software*, 84 GEO. WASH. L. REV. 1672, 1682-86 (2016) (describing the non-copyright entanglements of the 2014-2015 triennial review).

statute's balance of interests was askew.⁶³ Unfortunately, the Office largely sidestepped these concerns, contending that Section 1201's "overall structure and scope—including its treatment of circumvention as a standalone violation independent of copyright infringement—remain sound."⁶⁴ The Office recommended only modest expansions to permanent exemptions for conducting security research, using assistive technology to read e-books, repairing devices, and unlocking phones, and declined to recommend any significant legislative changes to the triennial review itself.⁶⁵

Though the Office's missed opportunity to provide more significant guidance on reform is unfortunate, the Subcommittee should forge ahead to protect the right to engage in non-infringing activities. At a bare minimum, Congress should:

- Expand and permanently codify long-standing temporary exemptions, including those for accessibility and security research, and eliminate the automatic expiration of exemptions to reduce the need for non-profit organizations and individuals to make repeated, wasteful, resource-intensive pleas to the Copyright Office to renew exemptions that face no serious opposition;
- Ensure that exemptions apply to the prohibitions on trafficking to ensure that people affected by Section 1201 can seek help engaging in noninfringing activities;⁶⁶
- Allow proponents to seek renewal and expansion of exemptions at any time on an accelerated timetable, eliminating the arbitrary three-year cycle and ensuring that uses that arise as unexpected events, such as the dramatic shift to remote learning in the course of the COVID-19 pandemic, rapidly give rise to new and unanticipated noninfringing uses of works;
- Make clear that the Librarian can grant exemptions that cut across multiple or all classes of works for noninfringing uses, users, and purposes, eliminating the needless development of an endless array of fine-grained exemptions that frustrate non-infringing activities;
- Remove from the ambit of the Office's authority analysis of infringement in proposed exemptions, leaving unsettled questions of mainstream copyright law to judicial review;

⁶³ See 1201 Study Report, *supra* note 8, at ii-iii (acknowledging that many commenters "argue[d] that section 1201 does little to prevent digital piracy, while chilling a wide range of otherwise lawful activities," that "the statutory language sweeps far beyond the concerns Congress had in mind when it adopted the DMCA and has given rise to anticompetitive and other claims unrelated to legitimate copyright interests," and that "that these concerns are only partially remedied by the permanent exemptions and the triennial rulemaking").

⁶⁴ See *id.* at iii.

⁶⁵ See *id.* at iv-v.

⁶⁶ The exemptions promulgated during the triennial review are typically understood to exempt only circumvention prohibited under Section 1201(a)(1)(A), and not activity barred by the trafficking bans in Section 1201(a)(2) and (b). See 17 U.S.C. § 1201(a)(1)(B), (E).

- Eliminate the “mere inconvenience” doctrine and clarify that exemption proponents need not prove that circumvention is the only method by which their proposed use might be performed—to bring an end fruitless debates over the propriety of screen capture software and related technologies and the micromanagement of users engaged in noninfringing activities;
- Eliminate or significantly lower the standard for establishing a likelihood of adverse effects to avoid “Catch-22” criticism of exemption proponents’ necessarily speculative cases for new exemptions;
- Bar the Copyright Office from denying or limiting exemptions on grounds unrelated to copyright policy, ensuring that the consideration of exemptions does not involve other federal agencies and policy areas over which the Office has no expertise in the triennial review; and
- Transform the proceeding into a non-adversarial policymaking exercise by requiring the Library and the Office to proactively investigate needed exemptions, to stop categorizing commenters as litigation-style proponents and opponents, and to comply with the Administrative Procedure Act.⁶⁷

However, these changes are half-measures for overhauling a proceeding that requires ordinary people to ask the government’s permission to engage in a wide array of activities that are in many cases protected by the First Amendment. This dynamic positions the need to pursue exemptions through the triennial review as a quintessential prior restraint that raises serious constitutional concerns. Congress could and should address Section 1201’s intrusion into the First Amendment and its broader chilling effects once and for all by codifying the sensible conclusion of the Federal Circuit that there can be no violation of Section 1201’s provisions without a nexus to copyright infringement.⁶⁸ Doing so would maintain Section 1201’s protections for rightsholders while shielding ordinary people from the burden of seeking prior government approval to engage in indisputably beneficial, noninfringing activities.

Thank you for allowing me to join today to discuss these issues and I look forward to working with the Subcommittee as you continue to explore reforms to Section 1201.

⁶⁷ While the Copyright Office is subject to the APA under 17 U.S.C. § 701(e), there is some uncertainty about whether the Library’s role in the proceeding limits the application of the APA. *See Green*, 392 F.Supp.3d at 96-100 (concluding—incorrectly, in my view—that “The Triennial Rulemaking Process is Not Subject to the Administrative Procedure Act”).

⁶⁸ Chamberlain, 381 F.3d at 1204. As explained *supra* at note 3, legislation has already been introduced to impose a “nexus requirement” that would limit violations of Section 1201(a), 17 U.S.C. § 1201(a)(1)(A), (2), to acts of circumvention with a nexus to copyright infringement. Unlocking Technology Act of 2015, H.R. 1587, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/house-bill/1587/text?q=H.R.+1587>.