June 7, 2018

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Regan A. Smith
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United States Copyright Office
Library of Congress
101 Independence Avenue SE
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Re: Section 1201 Rulemaking (Docket No. 2017-10): Election System Providers' Response to CDT Report with respect to Proposed Class 10

Dear Ms. Smith:

Thank you for your letter dated May 21, 2018, providing participants in the Copyright Office's Section 1201 rulemaking proceeding with the opportunity to respond to the report submitted by the Center for Democracy & Technology ("CDT") with respect to Proposed Class 10 after the close of the written comment period (Exhibit 10-A). Dominion Voting Systems, Election Systems & Software, and Hart InterCivic, collectively the "Election System Providers," respectfully submit that the CDT report does not provide meaningful support for the proposed exemption.

As an initial matter, it must be understood that the CDT report is an advocacy paper designed to highlight a general policy view that current U.S. law relevant to computer security is more restrictive than CDT would like. The report concedes that it is not based on a representative sample of security researchers. Report at 5 (acknowledging that "[o]ur qualitative results are not representative" and that this sampling issue poses an "important limitation"); *id.* ("result is a non-representative view of the considerations that security researchers and hackers take into account"); *id.* at 4 (acknowledging that the study subjects were a nearly homogenous group in terms of race and gender, and that persons with different demographic characteristics might have different views concerning the matters studied). Instead, the report is based on a "snowball" study of only 20 individuals. The initial subjects were selected by the report's authors because they "possessed particularly useful insight into chilling effects," and additional subjects were like-minded individuals referred by subjects who had been interviewed. *Id.* at 4.[1] Recruitment of subjects stopped when the researchers hit "diminishing returns on the . . . strength of information obtained." *Id*. That is, CDT designed the study to confirm its premise that "chilling effects" are "a major concern" for security researchers, *id.* at 3; hand-picked subjects who share that view; and stopped looking for subjects

[1] The interviews also appear to have primed subjects to provide information about "specific kinds of chilling effects [they] have faced or are aware of along a number of subjects (DMCA, CFAA, IRBs/peer review, and norms)." *Id.* at 25.

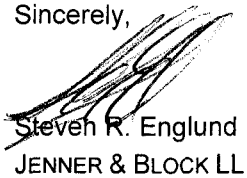
when it could no longer find security researchers who share that view. That CDT was able to find some perceptions of "chilling effects" when it looked for them is no surprise. However, the report provides no basis to believe that the views of a few persons having a connection to CDT can be extrapolated to provide reliable information about security research more broadly.

Moreover, the CDT report is not specifically relevant to the question before the Office in this proceeding: whether particular noninfringing uses of copyrighted works are unreasonably restrained by Section 1201(a)(1)(A) of the Copyright Act. Much of the CDT report addresses issues other than Section 1201. *See, e.g., id.* at 8-11 (discussing Computer Fraud and Abuse Act as "a primary source of risk"); *id.* at 16 (discussing researchers' misperceptions about the law). Where the report does focus on Section 1201, it notes that only half of the subjects interviewed mentioned it as a source of legal risk (despite those subjects' having been selected for their perspective on "chilling effects"). *Id.* at 6. The report then veers into legal argument and advocacy based on publicly-reported instances in which Section 1201 was invoked. *See id.* at 7 & nn.10-11.

Beyond a general recognition that security research involving media content is more likely to raise Section 1201 issues, the report does not distinguish among types or subjects of research or specify whether any area of activity involved infringement. *See, e.g., id.* at 11 (recognizing that results may encompass "so-called 'black hat' and 'white hat' hackers"). Specifically, the report does not identify whether any of the subjects interviewed has ever engaged in research within the scope of Proposed Class 10, whether the activities involved were infringing or not, or whether any noninfringing research was impeded by the prohibition on circumvention in Section 1201(a)(1)(A). The report does not mention election systems, other than to note that they are not readily available. *Id.* at 24. It certainly does not speak to the concerns discussed in our comments or testimony, including the unique security concerns applicable to critical infrastructure. It remains unclear what *legitimate* activities researchers would like to take with respect to election systems that are not already permitted under the current exemption.

For the foregoing reasons and those stated in our comments, the Office should not grant the proposed exemption as to election systems. Doing so would create risks to national security and voter confidence in the accuracy of elections, and would undermine the reasonable limitations on circumvention that the Librarian imposed in 2015.

Sincerely,



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