BEFORE THE UNITED STATES COPYRIGHT OFFICE

COMMENTS OF THE ASSOCIATION OF AMERICAN UNIVERSITIES, THE AMERICAN COUNCIL ON EDUCATION, THE ASSOCIATION OF PUBLIC AND LAND-GRANT UNIVERSITIES, AND EDUCAUSE ON SECTION 1201 OF THE DIGITAL MILLENNIUM COPYRIGHT ACT

Association Descriptions

The Association of American Universities ("AAU") is a non-profit association of 60 U.S. and two Canadian public and private research universities. Founded to advance the international standing of U.S. research universities, AAU today focuses on issues that are important to research-intensive universities, such as funding for research, research regulations, and graduate and undergraduate education.

The American Council on Education ("ACE") is a non-profit, national educational association that represents all sectors of American higher education. Its approximately 1,700 members reflect the extraordinary breadth and contributions of degree-granting colleges and universities in the United States. Founded in 1918, ACE's public policy advocacy advances its purpose to serve education, believing that a strong higher education system is the cornerstone of a democratic society.

The Association of Public and Land-grant Universities (APLU) is a non-profit research, policy, and advocacy organization representing 235 public research universities, land-grant institutions, state university systems, and affiliated organizations. Founded in 1887, APLU is North America's oldest higher education

association with member institutions in all 50 states, the District of Columbia, four U.S. territories, Canada, and Mexico.

EDUCAUSE is a non-profit association and the foremost community of information technology (IT) leaders and professionals committed to advancing higher education. Our membership includes over 2,000 colleges and universities, over 350 corporations serving higher education IT, and dozens of other associations, state and federal agencies, system offices, and not-for-profit organizations. EDUCAUSE strives to support IT professionals and the further advancement of IT in higher education through analysis, advocacy, community/network-building, professional development, and knowledge creation.

Introduction

The aforementioned associations collectively represent a significant number of copyright creators and consumers, with an enduring and critical interest in access to and use of copyrighted materials for scholarly research, education, and instruction. The associations were also active participants in the policy conversations leading up to the enactment of the DMCA, as well as in the first section 1201 triennial rulemaking and subsequent rulemakings, submitting extensive written comments and providing witness testimony. Today, we remain concerned that section 1201 is adversely affecting the ability of the educational community to access copyrighted works for the purpose of engaging in lawful, noninfringing uses of those works and using uncopyrighted materials integrated in those works.

Thus, we share the Copyright Office's view that the time is ripe for a serious reconsideration of the anticircumvention provisions in section 1201, as well as the 1201 rulemaking process. And for reasons that we will discuss in greater detail below, we urge the Copyright Office and Congress to consider the following proposals for reforming section 1201 and the section 1201 rulemaking process:

(1) Attach section 1201 liability to circumvention only where that act of circumvention results in infringement of the underlying copyrighted work(s).

(2) Expand the rulemaking process to apply to sections 1201(a)(2) and 1201(b) in order to allow beneficiaries of exemptions to acquire the tools to utilize those exemptions.

(3) Create a regulatory presumption for existing section 1201 exemptions, whereby the burden is shifted to those opposed to renewal of a previously granted exemption.

(4) Create an "equitable rule of reason" framework wherein previously granted exemptions are treated as illustrations of the types of uses permitted.

(5) At a minimum, draft broader and simpler exemptions that are easier for the public to interpret and apply.

History of Section 1201

The World Intellectual Property Organization's "Internet" treaties, which the United States implemented as the Digital Millennium Copyright Act, require contracting parties to provide legal remedies against the circumvention of technological measures

that protect authors' copyrights. The treaties, however, only instruct parties to "provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law."[1] The treaties are silent about regulating circumvention where there is no copyright infringement. Nor do the treaties direct parties to address the circumvention of access-control technologies in addition to the circumvention of copy-control technologies; certainly, the exercise of authorial rights under the treaties and the Berne Convention does not encompass an exclusive right to permit or prohibit access to a publicly distributed work.

At the time Congress deliberated over implementation of the WIPO treaties, it expressed apprehension that access-control technology could be applied to frustrate or prevent lawful, noninfringing uses of copyrighted works. The House Commerce Committee expressed particular unease about the prospect of chilling legitimate educational and scholarly uses, noting:

> "The growth and development of the Internet has already had a significant positive impact on the access of American students, researchers, consumers, and the public at large to informational resources that help them in their efforts to learn, acquire new skills, broaden their perspectives, entertain themselves, and

[1] *See* WIPO Copyright Treaty, adopted Dec. 20, 1996, WIPO Doc. CRNRIDC/94; WIPO Performances and Phonograms Treaty, adopted Dec. 20, 1996, CRNR/DC/95.

become more active and informed citizens….*Still, the Committee is concerned that marketplace realities may someday dictate a different outcome, resulting in less access, rather than more, to copyrighted materials that are important to education, scholarship, and socially vital endeavors*." [Committee on Commerce, House of Representatives, Digital Millennium Copyright Act of 1998, H.R. Rep. No. 105-551 at 35-36 (1998) (emphasis added)].

Significantly, the Committee further emphasized that "[f]air use…provides the basis for many of the most important day-to-date activities in libraries, as well as in scholarship and education." [*Id*. At 25-26]

Congress attempted to balance the rights of authors and users by structuring a complex set of exceptions and limitations as part of section 1201.[2] Congress also recognized that, beyond those enumerated exceptions and limitations, there may be additional legitimate reasons to circumvent technological protection measures ("TPMs"). For this reason, Congress included in section 1201 a provision requiring the Librarian of Congress to conduct a triennial rulemaking proceeding to consider potential limited exemptions to section 1201's general prohibition against circumvention of access controls. Specifically, the Librarian must determine whether the prohibition on circumvention will adversely affect the ability of users of a given class of copyrighted

[2] Signally, Congress offered special protections to nonprofit educational institutions, libraries, and archives by exempting them entirely from criminal liability for violations of Section 1201 or 1202 (Section 1204(b)) and by entitling them to a complete remission of civil damages where violations of Section 1201 or 1201 were innocent (Section 1203(c)(5)(B). Nevertheless, these protections do not provide sufficient reassurance to the educational community, because they do not address circumstances in which, say, a faculty member or researcher breaks a technological protection measure in order to lawfully incorporate a copyrighted work in a "non-work-for-hire" product (such as an e-textbook openly licensed to a state or local elementary school system).

works to make noninfringing uses of that class of works in the subsequent three-year period.

Congress made clear that the section 1201 rulemaking process was meant to temper the restrictive effects of section 1201 by ensuring that access controls would not be used to impede users' rights to use the copyrighted works in lawful, noninfringing ways. Unfortunately, as we will describe in further detail below, this triennial rulemaking procedure has not only impeded users' ability to legitimately use copyrighted works, but has also proved to be cumbersome and burdensome, resulting in increasingly lengthy, technical exemptions that are difficult for the public to understand and implement.

Section 1201 is Substantively Flawed

Despite evidence that Congress did not want section 1201 to encumber or prevent noninfringing uses of copyrighted works in educational and scholarly contexts, since its inception section 1201 has done exactly that.[3] First, section 1201 does not offer any meaningful permanent exemptions for nonprofit educational institutions, libraries, and archives – some of the very entities that Congress prospectively singled out as requiring relief from overbroad anticircumvention provisions. Second, section 1201 is inherently prejudicial to innovative educational approaches.

Section 1201(d) permits nonprofit educational institutions, libraries, and archives to circumvent TPMs solely for the purpose of making a good faith determination as to

[3] Since 1998, several bipartisan bills have been introduced that would prevent section 1201 from inadvertently restricting legitimate activities.

whether they wish to obtain authorized access to the work. But this exemption is of no practical utility, because any qualifying institution that wants to evaluate such a work for purchase merely asks the relevant vendor for a limited-time trial. Moreover, even if a vendor does not make such a trial available, it is unclear how a university or library would gain access in the first instance to a commercially exploited work, such as a database, that it had not yet purchased. Indeed, most universities and their libraries report that they are aware of no instances in which this provision has ever been employed.

Of even greater concern, perhaps, is that section 1201 is becoming progressively more problematic for institutions of higher education as scholarly, educational, and instructional models and attendant technologies rapidly evolve. Online and asynchronous instruction is growing explosively on almost all higher education campuses, along a number of dimensions, and across a variety of fields (including Art, Biology, Communication, English, Foreign Language and Literature, Film and Cinema Studies, and Music, to name just a few). “Traditional” classroom courses now often include parallel online elements, such as student discussion boards, live chat, or online notes from the instructor. There are also many more fully-online courses and degree programs for enrolled students, as well as many free online courses produced by universities and available to the public in a range of forms.

The boundaries between traditional classroom settings and online and distance education are dissolving as MOOCs, flipped classrooms, and other teaching models have come to be recognized as critical complements to and, in some instances, substitutes for

in-person instruction. Asynchronous interactions through learning management systems and other online tools are the norm in higher education today; such systems improve learning and the quality and quantity of the face-to-face engagement in the traditional classroom. In addition, changing student demographics – such as increasing numbers of older students who work full- or part-time and greater numbers of veterans with disabilities who are returning to school – call for the kinds of flexible and dynamic learning environments that online and asynchronous education makes possible.

Online and asynchronous course providers are particularly disadvantaged by section 1201. Fearful of violating section 1201's anticircumvention prohibitions, instructors who design and teach these courses often forego use of certain materials or they alter the content they provide, whether by choosing different content from that provided in a face-to-face teaching environment or by choosing less relevant or lower quality content than they might otherwise fairly use. Section 1201 should not require instructors teaching the same course to choose different content for different platforms and environments. Nor should section 1201 create barriers to developing novel and transformative instructional methods. Research and best practices show that much instruction can and should be moved to online or asynchronous platforms and yet, thanks to section 1201, such educational modalities must be treated as second-tier, lower-quality forms of instruction than in-person instruction.

Some have argued that the TEACH Act (17 USC § 110(2)) could be used to determine what is and what is not authorized in this area. We do not believe, however, that the TEACH Act provides a helpful guidepost in the section 1201 context. Although

the TEACH Act was intended to accommodate sharing content in distance education contexts, many of its restrictions are unworkably limited. In particular, the requirement that content shared via TEACH Act provisions be made inaccessible to students after a "class session" is over is inconsistent with best practices in online education (which allow students to review materials throughout the time they are enrolled in a course, or even throughout an integrated degree program). The requirement is also increasingly difficult to apply to online instruction at all – in a disintermediated course, when does the "class session" begin or end? In short, very few universities employ or rely on the TEACH Act's outdated and labyrinthine provisions when deciding how and what uses to make of copyrighted works. Contrary to the objective of the TEACH Act, it is simpler (but by no means simple) to wade into the complexities of a fair use analysis.

Fair use, which Congress took care to reference in the language of section 1201, is more flexible than the TEACH Act. And it has proven to be a reliable tool for implementing new educational practices that embrace technologies to enrich the educational experience and provide efficiencies for institutions and students. Especially in online instructional videos, for instance, fair use is often relied on to reproduce images on slides and may incorporate video or audio clips under a fair use rationale. Accordingly, we urge that any changes to section 1201 explicitly state that section 1201 should in no way hinder uses that may fall within the ambit of 17 USC § 107.

Section 1201 is Procedurally Flawed

The Section 1201(a)(1) rulemaking process, which authorizes the Librarian of Congress to consider possible temporary exemptions to section 1201(a)(1)'s prohibition on the circumvention of access controls, is arduous for participants and adjudicators alike.[4] And it is disproportionately burdensome for nonprofit and individual participants. Moreover, as we will explain below, it is unclear that the extraordinary effort required to participate in the section 1201 rulemaking process yields exemptions that are useful either for intended beneficiaries of the exemptions or for the authors of the underlying copyrighted works.

For nonprofit educational institutions, participation in the rulemaking process demands an investment of substantial scarce resources, including multiple sophisticated filings and appearances at in-person hearings in Washington, D.C. or Los Angeles. Developing fresh evidence of faculty need, of technological availability, of the state of the content market, and so forth is extremely taxing for nonprofit institutions. In the last rulemaking session, some exemptions were unopposed and yet proponents of certain non-commercial educational uses still had to marshal and present all of the evidence necessary for the exemption to be renewed.

In addition, the exemptions granted are now so complex and verbose that they are difficult even for sophisticated university attorneys to parse and apply with any

[4] Remarkably, during the course of the recently concluded sixth triennial rulemaking, the Copyright Office considered nearly 40,000 comments – a hundredfold increase from the 2000 rulemaking. The majority of these comments comprised brief statements without legal or evidentiary support, but a number of the longer submissions included substantial supporting evidence, including multimedia files. *See* Recommendation of the Register of Copyrights, *Section 1201 Rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention*, U.S. COPYRIGHT OFFICE 21–22 (Oct. 8, 2015), http://copyright.gov/1201/2015/registers-recommendation.pdf.

confidence. For instance, the exemption for using excerpts of audiovisual works for educational purposes increased from 44 words in 2006 to 96 words in 2010 to 752 words in 2013 to 1055 words in 2015. Yet these increasingly wordy exemptions also tend to be very narrow, resulting in unfair distinctions that prejudice certain users and uses. Exemptions of different scope apply to an instructor teaching the same course at a university, in a MOOC, and at a library or museum.[5]

Furthermore, educational institutions must prepare new policies and guidelines and recalibrate their budgets every three years after exhaustively reviewing these increasingly lengthy and convoluted exemptions. This is especially challenging in evolving online and asynchronous course environments. Even though an exemption was included for MOOCs during the 2015 sixth triennial rulemaking, for instance, colleges and universities cannot be sure that such an exemption will be recommended or modified in the next rulemaking.

For MOOCs and other online classes where the content is delivered by taped lectures, the cost of re-filming lectures is high enough that educational institutions abstain from legitimates uses of certain works rather than rely on an exemption that may disappear in three years. As in other contexts, it is difficult to prove harm because – as indicated above – perceived risks associated with section 1201 have led educators

[5] The exemption created for MOOCs during the 2015 sixth triennial rulemaking, discussed further below, provides an object lesson here. The exemption, though a laudable step forward for MOOC instructors and their students, requires MOOC providers to restrict access to the relevant material to enrolled students and to prevent further dissemination of that material outside of the course. Offering streaming rather than downloadable versions of the course content could reasonably limit unauthorized redistribution of the material, but streaming unfairly disadvantages learners with slower Internet access. In many instances, it is precisely those learners who are in greatest need of online or asynchronous educational opportunities.

systematically to avoid teaching courses that raise any DMCA questions. In general, then, innovative educational approaches such as MOOCs and flipped classrooms are inherently disadvantaged by a system that requires each new kind of use to come before the Copyright Office to seek its own narrow dispensation to move forward.

The uncertainty created by this cyclical process places significant impediments in the way of creating reliable, consistent policy decisions that can be promulgated to the entire educational community, particularly at very large and/or decentralized educational institutions.

Perhaps most importantly, it is unclear that the 1201 rulemaking process is of practical effect. Section 1201(a)(1)(C) authorizes the Librarian of Congress to adopt exemptions to the section 1201(a)(1)(A) prohibition on the act of circumventing a TPM, but not to the section 1201(a)(2) prohibition on the development and distribution of circumvention tools. So while an entity granted an exemption might be legally allowed to perform an act of circumvention, there may be no legal way to obtain the technological tools necessary to perform that act. No educational institution granted an exemption wants to assume that a temporary exemption implicitly includes the right to develop the necessary circumvention tools to take advantage of that exemption.

At the same time, in contexts where tools enabling circumvention are available, it is not clear that the exemptions granted through the rulemaking process have any impact on levels of infringement. For example, the technology necessary to circumvent the TPMs on DVDs and other storage media is widely available via the Internet and simple to use. If a user plans to unlawfully copy a DVD and the necessary tools to do so

are readily available, there is no reason to think (s)he will be deterred by section 1201's anti-circumvention provision or any narrow exemptions to that provision. But, because postsecondary institutions seek to operate in accordance with law, section 1201 limits uses Congress sought to encourage, while having minimal concrete impact on the misuses it sought to prevent.

Proposed Changes to Section 1201

First, we urge Congress to adopt the approach proposed in the 114th Congress by Representatives Zoe Lofgren, Thomas Massie, Anna Eshoo, and Jared Polis in H.R. 1587, the Technology Unlocking Act, which would attach section 1201 liability to circumvention only if that act of circumvention results in infringement of the underlying copyrighted work(s). It is our view that the burdensome section 1201 rulemaking process would be rendered unnecessary if section 1201 operated solely to prohibit circumvention resulting in infringement.

Alternatively, but less optimally, Congress could enact additional permanent exemptions for nonprofit educational uses or for certain "per se" educational works (such as scientific databases or academic monographs and treatises), and for uses by and for those with disabilities. We caution, however, that any such exemptions should be drafted so they are sufficiently adaptable to accommodate evolving technologies.

Second, the rulemaking process should be expanded to apply to sections 1201(a)(2) and (b), to ensure that the tools necessary to effectuate any permitted circumvention can be developed and distributed.

Third, as Register of Copyrights Maria Pallante herself has suggested,[6] there are powerful arguments for why exemptions should not have to be reassessed *de novo* every three years.[7] If exemptions are to be time limited, when a previously approved exemption is up for consideration, the default should be presumptive renewal with the burden shifting to those opposed to renewal to prove market harm or otherwise demonstrate why the exemption should not be continued.

In fact, we would go one step further and suggest that previously granted exemptions should be treated as illustrations of the types of uses permitted. This framework would function, in essence, as an equitable rule of reason, providing subsequent users with a more reliable means of evaluating the likelihood that a given use will or will not be deemed permissible. At a minimum, certainly, we ask the Copyright Office to exercise its extant authority to draft broader and simpler exemptions.

As a general matter, we believe that flexibility must be added to section 1201. As currently structured and interpreted, section 1201 hinders innovation through a lack of predictable results, creates redundant administrative burdens through a repetitive filing

[6] *See The Register's Perspective on Copyright Review*, *Hearing Before the Subcomm. on Courts, Intell. Prop. and the Internet of the H. Comm. on the Judiciary*, 114th Cong. (2015) (statement of Maria A. Pallante, Register of Copyrights).

[7] It is worth noting here that the *de novo* standard is set out only in the report of one committee that considered the DMCA. Nothing in section 1201(a)(1)(C) itself mandates that the renewal of an exemption be based on *de novo* review. *See* Report of the H. Comm. On Commerce on the Digital Millennium Copyright Act of 1998, H.R. Rep. No. 105-551, pt 2, at 37 (1998). Accordingly, the Copyright Office could disregard this report language or merely apply it in a less burdensome way, such as by automatically incorporating evidentiary records of past rulemakings into the records of present rulemakings.

process, and interferes with likely legitimate fair uses of copyrighted works. Equally importantly, section 1201 fails to meaningfully protect copyright holders.

We thank the Copyright Office for soliciting the views of stakeholders as it moves forward with an in-depth legal and policy review of the impact and efficacy of section 1201 and the section 1201 rulemaking process. We greatly appreciate this opportunity to share our perspectives.