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UNITED STATES COPYRIGHT OFFICE



Long Comment Regarding a Proposed Exemption Under 17 U.S.C. § 1201

Please submit a separate comment for each proposed class.

NOTE: This form must be used in all three rounds of comments by all commenters not submitting short-form comments directly through regulations.gov, whether the commenter is supporting, opposing, or merely providing pertinent information about a proposed exemption.

When commenting on a proposed expansion to an existing exemption, you should focus your comments only on those issues relevant to the proposed expansion.

[] Check here if multimedia evidence is being provided in connection with this comment

Commenters can provide relevant multimedia evidence to support their arguments. Please note that such evidence must be separately submitted in conformity with the Office's instructions for submitting multimedia evidence, available on the Copyright Office website at <https://www.copyright.gov/1201/2018>.

ITEM A. COMMENTER INFORMATION

*Consumers Union
George P. Slover
Senior Policy Counsel
1101 17th St., NW, Suite 500
Washington, DC 20036
(202) 462-6262*

ITEM B. PROPOSED CLASS ADDRESSED

Class 10 – Computer Programs – Security Research

ITEM C. OVERVIEW

[See below]

ITEM D. TECHNOLOGICAL PROTECTION MEASURE(S) AND METHOD(S) OF CIRCUMVENTION

[See below]

ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGEMENT USES

Privacy Act Advisory Statement: Required by the Privacy Act of 1974 (P.L. 93-579)

The authority for requesting this information is 17 U.S.C. §§ 1201(a)(1) and 705. Furnishing the requested information is voluntary. The principal use of the requested information is publication on the Copyright Office Web site and use by Copyright Office staff for purposes of the rulemaking proceeding conducted under 17 U.S.C. § 1201(a)(1). NOTE: No other advisory statement will be given in connection with this submission. Please keep this statement and refer to it if we communicate with you regarding this submission.

Supporting Comments for New Exemption Under 17 U.S.C. § 1201
Class 10 – Computer Programs – Security Research
December 18, 2017

Consumers Union, the policy and mobilization division of Consumer Reports,¹ submits this statement in support of proposed Class 10, to expand the current exemption for security research, to cover a broader range of products, and to clarify that the consumer who purchases the product is the owner of the copy of the software inside it.

As we have stated in previous submissions to the Copyright Office, and in our Digital Testing Standard launched in March 2017,² when a consumer purchases a product, the consumer should obtain genuine ownership of the product and its parts, including the ability to make effective use of the product, and the ability to effectively resell it.³ We believe consumers should have the ability to use the products they have purchased in all these respects, as they see fit. We have successfully made this case with respect to mobile devices, both in Congress and before the Copyright Office. And we believe it also applies here.

Congress enacted the prohibition in section 1201 of the Digital Millennium Copyright Act in response to concern that the digital age would otherwise usher in a massive deluge of copyright infringement. But this response has proven, with experience, to be overbroad. Its proliferating use to block 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, is causing far-reaching harm to fundamental consumer rights.

We recognize the value of copyright law in nurturing and protecting incentives for innovation, both generally and in particular with respect to computer software. At the same time, it is important that the monopoly rights conferred on creators by the copyright laws be kept appropriately contained, so they do not spill over into broader, unjustified and counterproductive restraints on competition and consumer choice, and do not undermine long-established,

¹ Consumers Union is the policy and mobilization division of Consumer Reports, an expert, independent, non-profit organization whose mission is to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves. It conducts its policy work in the areas of antitrust and competition Policy, financial reform, food and product safety, privacy and data security, telecommunications reform, health care reform, and other areas. Consumer Reports is the world's largest independent product-testing organization. Using its dozens of labs, auto test center, and survey research department, the non-profit organization rates thousands of products and services annually. Founded in 1936, Consumer Reports has over 7 million subscribers to its magazine, website, and other publications.

² The Digital Testing Standard (theDigitalStandard.org) was launched on March 6th, 2017 and is the result of a collaboration with our cybersecurity partners, Disconnect, Ranking Digital Rights, and the Cyber Independent Testing Lab. The Standard is designed to hold companies accountable and equip Consumer Reports and other organizations to test and rate products for how responsibly they handle our private data. This is a collaborative and open source effort. The Standard is designed to empower consumers to make informed choices about the connected products, apps, and services consumers use every day.

³ *The Standard*, THE DIGITAL STANDARD, <https://www.thedigitalstandard.org/the-standard>.

fundamental rights and expectations of consumers regarding their ownership and dominion over the products they have lawfully acquired. Beyond these immediate effects on consumer rights and expectations, broader innovation is impeded if a product's manufacturer is given inordinately sweeping power to control how it is used once it has been released into the marketplace.

We also recognize that some product changes can have serious implications for safety. Ensuring product safety has been a bedrock objective of Consumers Union's mission since its founding 80 years ago. Safety must of course be at the forefront of concerns carefully monitored and vigorously addressed as we move to increasingly complex and interactive technologies. Likewise, pro-consumer data privacy and data security practices must be a top priority, for manufacturers and for policymakers; consumers should receive sufficient information to exercise informed choice, and companies should compete and be held accountable on the basis of the data privacy and security protections they incorporate into the design of their products and services.

But these considerations generally do not implicate copyright law, and generally fall outside the Copyright Office's expertise. And we are concerned that they are more apt to be used by companies as a pretext for blocking competition and consumer choice and undermining rights of ownership. So in our view, they should generally not be part of the Copyright Office's own deliberations in considering exemptions under section 1201. We recommend that the Copyright Office instead consider, when safety and privacy issues are implicated, referring those issues to regulatory agencies whose missions and expertise are directed at those issues.

There may be times when delaying the availability of a new exemption is warranted, to give the regulatory agency prior notice and a reasonable opportunity to establish appropriate conditions on accessing and altering a product's software, in keeping with the need to ensure safety and privacy protections. For example, in the most recent Triennial Review, the Copyright Office subjected the exemption for access to computer programs that control the functioning of an automobile, for lawful alterations as well as diagnosis and repair, to regulations promulgated by the Department of Transportation and the Environmental Protection Agency, and delayed the effective date in order to enable the agencies to consider and develop appropriate regulations. We would anticipate that in many instances, appropriate input could be obtained from the regulatory agency during the Copyright Office's consideration of the exemption, so that a further delay would not be necessary.

In this regard, we believe the "controlled environment" condition in the existing security research exemption may be particularly important for ensuring safety and security. Any adjustments to this condition should be made only after thorough consideration, and should be carefully and specifically circumscribed. Other existing conditions may also warrant similarly thorough consideration.

The same kinds of unjustified harms to consumers and the marketplace that resulted from blocking access, for purposes of security research, to software in the kinds of products in specified in the current exemption are also present with respect to the software in other products. We therefore urge the Copyright Office to look favorably on recommendations to extend the current security research exemption to other products, subject to the considerations set forth above.

Respectfully,

George P. Slover
Senior Policy Counsel
Consumers Union
1101 17th St., NW, Suite 500
Washington, DC 20036
(202) 462-6262

DOCUMENTARY EVIDENCE

[See above]