



UNITED STATES COPYRIGHT OFFICE

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

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

### ITEM A. COMMENTER INFORMATION

The Petition submitter is Software Freedom Conservancy (“Conservancy”), a 501(c)(3) not-for-profit organization that helps promote, improve, develop, and defend Free and Open Source Software (“FOSS”) – software developed by volunteer communities and licensed for the benefit of everyone. Conservancy is the nonprofit home for dozens of FOSS projects representing approximately five thousand volunteer contributors. Conservancy’s communities maintain some of the most fundamental utilities in computing today, and introduce innovations that will shape how software will be created in the future.

Among the projects that are a part of Conservancy and for which it provides logistical, administrative, and legal support are BusyBox, Samba, OpenWrt and the GPL Compliance Project for Linux Developers. BusyBox is software that provides a number of key system utilities that enable “smart devices” – or what can more accurately be called computer-embedded consumer electronics devices – to perform their function. Samba is software that facilitates communication between different file systems, such as between a Windows operating system and a Unix operating system. OpenWrt is wireless router software. Linux, like Windows and macOS, is a computer operating system upon which user applications run. These programs of Conservancy’s focus and interest in particular are ones affected by the absence of the requested exemption. Other non-profit organizations, companies, and individual copyright holders in FOSS are similarly impacted regarding the matter of this exemption.

Conservancy may be contacted through its authorized representative:

Karen Sandler, Executive Director  
Software Freedom Conservancy, Inc.  
137 Montague St. Ste, 380  
Brooklyn, NY 11201-3548  
[dmca-exemption@sfconservancy.org](mailto:dmca-exemption@sfconservancy.org)  
212-461-3245

**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.

## ITEM B. PROPOSED CLASS ADDRESSED

The request for exemption as originally filed was:

Class 16: Computer Programs—Copyright License Investigation:

To permit circumvention of TPMs protecting computer programs for purposes of (a) investigating potential copyright infringement of the computer programs; and (b) making lawful use of computer programs (e.g., copying, modifying, redistributing, and updating free and open source software (FOSS)).<sup>1</sup>

However, the opposition comments made suggestions for further refinement of the exemption.

1. The exemption was criticized for not being limited to free and open source software.<sup>2</sup>
2. The submission on behalf of the Joint Creators and Copyright Owners suggested that the requested exemption should include “standard limitations common to previously granted exemptions,” specifically, (1) a limitation stating that the covered activity must be “solely for the purpose of” the covered circumvention; (2) a limitation against gaining unauthorized access to expressive content/facilitation of infringement; (3) a definition of who is allowed to conduct the circumvention; (4) a prohibition against violating other laws; and (5) a requirement that the person engaged in circumvention own a copy of the program or the device or have lawful possession of it or access to it.<sup>3</sup>
3. Two comments state that part (b) of the proposed exemption is too hypothetical or speculative<sup>4</sup> or does not describe uses that are clearly non-infringing.<sup>5</sup>
4. All comments expressed the view that the proposed exemption was not properly limited to a particular class of goods.<sup>6</sup>

Conservancy therefore is amending its proposed exemption to address these comments and now proposes the following:

<sup>1</sup> Exemptions to Permit Circumvention of Access Controls on Copyrighted Works, 85 Fed. Reg. 65293, 65308 (Oct. 15, 2020).

<sup>2</sup> *Id.* (“It is somewhat unclear whether the requested exemption for ‘lawful use of computer programs’ would apply to *any* lawful use or seeks merely to allow licensed uses of FOSS software”); Submission on behalf of the Joint Creators and Copyright Owners at 2, [https://www.copyright.gov/1201/2021/comments/opposition/Class\\_16\\_Opp'n\\_DVD%20CCA%20and%20AACS%20LA.pdf](https://www.copyright.gov/1201/2021/comments/opposition/Class_16_Opp'n_DVD%20CCA%20and%20AACS%20LA.pdf) [hereinafter “Joint Creators Comment”].

<sup>3</sup> Joint Creators Comment at 6-7; *see also* Submission on behalf of the Equipment Dealers Association and Associated Equipment Distributors at 5, [https://www.copyright.gov/1201/2021/comments/opposition/Class\\_16\\_Opp'n\\_Equipment%20Dealers%20Association%20and%20Associated%20Equipment%20Distributors.pdf](https://www.copyright.gov/1201/2021/comments/opposition/Class_16_Opp'n_Equipment%20Dealers%20Association%20and%20Associated%20Equipment%20Distributors.pdf) [hereinafter, “Equipment Dealers Comment”].

<sup>4</sup> Submission on behalf of the DVD CCA and AACS LA at 1, n.1 [https://www.copyright.gov/1201/2021/comments/opposition/Class\\_16\\_Opp'n\\_DVD%20CCA%20and%20AACS%20LA.pdf](https://www.copyright.gov/1201/2021/comments/opposition/Class_16_Opp'n_DVD%20CCA%20and%20AACS%20LA.pdf) [hereinafter “DVD CCA Comment”].

<sup>5</sup> Joint Creators Comment at 5.

<sup>6</sup> Equipment Dealers Comment at 5-6; DVD CCA Comment at 5; Joint Creators Comment at 5.

Computer programs, where the circumvention is undertaken on a lawfully acquired device or machine on which the computer program operates, the circumvention solely for the purpose of investigating a potential copyright infringement where the circumvention is performed by, or at the direction of, a party that has standing to bring a breach of license claim and where such circumvention does not constitute a violation of applicable law.

Four of the five points raised in the Joint Creators Comment have been expressly added to the exemption. The remaining suggestion, that the exemption should also prohibit gaining unauthorized access to expressive content/facilitation of infringement, will be addressed below.

Subpart (b) of the original proposed exemption has been deleted. This change moots many of the concerns expressed in the comments.<sup>7</sup>

As to the class of goods, the exemption is now sought for “Computer programs, where the circumvention is undertaken on a lawfully acquired device or machine on which the computer program operates.” This is a subset of the class of goods currently approved for security research.<sup>8</sup>

There has been some discussion about whether the exemption should apply to the investigation of infringement of proprietary software programs. In fact, the DVD CCA Comment suggests that it would be beneficial to the proprietary software industry too.<sup>9</sup> Conservancy is unaware of any facts or policy that suggest that the two different styles of copyright licenses should be treated differently – both are copyright licenses for computer programs that grant a right to use the software based on compliance with specific conditions, simply with the scope of the rights granted and the conditions on the grant varying. However, because Conservancy works specifically in FOSS, Conservancy does not have the factual data that either supports or disputes the need for the exemption in the proprietary software industry. Should the Copyright Office therefore believe that the exemption is properly limited to FOSS, Conservancy suggests the following language for the exemption (additional wording in italics):

Computer programs, where the circumvention is undertaken on a lawfully acquired device or machine on which the computer program operates, the circumvention solely for the purpose of investigating a potential infringement *of free and open source computer programs and* where the circumvention is performed by, or at the direction

---

<sup>7</sup> See, for example, Joint Creators Comment at 4-5 (subpart titled “Modifying and Redistributing Software/All “Lawful Uses”); Equipment Dealers Comment at 5-6 (subpart titled “Making Lawful Use of Computer Programs”).

<sup>8</sup> 37 CFR § 201.40(b)(11), which is for “Computer programs, where the circumvention is undertaken on a lawfully acquired device or machine on which the computer program operates, or is undertaken on a computer, computer system, or computer network on which the computer program operates with the authorization of the owner or operator of such computer, computer system, or computer network.”

<sup>9</sup> “[T]he proposal would provide a new enforcement mechanism to the opensource movement [sic] that far exceeds the tools currently available to rightsholders in the traditional copyright industries.” DVD CCA Comment at 1.

of, a party that has standing to bring a breach of license claim and where such circumvention does not constitute a violation of applicable law.

Conservancy thanks the commenters for their assistance in pointing out the unintended overreach in the original draft of the requested exemption.

### ITEM C. OVERVIEW

It is difficult to see how any copyright owner could object to this request for exemption. The request has one purpose – to be able to investigate copyright infringement free from the risk of a collateral attack when the infringer is held accountable for their wrongdoing. This is an exemption every copyright owner should love.

Notably, no opposition comment suggested that the purpose for which circumvention is sought, investigation of infringement, is not a lawful use of a copyrighted work. Instead, the objections have two main themes: the potential for knock-on risks after circumvention and suggestions for other means for obtaining the information without circumventing the TPMs.

The supposed knock-on risks are red herrings. In this request for exemption, the exposure of copyrighted content goes no further than the investigation environment. Suppose a TPM in software is circumvented and the investigation performed, with the result that, because of the design choices made by the infringer, the investigator also obtained access to proprietary software.<sup>10</sup> The exemption does not excuse the investigator's further copying or redistribution of the proprietary software, since doing so would be a copyright infringement. As to the availability of other mechanisms for identifying infringement, none of the suggestions are realistic.

The comments also reflect a disingenuousness. The DVD CCA Comment explains at length that the harm caused by the pirating of movies,<sup>11</sup> apparently failing to notice that it is trying to prevent another copyright-based industry, software, from being able to adequately identify and address infringement occurring in its sphere. But perhaps it is not a case of blinders – of the eight companies listed as members of the AACS LA, six of them have been previously investigated (or are currently under investigation) for credible reports of copyright infringement. With some of those six, Conservancy is currently engaged in remediation discussions.

Several points merit reinforcement. If the device manufacturer complies with their FOSS license obligations, they can have no concern because there will be no need for any circumvention for purposes of investigation. FOSS license compliance is easily ascertained: the device manufacturer will have provided, as part of their documentation or user guides or on the device itself, a list of FOSS used along with the copies of the licenses. If any of the licenses are for

<sup>10</sup> Some FOSS licenses permit combining FOSS and proprietary software in the same file, directory or program, so it is not possible to access FOSS without also accessing proprietary software. The terms of the GNU General Public License (“GPL”) require that the user of the GPL-licensed software segregate their proprietary software from the GPL-licensed software if they want to avoid the copyleft effect of the GPL license. See GPL version 2, § 2, GPL version 3, § 5 (describing how to combine works to avoid the copyleft requirement of the license). Thus, if the device manufacturer has blended the two, so the investigator cannot avoid accessing the proprietary software in its effort to investigate the use of the FOSS software, it was the result of a design choice made by the software creator.

<sup>11</sup> DVD CCA Comment at 12-18.

copyleft software, the manufacturer will have also provided either a copy of the source code or information on how to get a copy of the source code. This point alone should reassure all the lawful software suppliers – that is, those who are in compliance with their licenses – that they are at no risk from this exemption. Only infringers need worry.

Further, if there is no indication that infringement is occurring, the exemption would not excuse circumventing TPMs because the work would not have been done for purposes of investigation. The device owner can bring their claim for improper circumvention of TPMs, the same as if the exemption never existed.

There is also some confusion that needs to be cleared up. One comment states that there is no need for circumvention because FOSS is already available.<sup>12</sup> This comment has missed the point of the exemption request. The request is to investigate infringement of a particular software program on a particular device. When the Business Software Alliance investigates whether a business has unlicensed copies of software on employee workstations, the business cannot avoid an investigation by pointing out that there are plenty of other copies available from the software owner's website. There is no substitute software available without the use of circumvention to learn whether infringement is occurring.

Some comments focused on the fact that FOSS may be used lawfully.<sup>13</sup> However, the investigation is exactly because of a suspicion that it is not being used lawfully. More importantly, Section 1201 does not necessarily require an underlying copyright infringement before a plaintiff can state a claim for unlawful circumvention.<sup>14</sup> Whether the circumvention is to access only FOSS code, or FOSS code that has been blended with proprietary code, without an exemption there is a risk of a Section 1201 claim.

Some comments criticize the fact that the requested exemption does not fall within the scope of already-existing exemptions.<sup>15</sup> But that is the very nature of an exemption request – if a new exemption request will only be approved if it fell within the scope of an existing one, there would be no need for any new one. The very purpose of the triennial rulemaking process is to give the Copyright Office the ability to add new exemptions to “accommodate changing marketplace realities and ensure that access to copyright works for lawful purposes is not unjustifiably diminished.”<sup>16</sup> Such is this request.

---

<sup>12</sup> Equipment Dealers Comment at 7, 8.

<sup>13</sup> Equipment Dealers Comment at 5 (stating it was unclear whether the exemption was for FOSS or FOSS and non-FOSS components); Joint Creators Comment at 3 (stating that there is no liability for accessing one's own work).

<sup>14</sup> *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928, 947 (9th Cir. 2010).

<sup>15</sup> DVD CCA Comment at 2 (exemption is not within the scope of Class 12); Equipment Dealers Comment at 7-8 (exemption is not within the scope of Section 1201(f)); Equipment Dealers Comment at 8 (exemption is not within the scope of the exemption for computer programs in motorized land vehicles and reverse engineering and encryption research); Equipment Dealers Comment at 10 (exemption is not within the scope of Sections 1201(f)(g)).

<sup>16</sup> Copyright Office, *Section 1201 of Title 17, A Report of the Register of Copyrights 2* (2017), citing H.R. Rep. No. 105-551, pt. 2, at 35-36 (1998).

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

As previously described.

## **ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGEMENT USES**

The adverse effects claimed in the opposition comments have largely been obviated by the proposed amendment to the requested exemption or they are ill-founded, as described below.

### Knock-On Effects

As explained above in Item B, a substantial part of the comments were objecting directly to subpart (b) of the original proposed exemption as too expansive. The elimination of subpart (b) should address all of those concerns.

In addition, two comments opine that devices that deliver games and movies deserve different treatment.<sup>17</sup> However, there is no reason that devices that deliver entertainment, which are as likely to have infringing operating software as any other kinds of devices, should be treated differently. There are several reasons. First, as noted, the circumvention is only to identify infringement and does not ratify any further use of the materials accessed during the investigation, and certainly does not allow the subsequent distribution of content. Second, the devices being investigated are typically sold without content, so there would be no possible exposure of games or movies when new devices are investigated, as is the usual case. To the extent content is installed on the device's internal memory itself (that is, the game and movie content is not a DVD or game cartridge), it would be an unusual device architecture indeed – and one deliberately chosen by the device manufacturer – that would somehow require accessing content in order to gain access to the operating software. Third, it is also not a rational concern that the very difficult task of circumventing a TPM would be used to gain access to content rather than acquiring a lawful copy at a nominal cost. Fourth, software is highly creative content in its own right; Conservancy seeks this exemption to assure the rights under the copyright statute for its authors are respected in equal measure to everyone else's copyrights.

The DVD CCA Comment makes much of the fact that the investigation may mean that mechanisms for preventing the unauthorized copying of DVD and Blu-Ray discs, such as an encryption key, might be exposed.<sup>18</sup> As noted previously several times, the exemption does not affirmatively permit any subsequent use of any materials accessed. If keys were publicly exposed as a result of the circumvention, the device manufacturer can bring the force of law to bear for any unlawful exposure of the key.

One comment objects to the exemption on that theory that the permitted circumvention will remove trade secret protection.<sup>19</sup> If the statement is accurate, it is true of every single exemption, statutory and regulatory, existing and proposed, because every exemption allows circumvention of mechanisms for making material inaccessible to the general public. Of course it is not true that

---

<sup>17</sup> Joint Creators Comment at 2-3; DVD CCA Comment generally.

<sup>18</sup> DVD CCA Comment at 2-3, 14.

<sup>19</sup> Equipment Manufacturers Comment at 10-12.

trade secrets will be forfeited; the information will still not be “generally known” or “readily ascertainable”<sup>20</sup> to others and the trade secret status is maintained.

The Equipment Manufacturers Comment expressed concern about the Environmental Protection Act and vehicle safety regulations.<sup>21</sup> The exclusion now expressly excludes circumvention “where such circumvention does not constitute a violation of applicable law,” which would include Environmental Protection Agency and Department of Transportation regulations.

Thus, the opposition comments have not identified any harm that will come as the result of circumvention.

### Availability of Other Mechanisms

The opposition comments also include a number of suggestions for mechanisms for investigating infringement short of circumvention, none of which are an adequate substitute for permitting circumvention by regulation.

- The licensor can just ask the infringer whether they are infringing.<sup>22</sup>

Conservancy would very much like to know whether this approach works for the Motion Picture Association, The Alliance for Recorded Music and the Entertainment Software Association, the entities that proposed this approach.<sup>23</sup> Copyright infringers typically do not freely admit to their infringement. When someone selling illegal copies of DVDs on the subway sees a transit officer coming in their direction, the infringer typically does not walk, but runs, in the other direction.

- The licensor can just send a “pre-lawsuit letter” or cease and desist letter asking for access to the code.<sup>24</sup>

A plaintiff should have a reasonable basis for sending a cease and desist letter, for which the investigation being discussed is a necessary predicate. Conservancy has also sent many, many letters to infringers asking that the software distributor comply with their license obligations. Conservancy’s primary compliance efforts are for GPL licenses, so the request is always asking that the software distributor provide source code. Sadly, the most common responses are stonewalling, delay, and silence. Obtaining a copy of the source code is measured, not in months, but years, and rarely does the infringer ever achieve full compliance.

- The licensor should just file a complaint<sup>25</sup> and get the infringed code in discovery.<sup>26</sup>

This approach is unfeasible given the number of claims reported. The Free Software Foundation, in support of Conservancy request, disclosed that it receives 186 reports each year of copyright

---

<sup>20</sup> 18 U.S.C. § 1839(3) (2018) (defining trade secrets).

<sup>21</sup> Equipment Manufacturers Comment at 9-10.

<sup>22</sup> Joint Creators Comment at 4.

<sup>23</sup> See, e.g., Motion Picture Association, *Who We Are*, <https://www.motionpictures.org/who-we-are/> (last visited Mar. 4, 2021, describing all the anti-piracy work that MPA does).

<sup>24</sup> DVD CCA Comment at 11; Joint Creator Comment at 3.

<sup>25</sup> Joint Creators Comment at 3.

<sup>26</sup> DVD CCA Comment at 7; Joint Creators Comment at 2.

violations of free software programs.<sup>27</sup> It would be an undue burden on the courts to file complaints for every suspected infringement simply to make the tool of discovery available. The process will also take months or years, undoubtedly including rounds on motions to compel.

- Sometimes the TPMs aren't really effective and there would be no liability for bypassing those that are ineffective.<sup>28</sup>

Indeed, some steps taken may not meet the definition of a technological measure, in which case an exemption would not be required. But that is a fact-based question for which the answer may not be known until after a court has opined and, of course, there are many effective measures for which an exemption is still required.

- The licensor should just take their lumps and deal with a claim of violation of Section 1201 in any lawsuit. The licensor might have an unclean hands defense anyway.<sup>29</sup>

The purpose of exemptions is specifically to avoid this eventuality. Congress understood that the DMCA is a powerful tool that required the counterbalance of exemptions to protect the rights of those who have adequate justification for lawful access to content.<sup>30</sup> Further, the comment cited no case law stating that equitable defenses are available to one alleging a violation of Section 1201.

- Someone will take the case on contingency.<sup>31</sup>

The ability to fund a lawsuit should have no role in determining whether behavior is lawful or not.

To summarize, the requested exemption as amended has mooted most of the objections expressed in the comments or, alternatively, the concerns expressed were illusory to start. The objection comments also did not demonstrate that there is any mechanism for obtaining access to the copyrighted works without circumvention that would be effective. Instead, as demonstrated by Conservancy, the exemption sought is in the interest of protecting copyright owners and requests that the Copyright Office approve the exemption as amended.

## **DOCUMENTARY EVIDENCE**

None.

---

<sup>27</sup> Comment Supporting Proposed Exemption by the Free Software Foundation at 2, [https://www.copyright.gov/1201/2021/comments/Class%2016\\_InitialComments\\_Free%20Software%20Foundation.pdf](https://www.copyright.gov/1201/2021/comments/Class%2016_InitialComments_Free%20Software%20Foundation.pdf).

<sup>28</sup> DVD CCA Comment at 8.

<sup>29</sup> DVD CCA Comment at 9-10.

<sup>30</sup> H.R. Rep. No. 105-551, pt. 2, at 35-36 (1998).

<sup>31</sup> DVD CCA Comment at 11.