

November 16, 2016
Additional Comments of Consumers Union
To the U.S. Copyright Office
Section 1201 Study
[Docket No. 2015–8]

Consumers Union, the policy and mobilization arm of Consumer Reports,¹ respectfully submits these additional comments in the above-referenced matter, in response to the Copyright Office’s request for additional information dated September 27, 2016, and in light of the further comments submitted by others.

Introduction

As we have stated previously, including in our initial comments submitted in March of this year, the prohibition in section 1201 of the Digital Millennium Copyright Act against circumvention of technological protection measures has proven, in experience, to be an overbroad response to a concern that the digital age would usher in a massive deluge of copyright infringement for which drastic new countermeasures were needed. Instead, its use to protect access to software that enables and governs – and *restricts* – the functioning of everyday consumer products in which it is embedded, and their interoperability with other products, threatens to cause far-reaching harm to fundamental consumer rights.

Section 1201 was conceived with the goal of protecting digital forms of traditional copyright-protected creative works in mind, such as digital versions of books, music, and films. But its actual reach is far broader, affecting the full array of the increasing numbers of consumer products that rely on computer software for their functioning. Section 1201 is being misused by some businesses to shield themselves against competition, and the leverage competition gives consumers in the marketplace. Consumers are also being denied the long-accustomed rights and incidents of ownership and control over products they have purchased, including the right to choose who will service those products, the right to adapt them to other uses, and the right to prolong their usefulness – undermining fundamental consumer expectations of what ownership means.

¹ Consumers Union is the policy and mobilization arm of Consumer Reports, an expert, independent, nonprofit organization whose mission is to work for a safe, fair, and just marketplace for all consumers and to empower consumers to protect themselves. Consumers Union conducts its policy and advocacy work in the areas of telecommunications reform, health reform, food and product safety, financial reform, and other areas. Consumer Reports is the world’s largest independent product-testing organization. Using its more than 50 labs, auto test center, and survey research center, the nonprofit organization rates thousands of products and services annually. Founded in 1936, Consumer Reports has over 8 million subscribers to its magazine, website, and other publications.

The current section 1201 puts an unreasonable and costly burden on consumer rights. It starts with prohibiting any circumvention of any access-blocking technology whatsoever, subject to felony fines and imprisonment. The statute lists a few exceptions for specified purposes, each of which needs a lawyer to understand. Then every three years, those who want permission to circumvent for any other purpose must go through a resource-intensive process before the Copyright Office to demonstrate with specificity how it is warranted and useful, and must do so repeatedly. And because the burden of proof lies with the person seeking the exception, the exception is typically written tightly around the justification put forward, often with conditions written in complicated language that creates uncertainty and limits the exception's practical usefulness.

As experience is repeatedly proving, blocking access to software that governs product functioning goes far beyond any legitimate copyright goal. We are pleased that the Copyright Office has recognized that section 1201 is in need of rebalancing, and is gathering perspectives for a recommendation to Congress.

The goal should be to bring consumers' rights and abilities to exercise ownership dominion and control over software-enabled products to an equivalent place to where they have been for products that did not depend on software for their functioning. A consumer who purchases a product or otherwise lawfully acquires it should own it, and be able to use it – as he or she sees fit.

That also includes selling or giving the product to someone else, complete with all its parts and contents and accessories. It includes being able to tinker with the product, to customize or adapt it, to improve its utility or performance, to get it repaired, or to remove its parts and use them in some other product. And it includes being able to choose how to accomplish any of those, or who to enlist or hire for assistance. Just as a dress can be resold in a consignment shop, or given to a friend, or donated to a thrift store; or re-hemmed, or mended, or have its buttons removed and used on another dress, either by the owner herself, or by hiring a seamstress.

Technological innovation should be bringing new freedoms and capabilities to consumers, not placing consumers under new constraints.

Ideally, Congress would comprehensively tighten the scope of the prohibition on circumvention to better focus it on the accepted goal of deterring actual copyright infringement. It would replace the current sweeping approach, under which all circumventions are presumed to be prohibited, with an approach that more closely ties the prohibition to actual copyright infringement. This would eliminate the need for many of the new permanent exceptions now being contemplated, and would reduce the number of exceptions that would need to be requested would become unnecessary.

If the Copyright Office opts instead to limit itself to proposing specific new exemptions, we address below some of the specific questions posed in the September 27 request, as they pertain to our experience with the exemption and legislation to permit the unlocking of mobile devices, and our more general interest in giving consumers more control over other consumer products that depend on computer software for their functioning. The goal should be for

exemptions to be written simply enough for consumers to understand and apply in confidence without having to hire attorneys to help them navigate the requirements.

Comments on Specific Questions

(1)(b) – Permanent exemption for mobile device unlocking

We recommend making this exemption permanent – finally. We have now advocated for this exemption in three Copyright Office triennial review proceedings, as well as helping lead the effort in Congress to enact the Unlocking Consumer Choice and Wireless Competition Act, as well as in efforts to address the issue in the Federal Communications Commission. We recommend applying the exemption broadly to all devices that connect to a wireless network, rather than freezing a list of categories of devices into the statute, however comprehensive that list may appear to be now. Consumers will have the same interest in having power to choose among competing wireless networks for whatever product they are connecting, including products in the Internet of Things. (If the exemption for computer programs, (1)(c) above, is written comprehensively enough, as we recommend, a separate exemption here may be less important.)

(1)(c) – Permanent exemption for access to computer programs

We recommend making such an exemption permanent. We recommend writing it broadly, so as to permit circumvention for any lawful analysis, diagnosis, maintenance, repair, or adaptation of a computer program in any consumer product. This is the essential protection for helping ensure that a consumer's product's ability to function can be in the hands of the consumer. To the fullest extent possible, this exemption should not be limited or conditioned.

We fully recognize that some changes to the operating software of some products could have serious impacts on safety. Ensuring product safety has been a bedrock objective of Consumers Union's mission since its founding 80 years ago. But safety considerations should not be dragged into copyright law, where they are more apt to be used as a pretext for blocking competition and consumer choice and undermining rights of ownership. Safety issues are better dealt with by agencies experienced in and responsible for protecting safety, not as an awkward adjunct to copyright law.

(1)(d) – Permanent exemption for addressing obsolete or discontinued technologies

We recommend making such an exemption permanent. This is essential for putting control over a product's useful life in the hands of the consumer, rather than allowing the manufacturer or seller to arbitrarily render it obsolete in order to sell a new product or because maintaining support for it is no longer profitable enough. We recommend including circumvention to address malfunction or damage as well, as suggested by the Copyright Office in its request. (If the exemption for computer programs, (1)(c) above, is written comprehensively enough, as we recommend, a separate exemption here may be less important.)

(2)(e) – Revising exemption for interoperability

We recommend extending this exemption to cover not only analyzing the software in a product that would enable interoperability with other products, but also adapting the software to enable interoperability. This is essential to enabling consumers to better control how they are able to use their products, and to get the benefit of choosing between competing products for each function rather than having to stick with one “family” of interoperating products. It is also essential for enabling consumers to adapt a product for which the manufacturer or seller has discontinued support. (If the exemption for computer programs, (1)(c) above, is written comprehensively enough, as we recommend, a separate exemption here may be less important.)

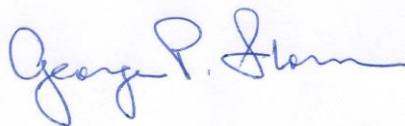
(3) – Clarifying the anti-trafficking provisions

The laws should be clear that when there is a right to circumvent the technological protection measures, there should also be a right to obtain assistance in doing so, and therefore a right to assist. Although this may well be implicit, we recommend erring on the side of caution and making this clear in the statute, without conditions that would inject uncertainty regarding its usefulness.

Conclusion

There is now a more than sufficient record of experience with section 1201 to have illuminated its overbreadth and other flaws, and to form a sound basis for revising it to more closely adhere to the purpose for which it was enacted, the deterrence of wide-scale copyright infringement in the digital age. We urge the Copyright Office to incorporate our recommendations into a common-sense proposal to help guide Congress to a revised law that better protects the rights and interests of consumers in competition and choice and in control over products they have paid for or otherwise lawfully acquired.

Respectfully,



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