



# What is Section 1201 Digital Millennium Copyright Act?: A Legislative Primer

Prepared by

Shreyanka Mirchandani Changaroth<sup>1</sup> and Lateef Mtima<sup>2</sup> of the Institute for Intellectual Property & Social Justice (IIP SJ)<sup>3</sup>, under a grant from The Wikimedia Foundation’s Knowledge Equity Fund.

## Table of Contents

Executive summary .....	2
1. <i>Introduction: Technological Protection Measures &amp; The DMCA</i> .....	3
2. <i>About Section 1201</i> .....	3
a) How does Section 1201 work? .....	3
b) Statutory exemptions .....	3
c) Rulemaking & temporary exemptions.....	4
3. <i>Current Conversations About (and Criticisms of) Section 1201</i> .....	4
a) Misuse of TPMs to “inflate” copyright protection .....	5
b) Anticompetitive effects and impact on innovation and competition .....	5
c) Interference with the fair use doctrine .....	6
d) Effects on research, education, archival, and access to knowledge .....	6
e) Rulemaking process is complex and burdensome .....	6
f) Leveraging Section 1201 to achieve outcomes unrelated to copyright.....	7
g) DRM encouraging privacy breaches & security vulnerabilities .....	7
4. <i>Impacts on Marginalized &amp; Underserved Communities.</i> .....	7
a) Educational opportunities .....	7
b) Accessibility issues for persons with disabilities .....	8
c) Modification and repairability of devices and software .....	8
d) The burden of requesting for exemptions .....	9
5. <i>Potential reform</i> .....	9
a) Requiring a nexus between copyright infringement and Section 1201 liability .....	9
b) Reform of the Rulemaking Process .....	9
c) Repeal of Section 1201 .....	10
6. <i>Conclusion</i> .....	10
Appendix .....	11

<sup>1</sup> Wikimedia Race and Knowledge Equity Fellow 2022-23

<sup>2</sup> Professor of Law at the Howard University School of Law, and Founder and Director of the Institute for Intellectual Property and Social Justice

<sup>3</sup> We thank Erik Stallman (Assistant Clinical Professor of Law at University of California, Berkley, and Associate Director of the Samuelson Law, Technology & Public Policy Clinic) for his counsel on certain matters related to § 1201 proceedings.



## Executive summary

### About Section 1201 of the Digital Millennium Copyright Act (“DMCA”)

Most technological devices and software today contain anti-circumvention or technological protection measures (“TPM”) that act as “locks” on digital copyrighted works to prevent unauthorized uses of these works. Section 1201 DMCA prohibits the breaking, bypassing or “circumvention” of TPMs, and also prohibits trafficking in technology that can circumvent TPMs. The purpose of this law is to enhance the legal protection for copyrighted works in digital formats, thereby incentivizing copyright owners to distribute their works digitally without fear of violations of their copyrights by the public. See p 3.

### Section 1201 in Practice

There are two **types of TPMs** or “digital locks” – i) TPMs that prevent *access* to copyrighted works (e.g. encryption); and ii) TPMs that prevent *copying* of the copyrighted work. Some TPMs can prevent both access and copying. **Section 1201 prohibits two types of activities** – i) bypassing a TPM (i.e., breaking the digital lock); and ii) sharing or distributing TPM “lock-breaking” tools or technologies. See p 3. However, there are exceptions (**exemptions**) to these prohibitions - the law allows the breaking of technological locks and trafficking in lock-breaking technologies under certain circumstances, such as specific, enumerated activities of archives, libraries, and law enforcement agencies. In addition, the Copyright Office conducts a **rulemaking** proceeding every three years that allows interested parties to request additional temporary exemptions. The Librarian of Congress considers the requests and releases a Final Rule, which details the exemptions granted. Once granted, the three-year **exemptions are available to anyone meeting the exemption’s qualifications (if any)**, so long as they stick to the terms of the exemption as found in the Librarian’s Final Rule. The rulemaking process can only grant temporary exemptions for the anti-circumvention law. Exemptions for the anti-trafficking provision can only be established as a permanent exemption through an act of Congress. See pp 3-4.

### Purpose of This Legislative Primer

This primer is intended to educate and inform social activists and others about the laws governing TPMs, (including exemptions that permit circumvention of TPMs), and how the rulemaking proceedings work. TPMs can negatively impact the rights of the public, for example, **by preventing legitimate access to or sharing of a copyrighted work**. An understanding of Section 1201 and its impacts can therefore empower activists to serve and protect the access to knowledge needs and interests of their communities, and enable them to advocate against the restrictions imposed by, or misuse of, Section 1201. Additionally, activists will be better equipped to encourage effective use of the Section 1201 exemptions and rulemaking, thereby providing underserved communities greater access to knowledge and information contained in copyrighted works.

### Concerns, Impacts on Underserved Communities, and Potential Reform

Section 1201’s sweeping protection of TPMs has enabled some established device, software, and media companies to misuse TPMs to maintain their market dominance. For example, some copyright owners use TPMs to improperly prevent legitimate uses of works, such as for certain educational and research purposes, or for uses that are protected by the First Amendment. See p 5.

Digital rights and other social activists have called for reform of Section 1201 to address the misuse of TPMs to restrict access to knowledge beyond the limits of traditional copyright protection, such as restraining free speech; interfering with copyright fair use; erecting barriers to research and access to knowledge; and limiting competition and innovation. See pp 5-7. The negative effects of Section 1201 can be especially detrimental to marginalized and underserved communities, which already struggle with traditional systemic and pecuniary barriers to knowledge access and exchange, further exacerbated by the fact that seeking exemptions to Section 1201 through the Copyright Office rulemaking procedure can be prohibitively expensive and burdensome to such under-resourced communities. See pp 7-9



## 1. Introduction: Technological Protection Measures & The DMCA

The growth of the internet and digital media in the 1990s prompted worry amongst copyright owners over piracy and illegal distribution of copyrighted works, due to the easy copying enabled by digital formats. Congress unsuccessfully attempted to pass legislation to address the concerns.<sup>4</sup> In 1996, the World Intellectual Property Organization (WIPO) drafted two treaties that were intended to address copyright issues and challenges posed by new digital technologies.<sup>5</sup> The US ratified the treaties, which were eventually enacted into law as part of the Digital Millennium Copyright Act (DMCA) in 1998. The DMCA sought to protect IP rights in the new digital environment and to promote the growth of electronic commerce. One way it aimed to do this was through Section 1201 DMCA<sup>6</sup> which imposes civil and criminal penalties for bypassing digital locks. With this section, Congress aimed to incentivize copyright owners to provide access to their digital works without the fear of copyright violations.

Today, many copyright owners place digital rights management (DRM) on their works to manage third party access and use of their works. This usually involves the use of digital locks, also referred to as technological protection measures (TPM), on devices and software. DRM is controversial because on the one hand, large corporations claim that DRM is necessary to prevent copyright. On the other hand, corporations have been accused of employing DRM as a means of stifling competition and innovation. Additionally, there is little evidence that DRM is effective in countering infringement. DRM is now widespread due to the passing of the DMCA.

## 2. About Section 1201

### a) How does Section 1201 work?

TPMs typically prevent *access* to copyrighted works (e.g., encryption of works), or they prevent *copying* of copyrighted works in violation of the copyright owner's legal rights; some TPMs prevent both access and copying. Section 1201 prohibits two activities – i) circumvention of a TPM; and ii) trafficking in circumvention technologies. Violation of the section can lead to civil and criminal liability.<sup>7</sup> The aim of prohibiting circumvention of DRM was to assure copyright holders that the law would protect DRM. As DRM protects copyrighted content, rightsholders would then be incentivized to provide greater access to their works in digital formats without fear of copyright violations.

### b) Statutory exemptions

Section 1201 contains statutory exemptions that are permanent (sections 1201(d)-(j)).<sup>8</sup> These exemptions can only be modified or repealed by an act of Congress. Such exemptions exist for specific activities conducted by archives, libraries, researchers, and law enforcement agencies. These

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<sup>4</sup> Dinwoodie, Graeme, *The WIPO Copyright Treaty: A Transition to the Future of International Copyright Lawmaking*, 57 Case W. Rsv. L. Rev. 751 (2007) Available at: <https://scholarlycommons.law.case.edu/caselrev/vol57/iss4/5>

<sup>5</sup> The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (together known as the “WIPO Internet Treaties”), available at [https://www.wipo.int/copyright/en/activities/internet\\_treaties.html](https://www.wipo.int/copyright/en/activities/internet_treaties.html); The US was influential in pushing the issue for international consideration at WIPO, a move which was criticized as forum shopping and policy laundering – Sheinblatt, J. S. (1998). *The WIPO Copyright Treaty*. *Berkeley Technology Law Journal*, 13(1), 535–550. <http://www.jstor.org/stable/24116695>

<sup>6</sup> Digital Millennium Copyright Act, 17 U.S. Code § 1201 (1998) – “Circumvention of Copyright Protection Systems”

<sup>7</sup> §§ 1203-1204

<sup>8</sup> §§ 1201(d)-(j): statutory exemptions for non-profit libraries, archives, and educational institutions, law enforcement, intelligence, and other government activities, reverse engineering, encryption research, minors, the protection of personal information, and security testing.



permanent exemptions to the anti-circumvention law were established because Congress recognized the importance and benefit these activities have on society in general.<sup>9</sup>

### c) Rulemaking & temporary exemptions

An important aspect of Section 1201 is the inclusion of the triennial rulemaking proceeding, a “fail-safe mechanism”<sup>10</sup> for the creation of new temporary exemptions, where it is discovered that the permanent statutory exemptions are inadequate to cover socially beneficial, non-infringing uses of copyrighted works. Through rulemaking, one can submit a request to break digital locks to access or copy digital content on the grounds that legitimate users and uses are being adversely affected by the prohibition against circumventing a TPM.<sup>11</sup> The Librarian of Congress will then determine whether to grant the requested exemption. These exemptions are considered “temporary” in that they require renewal and reconsideration every three years. The rulemaking proceeding only applies to the anti-circumvention provision. One cannot seek an exemption from the anti-trafficking provision – only an act of Congress can grant a permanent exemption to the anti-trafficking provision.

The Copyright Office (CO) conducts public rulemaking every three years. When the rulemaking process is initiated, interested parties may submit petitions for exemptions or renewals of exemptions. This culminates in a hearing a year later, during which time the CO consults with the National Telecommunications and Information Administration (NTIA) before drafting a recommendation to the Librarian of Congress on what exemptions should be granted. The Librarian of Congress considers the recommendations and chooses which exemptions to grant. The entire process takes approximately one year to complete. Announcements about the triennial rulemaking can be found on the [CO Section 1201 webpage](#), the [Federal Register](#), and [NewsNet](#). Information on the 2024 rulemaking may be found [here](#).

#### ***If you are thinking of circumventing a TPM...***

- 1) *Does the TPM protect **only** against unauthorized copying?  
If yes, you will only be liable if the copying that follows the circumvention constitutes copyright infringement; if the copying is Fair Use, then you will not be held liable under Section 1201. In practice, however, the distinction between access and copy controls is not as clear.<sup>12</sup>*
- 2) *Does a permanent (i.e., statutory) exemption apply to your act of circumvention?  
If yes, then you are free to circumvent the TPM.  
If no, consider whether a temporary exemption applies.*
- 3) *Does a temporary exemption apply to your act of circumvention?  
If yes, then you are free to circumvent the TPM.  
If no, consider requesting for a new temporary exemption at the next triennial rulemaking proceeding.*

## **3. Current Conversations About (and Criticisms of) Section 1201**

Section 1201 has been criticized for legitimizing the use of DRM by corporate copyright holders to restrict access to information that would otherwise be widely accessible and available in non-digital sources, or on the Internet before the prevalence of digital locks. This has resulted in a chilling effect on knowledge dissemination, speech, and many other socially beneficial activities.

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<sup>9</sup> See, e.g., Senate Committee Report. 105-190 - THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998, at 13-16, 31-34

<sup>10</sup> Commerce Committee Report, H.R. REP. NO. 105-551, pt. 2, at 35–36 (1998)

<sup>11</sup> See 17 U.S.C. 1201(a)(1)(E)

<sup>12</sup> For instance, the DVD Content Scramble Systems (CSS) primarily functions as a copy control. However, the Motion Picture Association of America casts them as access controls as this triggers § 1201 protection.



### a) Misuse of TPMs to “inflate” copyright protection

Section 1201’s anti-circumvention provisions cover activities outside the scope of copyright law. As such, individuals could find themselves in violation of Section 1201 *without infringing copyright*. Accessing or viewing a copyrighted work might not be against the law, but breaking a digital lock that prevents access is unlawful under Section 1201. For instance, even though it is non-infringing to utilize copyrighted movie excerpts in the course of teaching<sup>13</sup>, educational institutions are required to circumvent TPMs on movies before non-infringing educational screenings of such clips occur.

Some companies use digital locks to hide harmful practices from the public.<sup>14</sup> For instance, Volkswagen used digital locks to prevent access to the programming in Volkswagen cars; researchers at [X] ultimately revealed that this Volkswagen used DRM-protected software to conceal the level of pollution generated from the cars and thus enable Volkswagen to evade emissions laws. In such cases, there is a clear public interest in unfettered access to underlying information or technologies.

### b) Anticompetitive effects and impact on innovation and competition

Healthy innovation and competition motivate market players to improve on their existing products and services and/or provide them at competitive prices.<sup>15</sup> However, digital locks can be used to prevent competitors from improving upon existing offerings in the market and challenging the dominance of incumbent market players.

For instance, TPMs can be used to restrict access to computer maintenance hardware and software programs, which often means that maintenance and repair work can only be done by original equipment manufacturers (OEMs) as opposed to independent service contractors. This has allowed OEMs to prevent competition in the after-market of computer maintenance.

TPMs can also restrict competition in product markets. It was recently revealed that coffee machine maker Keurig configured its coffee machines to brew coffee only from Keurig coffee pods. Competitors accused Keurig of installing DRM to prevent them from offering cheaper coffee pods.<sup>16</sup> Because the technology behind the DRM was not made public, breaking the digital lock to learn how to make coffee pods that can work in Keurig coffee machines risks violation of Section 1201.

These situations demonstrate how digital locks are not used to prevent copyright infringement but, rather, to stifle competition, control after-markets in replacement parts and maintenance of devices, and limit consumer choice in purchasing devices, device parts, and services. Nonetheless, many courts hold that unless an exemption applies, breaking a digital lock implicates Section 1201 liability, even where gaining access to a work does not constitute copyright infringement.

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<sup>13</sup> Certain acts are considered non-infringing under the law due to the statutory exemptions. For example, § 107 of the Copyright Act permits fair use of copyrighted work, and §§ 110(1), or 110(2) provide exemptions for the usage of certain performances and displays.

<sup>14</sup> Kit Walsh, *Researchers Could Have Uncovered Volkswagen’s Emissions Cheat If Not Hindered by the DMCA* (September 2015), available at: <https://www.eff.org/deeplinks/2015/09/researchers-could-have-uncovered-volkswagens-emissions-cheat-if-not-hindered-dmca>

<sup>15</sup> Product interoperability limits market domination and anti-competitive monopolies; by contrast, “adversarial interoperability” promotes monopolization in goods and services markets. See Cory Doctorow, *A Cycle of Renewal, Broken: How Big Tech and Big Media Abuse Copyright Law to Slay Competition* (August 2019), available at: <https://www.eff.org/deeplinks/2019/08/cycle-renewal-broken-how-big-tech-and-big-media-abuse-copyright-law-slay> (broadcast television); Cory Doctorow, *IBM PC Compatible’: How Adversarial Interoperability Saved PCs from Monopolization* (August 2019), available at: <https://www.eff.org/deeplinks/2019/08/ibm-pc-compatible-how-adversarial-interoperability-saved-pcs-monopolization> (personal computers).

<sup>16</sup> Mike Masnick, *Keurig Begins Demonstrating Its Coffee DRM System; As Expected, It Has Nothing To Do With ‘Safety’* (Jul 2014), available at: <https://www.techdirt.com/2014/07/09/keurig-begins-demonstrating-its-coffee-drm-system-as-expected-it-has-nothing-to-do-with-safety/>



### c) Interference with the fair use doctrine

Copyright law makes it unlawful to copy protected work. However, the fair use doctrine allows anyone to copy protected work without permission in certain situations, such as to comment on, criticize, or parody the work.<sup>17</sup> Fair use also balances the interests of the public and copyright holders as an important free speech exception to copyright protection, which allows one to use copyrighted works in ways that benefit society without harming the interests of copyright holders.

Section 1201(c) states that the section is not intended to affect fair use rights. However, in practice, the public is precluded from accessing and building on copyrighted work in ways that are traditionally permitted by the fair use doctrine, and fair use is not widely accepted as a defence to circumvention activity prohibited by the section. Courts have been inconsistent in deciding if Section 1201 permits access for fair use.<sup>18</sup> Digital locks can thus effectively allow copyright holders to quash fair use rights.

The terms of service (which serves as a contract between user and rightsholder) may also undermine fair use. A number of digital content providers prohibit circumvention within their terms of service, such that even if one were to successfully request an exemption, an act of circumvention could still constitute a breach of contract.

### d) Effects on research, education, archival, and access to knowledge

Research, education, and archive institutions have made the case that Section 1201 interferes with their ability to effectively provide services to the public and that the exempted activities are not enough to offset this.<sup>19</sup> Section 1201 has made it more difficult for archives to preserve digital material<sup>20</sup> and for education institutions to deploy tools for copying digital media for use in educational programs. It is also often difficult to detect TPMs, which in turn makes it difficult to know if one is in contravention of Section 1201. As a result, many institutions are reluctant to provide materials to students for online learning since they run the risk of violating Section 1201.<sup>21</sup>

### e) Rulemaking process is complex and burdensome

The opportunity to create exemptions through rulemaking every three years might appear to allow the law to respond to marketplace developments. However, the process is lengthy, complex, and costly, especially for individuals and small or non-profit organizations. Resulting exemptions are temporary and sometimes too narrow. During rulemaking, the burden of proving that an activity ought to be exempt from anti-circumvention laws lies with the requestor, even when the request is to renew an existing temporary exemption.<sup>22</sup> Though there remains room for improvement, to its credit, the

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<sup>17</sup> 17 U.S.C. 107.

<sup>18</sup> Conflicting cases of *Universal City Studios v. Reimerdes*, 111 F. Supp. 2d 294, 322 (S.D.N.Y. 2000); and *Storage Tech. Corp. v. Custom Hardware Eng'g & Consulting, Inc.*, 421 F.3d 1307, 1318-19 (Fed. Cir. 2005)

<sup>19</sup> Kit Walsh, *Section 1201 of the DMCA Cannot Pass Constitutional Scrutiny* (Jul 2016), available at: <https://www.eff.org/deeplinks/2016/07/section-1201-dmca-cannot-pass-constitutional-scrutiny>

<sup>20</sup> Chipman, D. R. (2018). *More Breaking, Less Rulemaking: Why Congress Should Go Beyond the Copyright Office's 1201 Report and Amend the DMCA to Require a Nexus to Infringement*. *Berkeley Technology Law Journal*, 33, 1067–1090, at 1087. <https://www.jstor.org/stable/26667675>

<sup>21</sup> EFF, *Unintended Consequences: Sixteen Years under the DMCA* (Sept 2018) available at: <https://www.eff.org/files/2014/09/16/unintendedconsequences2014.pdf>

<sup>22</sup> Before 2018, one would need to submit a new request to renew an exemption as renewals were not automatic, even if there were no oppositions to the request. The Copyright Office (CO) acknowledged that the process of renewing exemptions ought to be streamlined and this was done for the seventh Triennial Proceeding in 2018. United States Copyright Office, *Streamlined Petitions for Renewed Exemptions*, [https://cdn.loc.gov/copyright/1201/1201\\_streamlined\\_renewal\\_slides.pdf](https://cdn.loc.gov/copyright/1201/1201_streamlined_renewal_slides.pdf) Instead of starting a brand-new exemption request, parties need only provide a short paragraph explaining why the exemption ought to be readopted and declare that without the renewal, there would be adverse consequences to users. Despite these changes, there is a consensus amongst digital rights activists that the rulemaking proceeding still needs to be improved.



Copyright Office has made efforts to streamline the renewals process. As a result, the process has now become a little less cumbersome and a little more accessible.

#### **f) Leveraging Section 1201 to achieve outcomes unrelated to copyright**

In 2006, the Librarian of Congress granted an exemption that allowed cell phone users to unlock their own phones to use on other carrier networks. The exemption was renewed in 2010. However, in 2012, the exemption was removed. Unlocking of any new cellphone suddenly became illegal and anyone violating this law would be slapped with a hefty fine. There was widespread backlash (including by the National Telecommunications and Information Administration) over the removal of the exemption due to the anti-competitive effect of the locks – they served to limit consumer choice of network carriers rather than prevent thefts of underlying operating software.<sup>23</sup> It appeared as though cellphone carriers were attempting to use the 1201 process for purposes unrelated to copyright issues. In response, the White House initiated a petition against the decision, which received over 100,000 signatures from the public. The White House noted that the rulemaking process was not the appropriate forum for this telecommunications issue. Congress went on to enact federal legislation (the Unlocking Consumer Choice and Wireless Competition Act) that would permanently allow cellphone users to unlock their own devices.<sup>24</sup>

#### **g) DRM encouraging privacy breaches & security vulnerabilities**

Related to the aforementioned issue of lack of clarity over the workings of digital locks, is the issue of security vulnerabilities that can result from the lack of transparency around lock technologies. In October 2005, Sony came under public scrutiny and fire for surreptitiously installing Extended Copy Protection (XCP) software onto the computers of anyone who played a Sony copy-protected music CD. The XCP was a form of DRM that would prevent users from making unauthorized copies of the CD. It used something called a “rootkit”, which is typically used for providing viruses backdoor access to a computer and to prevent anti-virus software from detecting its existence. The program could not be easily uninstalled, and rendered computers vulnerable by further creating avenues for malware to infect users’ computers. The Sony XCP case serves as an example of how poorly designed DRM may have the unintended effect of increasing avenues of malware attack. DRM also acts as an obstacle to good faith security and privacy testing. Privacy researchers that investigate and expose privacy flaws in devices are unable to access copyrighted software to effectively carry out such research due to encryption and other administrative access controls, such as developer passwords, which prevent access to software programs.

## **4. Impacts on Marginalized & Underserved Communities.**

Section 1201 puts the typical user of copyrighted content and other consumers at an access to knowledge and market choice disadvantage. However, Section 1201 can impose even greater burdens on communities that already face existing barriers to knowledge and opportunities.

#### **a) Educational opportunities**

Educational experiences and outcomes for minority students differ vastly from white students in the US. This is partially a function of segregation and other disparities in education. Schools serving white

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<sup>23</sup> Derek Khanna, *The Law Against Unlocking Cellphones Is Anti-Consumer, Anti-Business, and Anti-Common Sense* (Feb 2018), available at: <https://www.theatlantic.com/business/archive/2013/02/the-law-against-unlocking-cellphones-is-anti-consumer-anti-business-and-anti-common-sense/272894/>; See also Jonathan Band, *Cell Phone Unlocking: A Legal Primer* (2013), available at: <https://www.arl.org/wp-content/uploads/2013/03/band-cell-phone-unlocking-08mar13.pdf>

<sup>24</sup> Ezra Mechaber, *Here’s How Cell Phone Unlocking Became Legal* (Aug 2014), available at: <https://obamawhitehouse.archives.gov/blog/2014/08/15/heres-how-cell-phone-unlocking-became-legal>



populations in the US often receive larger funding amounts as compared to schools that serve communities of African American, Latino, and Native American communities.<sup>25</sup>

By enabling digital locks to be applied to copyrighted content, the DMCA effectively legitimizes the creation of a right of access by copyright holders.<sup>26</sup> Allowing unnecessary impediments to be placed on knowledge access only makes matters worse for under-funded minoritized communities. Libraries are permitted, by law, to purchase copyrighted material and make available copies of these works to users without seeking permission or paying fees to the copyright holder.<sup>27</sup> But TPMs can impede libraries' ability to fulfill this function. Gaining access to copyrighted content is not always a realistic possibility for historically black colleges due to the expenses involved,<sup>28</sup> and libraries with limited resources (especially in underserved communities) lack the means to break or challenge TPMs.

#### **b) Accessibility issues for persons with disabilities**

In recent years, electronic books (e-books) and readers have skyrocketed in popularity due to the convenience they offer readers. E-books may contain accessibility features, such as read-aloud and text-to-speech functions, which allow visually impaired persons to enjoy books. However, copyright owners may use DRM to disable the read-aloud function on the e-book or prevent screen reader software to access the work, making it difficult for people with disabilities to participate fully in education or research.

Since 2003, the Librarian of Congress has granted exemptions allowing the circumvention of digital locks to enable or install accessibility functions in an e-book.<sup>29</sup> However, during the Covid-19 pandemic, everyone, including visually impaired communities, was forced to conduct much of their lives online. The lack of accessibility features for print material and even mobile and computer apps put an unnecessary burden on the visually impaired, who struggled with accessibility difficulties and were limited in solutions due to the narrow parameters of the Section 1201 exemption.<sup>30</sup> The exemption is meant to protect persons who circumvent digital locks for the purpose of making an e-book accessible to the visually impaired. Requiring affected parties to petition every three years to access print material that is easily available to persons without disabilities is a fundamental injustice.<sup>31</sup>

#### **c) Modification and repairability of devices and software**

With the cell phone unlocking exemption (p 7), Congress acknowledged the harms that can arise when consumers are prohibited from unlocking their cellphones. Among other things, the ability to repair one's own product is an important right that has the potential to bridge the digital divide – "it creates

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<sup>25</sup> Linda Darling-Hammond, *Unequal Opportunity: Race and Education* (Mar 1998), available at:

<https://www.brookings.edu/articles/unequal-opportunity-race-and-education/>

<sup>26</sup> Laura N. Gasaway, The New Access Right and Its Impact on Libraries and Library Users, 10 J. INTELL. PROP. L. 269 (2003). Available at: <https://digitalcommons.law.uga.edu/jipl/vol10/iss2/6>

<sup>27</sup> The "first sale doctrine" 17 U.S.C. § 109(a) **CITE ALSO THE SPECIFIC EXCEPTIONS THAT APPLY TO LIBRARIES**

<sup>28</sup> Authors Alliance/AAUP/LCA Class 7 Initial at App. C (letter from James Clawson), Section 1201 Rulemaking: Eighth Triennial Proceeding: Recommendation of the Register of Copyrights (Oct 2021), available at: [https://cdn.loc.gov/copyright/1201/2021/2021\\_Section\\_1201\\_Registers\\_Recommendation.pdf](https://cdn.loc.gov/copyright/1201/2021/2021_Section_1201_Registers_Recommendation.pdf)

<sup>29</sup> The Librarian has renewed the exemption at every rulemaking proceeding since then, even in 2009, when the Copyright Office recommended that the rule not be renewed. See: [https://www.copyright.gov/1201/docs/1201\\_recommendation.pdf](https://www.copyright.gov/1201/docs/1201_recommendation.pdf) at 37

<sup>30</sup> Damon Beres, *Blind People Won the Right to Break Ebook DRM. In 3 Years, They'll Have to Do It Again* (Oct 2021), available at: <https://www.wired.com/story/ebooks-drm-blind-accessibility-dmca/>

<sup>31</sup> Additionally, as the US is a signatory to the Marrakesh Treaty it is obliged to enact laws that enable accessibility of literary works by visually impaired, blind, or print disabled persons. Supra note 26 (Gasaway). The Treaty aims to "end the global book famine" by requiring signatories to adopt copyright laws that allow works to be made accessible without permission from publishers.





local jobs that are at risk from monopolization; it diverts waste from landfills; it increases the longevity and value of our property, and creates secondary markets that benefit people with low incomes”.<sup>32</sup>

#### d) The burden of requesting for exemptions

Requestors seeking exemptions are often required to go up against extremely well-funded rightsholders and affiliated trade associations who are motivated to keep their profitable business models in place. The entire process, which can take up to a year to complete,<sup>33</sup> is especially challenging for requestors who are under-resourced. Further, requestors are required to repeat the entire process every three years, despite having already made a solid case to preserve their fundamental right to access copyrighted material.

## 5. Potential reform

#### a) Requiring a nexus between copyright infringement and Section 1201 liability

Many have called for Section 1201 to be reformed to require copyright infringement to be present before one can be in violation of the section.<sup>34</sup> The wrongful act would be infringement of copyright rather than merely accessing the copyrighted work. This would prevent the erosion of traditional fair uses. Traditional copyright law has always recognized fair use as a necessary safeguard of free speech, and an important promoter of criticism, education, creativity, and innovation. Requiring copyright infringement to be established would also decrease the number of exemption requests during rulemaking, since most requests relate to non-infringing uses, such as repair and education.<sup>35</sup>

Such reform would ensure that traditional copyright law limits are applied to Section 1201 and allow the law to be flexible in the ever-changing digital age. It would also address issues of anti-competitive practices by large copyright holders, as well as reduce impediments on free speech, knowledge access, and security research. The public would benefit from fewer restrictions on expression, innovation, education, and the ability to modify their products.

#### b) Reform of the Rulemaking Process

The rulemaking proceeding has expanded exponentially in terms of requests, exemptions granted, and public participation.<sup>36</sup> With the law and rulemaking favoring content owners’ interests, the burden often falls on public interest groups to seek exemptions. Some proposed reforms to the rulemaking process include:

- *Presumption in favor of renewal.* Many have called for a regulatory presumption in favor of renewing existing temporary exemptions.<sup>37</sup> There have been requests for renewals of exemptions that have received widespread support and no opposition. Nevertheless, the law

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<sup>32</sup> Karl Bode, *Once Again, Activists Must Beg the Government to Preserve the Right to Repair* (May 2018), available at: <https://www.vice.com/en/article/mbxzyv/dmca-1201-exemptions>

<sup>33</sup> Krista Cox, *Flaws of the 1201 Rulemaking Process* (Jan 2015), available at: <https://www.arl.org/blog/flaws-of-the-1201-rulemaking-process/>

<sup>34</sup> Chipman, Derek Russell. “More Breaking, Less Rulemaking: Why Congress Should Go Beyond the Copyright Office’s 1201 Report and Amend the DMCA to Require a Nexus to Infringement.” *Berkeley Technology Law Journal* 33 (2018): 1067–90. <https://www.jstor.org/stable/26667675>

<sup>35</sup> Krista Cox, *1201 Rulemaking for a New Era?* (Jan 2016), available at: <http://policynotes.arl.org/?p=1262>

<sup>36</sup> US Copyright Office, *Section 1201 of Title 17: A Report of the register of Copyrights* (Jun 2017), available at: <https://www.copyright.gov/policy/1201/>. The first rulemaking received 392 public comments, with two temporary exemptions being recommended. In 2015, the Copyright Office received close to 40,000 comment, and 22 exemptions were recommended.

<sup>37</sup> Supra note 33 (Cox); Erik Stallman, *Needed Reforms to Section 1201 of the DMCA* (Mar 2016), available at: <https://cdt.org/insights/needed-reforms-to-section-1201-of-the-dmca/>



continues to require applications for renewals, which imposes an unnecessary administrative burden on the Copyright Office and requesting parties.

- *Presumption in favor of granting exemptions for certain lawful uses.* A narrower option for reform than requiring a nexus between infringement and Section 1201 liability could be to grant exemptions for uses traditionally considered lawful (e.g. research, education, repair).
- *Exemption for unlocking TPMs in preparation for exemption request.* Information on how digital locks work is rarely readily available. Requestors should be allowed to inspect locked material or even break a digital lock, even if this means circumventing a TPM, so that they can prepare well-informed petitions for exemptions. In some cases, it is conceivable that the DRM itself may warrant a need to circumvent the DRM, as in the case of Sony (Section G, p 7). In such cases, breaking the lock is the only way to get the information that is sufficient and necessary for a petition for exemption. In these circumstances, where there is no other way to access the information, granting exemptions can be extremely helpful.

### c) Repeal of Section 1201

Some digital rights organizations are lobbying for the repeal of Section 1201, on the basis that it is overly restrictive of individual freedoms, including some constitutional rights. Requiring users to petition the Librarian of Congress for permission to engage in certain activities, such as repairing devices that belong to them, is patently unreasonable.<sup>38</sup> The issues stemming from Section 1201 only appear to have snowballed, signifying that it is not working as it should and is unduly limiting the general public from exercising certain fundamental rights.<sup>39</sup>

## 6. Conclusion

Section 1201 poses a significant threat to free speech and access to knowledge – whether it’s buying printer ink from a third-party provider, blocking security research, or preventing persons with disabilities from reading e-books. There is little justification for instituting a law that so severely impacts constitutional rights on the basis that it is intended to prevent copyright infringement – a felony for which there are already well-established laws and substantial penalties in place.<sup>40</sup> The negative consequences of the law are felt the most by underserved communities that already face existing barriers to knowledge and opportunities. Digital locks that operate as access controls are only getting more prevalent, “impact[ing] a wide range of consumer activities that have little to do with the consumption of creative content or the core concerns of copyright”.<sup>41</sup> While the rulemaking process is open to everyone, the complexity of copyright law and the inefficient rulemaking process acts as a barrier to those it affects. Section 1201 should be reformed to focus on copyright infringement as the wrongful act and to inject some flexibility in the rulemaking proceedings so that it can be the fail-safe that Congress intended for it to be.

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<sup>38</sup> Right to repair legislation has been considered in a number of states, but only New York has enacted the Digital Fair Repair Act H.R.4006 - 117th Congress (2021-2022): Fair Repair Act. (2021, June 30).

<https://www.congress.gov/bill/117th-congress/house-bill/4006>

<sup>39</sup> See e.g., pending case of *Green v. U.S. Department of Justice* (Jul 2016), available at:

<https://www.eff.org/cases/green-v-us-department-justice> (lawsuit brought by security researchers to challenge the constitutionality of the DMCA); Shiva Stella, *Public Knowledge Joins Fight To Overturn Obscure Copyright Law Limiting Right to Repair* (Jan 2022) <https://publicknowledge.org/public-knowledge-joins-fight-to-overturn-obscure-copyright-law-limiting-right-to-repair/>.

<sup>40</sup> 18 U.S.C. § 2319(b) <<https://www.law.cornell.edu/uscode/text/18/2319>> and 18 U.S.C. § 3571(b)(3) <<https://www.law.cornell.edu/uscode/text/18/3571>>

<sup>41</sup> Section 1201 Rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights, 2 (Oct. 2015) (2015 Register’s Recommendations), available at <http://copyright.gov/1201/2015/registers-recommendation.pdf>.



## Appendix

### Permanent Exemptions

**Section 1201(a)** – Prohibition against circumvention of TPM

**Section 1201(b)** – Prohibition against trafficking in circumvention technologies

**Section 1201(c)** – Nothing in this law should affect other rights, remedies, limitations or defenses to copyright infringement, including fair use.

**Sections 1201(d)-(j)** – Statutory exemptions

- (d) – certain activities of nonprofit libraries, archives, educational institutions
- (e) – any lawfully authorized investigative, protective, information security, or intelligence activity of the federal or a state government
- (f) – certain reverse engineering activities where used for “identifying and analyzing those elements of [a computer] program that are necessary to achieve interoperability of an independently created computer program with other programs.”
- (g) – certain encryption research
- (h) – permits courts to consider whether a component or part in a technology was needed to prevent access of minors to material on the internet
- (i) – circumventing a TPM for the protection of personally identifying information
- (j) – certain acts of security testing

Section 1201(d), which exempts certain activities of nonprofit libraries, archives, and educational institutions from the circumvention bar in section 1201(a)(1), so that they can “make a good faith determination of whether to acquire a copy of [a] work for the sole purpose of engaging in conduct permitted under this title.”

Section 1201(e), which exempts “any lawfully authorized investigative, protective, information security, or intelligence activity” of the federal or a state government from the anticircumvention and anti-trafficking provisions in section 1201(a)(1), (a)(2), and (b).



**DMCA Timeline – history, milestones, key cases, and rulemaking proceedings**

Year	Case name / Legislation / Event	Decided by / Introduced by	About	Link to further information
1886	Berne Convention for the Protection of Literary and Artistic Works	WIPO	The treaty deals with protection of works and rights of authors. It provides creators “with the means to control how their works are used, by whom, and on what terms. It is based on three basic principles and contains a series of provisions determining the minimum protection to be granted, as well as special provisions available to developing countries that want to make use of them.”	<a href="#">Overview</a>
1976	Copyright Act of 1976		Federal protection extended to all works, unpublished and published. Copyright term for works created after Jan 1 1978 is life of author plus 50 years (later increased to 70 years)	
1980	Computer Software Copyright Act of 1980	Introduced by Robert Kastenmeier (D-WI-2) (96 <sup>th</sup> Congress), on recommendation by Commission on New Technological Uses of Copyrighted Works (CONTU)	Computer programs become copyrightable.  CONTU was created by Congress in 1974. Its aim was to recommend revisions to copyright law. In its final report of 1978, the Commission recommended that computer programs be protectable by copyright law.	<ol style="list-style-type: none"> <li>1. <a href="#">Computer Software Copyright Act</a> (digital text unavailable)</li> <li>2. <a href="#">CONTU Recommendations</a></li> </ol>
1989	US joins Berne Convention			<ol style="list-style-type: none"> <li>1. <a href="#">Overview</a></li> <li>2. <a href="#">Full Treaty</a></li> </ol>



Year	Case name / Legislation / Event	Decided by / Introduced by	About	Link to further information
1994	Conference on Fair Use (CONFU)	Working Group on Intellectual Property Rights	Discussion of fair use in educational and library uses of copyrighted works in digital environments	<a href="#">Final Report</a>
1996	WIPO Internet Treaties	World Intellectual Property Office	WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty (collectively the “WIPO Internet Treaties”) are adopted to deal with protection of works, sound recordings, and performances in sound recording and rights of authors, producers of sound recordings, and performers in the digital environment.	<ol style="list-style-type: none"> <li>1. <a href="#">Overview of the Internet Treaties</a></li> <li>2. <a href="#">WIPO Performances and Phonograms Treaty</a></li> <li>3. <a href="#">WIPO Copyright Treaty</a></li> </ol>
1998	Digital Millennium Copyright Act	Sen. Howard Coble (R-NC)	The DMCA is enacted. The act implements WIPO Internet Treaties and lays out the law on copyright owners’ use of TPMs to protect access and copying of digital content.	<a href="#">DMCA</a>
2000	First Triennial Section 1201 Rulemaking Proceedings	Librarian of Congress	<p>Library associations had called for a broad exemption from TPMs to ensure that fair use would remain possible and that access to copyrighted information would remain accessible to everyone, not just those with the ability to pay.</p> <p>Exempted classes of work:</p> <ol style="list-style-type: none"> <li>1) Compilations consisting of lists of websites blocked by filtering software applications; and</li> <li>2) Literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage, or obsolescence.</li> </ol> <p>Librarian of Congress requested Congress to review the law due to the “potential damage to scholarship” it could cause.</p>	<a href="#">Final Rule</a>



Year	Case name / Legislation / Event	Decided by / Introduced by	About	Link to further information
2001	<i>Universal City Studios, Inc. v. Corley</i> , 273 F.3d 429 (2d Cir. 2001)	Second Circuit	<p>The defendant distributed a decryption program, DeCSS, which was intended to circumvent Copyright Scramble Systems (CSS), an encryption technology used to prevent unauthorized viewing and copying of DVDs. Eight motion picture studios successfully brought an action for injunction under the trafficking provisions of DMCA to stop the defendant from distributing DeCSS. On appeal, the defendant argued that the DMCA was unconstitutional for infringing on his freedom of speech and for obstructing his right to fair use.</p> <p>The court held that DeCSS was indeed a form of protected speech, but that the speech restrictions were justified on the basis that the public would benefit from such restrictions. The court also ruled that the facts of the case meant that DeCSS did not constitute fair use that was allowed under the DMCA.</p> <p>The decision was criticized by free speech advocates and supported by rightsholders.</p>	<a href="#">Case text</a>
	<p><i>United States v. ElcomSoft and Dmitry Sklyarov</i> No. CR.01-20138 RMW</p> <p><i>United States v. Elcom Ltd.</i>, 203 F. Supp. 2d 1111 (N.D. Cal. 2002)</p>	US District Court for the Northern District of California	<p>Russian citizen, Dmitry Sklyarov was arrested for allegedly violating the DMCA during a presentation at DEFCON in the US. The purpose of the presentation was to demonstrate the weakness of the encryption of Adobe's e-book readers, which Sklyarov alleged was violating the rights of authors and publishers. Sklyarov was charged with trafficking in and offering a software program to the public to circumvent TPMs in the e-book. The case raised civil rights concerns before charges were dropped.</p>	<a href="#">Decision</a>



Year	Case name / Legislation / Event	Decided by / Introduced by	About	Link to further information
2002	Consumer Broadband and Digital Television Promotion Act	Sens. Ernest F. Hollings (D-SC) and Patrick Leahy (D- VT)	The bill would have banned any technology that did not have approved TPMs installed.  Bill not passed.	<a href="#">Bill</a>
2003	Second Triennial Section 1201 Rulemaking Proceedings	Librarian of Congress	Exempted classes of works: 1) Compilations consisting of lists of Internet locations blocked by commercially marketed filtering software applications that are intended to prevent access to domains, websites, or portions of websites; 2) Computer programs protected by dongles that prevent access due to malfunction or damage and which are obsolete; 3) Computer programs and video games distributed in formats that have become obsolete and which require the original media or hardware as a condition of access; and 4) Literary works distributed in e-book format when all existing e-book editions of the work contain access controls that prevent the rendering of text into specialized formats.	<a href="#">Final Rule</a>
2004	<i>Chamberlain Group Inc. v. Skylink Techs. Inc.</i>	Federal Circuit Arthur J. Gajarsa, Richard Linn, Sharon Prost	Chamberlain accused Skylink of violating Section 1201 by circumventing the lockout codes contained in Chamberlain's garage door systems to create universal access remotes for the garage doors.  The Court ruled that Section 1201 required circumvention to infringe or contribute to infringement of copyright. It found that Skylink did not infringe Chamberlain's copyright and	<a href="#">Decision</a>



Year	Case name / Legislation / Event	Decided by / Introduced by	About	Link to further information
			therefore did not violate Section 1201. i.e. Skylink's device could only be used for acts that copyright law authorized and was therefore legal.	
	<i>Lexmark v. Static Control Components</i>	Supreme Court (affirming Sixth Circuit holding)	<p>Static Control Components circumvented Lexmark's lock-out mechanism on their printers that would prevent use of third party ink cartridges, and made their own ink cartridges that were compatible with Lexmark printers. Lexmark sued, but the case was overturned because even though the mechanism was copyrightable and therefore protected under DMCA, Lexmark's TPM did not control access to the lock-out mechanism.</p> <p>The case was notable for addressing a number of copyright issues beyond circumvention of TPMs, including unfair competition and damage to business reputation as a result of misrepresentation and unfounded claims of copyright violation by Lexmark.</p>	<a href="#">Case text</a>
2006	Third Triennial Section 1201 Rulemaking Proceedings	Librarian of Congress	<p>Exempted classes of works: Renewal of 2003 rules-</p> <ol style="list-style-type: none"> <li>1) obsolete computer programs and video games</li> <li>2) computer programs protected by dongles</li> <li>3) electronic books</li> </ol> <p>Additionally-</p> <ol style="list-style-type: none"> <li>4) audiovisual works included in the educational library of a college or university's film or media studies department, when circumvention is for compiling portions of those works for educational use in the classroom by professor</li> </ol>	<a href="#">Final Rule</a>





Year	Case name / Legislation / Event	Decided by / Introduced by	About	Link to further information
			<ul style="list-style-type: none"> <li>5) wireless telephone handsets to connect to wireless networks</li> <li>6) sound recordings in CD formats, where circumvention is for good faith testing, investigating, or correcting such security flaws or vulnerabilities.</li> </ul>	
2007	Freedom and Innovation Revitalizing US Entrepreneurship Act of 2007 ("FAIR USE Act")	Rick Boucher (D-VA)	<p>The Bill proposed amendments to the DMCA to ensure that fair use rights would be protected. Under the act, companies would not have been liable for copyright infringement that resulted from the use of hardware or software. The bill also proposed six further permanent exemptions. This was Boucher's third attempt at reforming DMCA for fair use provisions.</p> <p>The Bill was not reintroduced.</p>	<a href="#">Bill</a>
2010	Fourth Triennial Section 1201 Rulemaking Proceedings	Librarian of Congress	<p>Exempted classes of works:</p> <ul style="list-style-type: none"> <li>1) Motion pictures on DVDs with the aim of incorporating small portions for educational uses in schools, documentary films, and non-commercial videos;</li> <li>2) Computer programs to allow interoperability between wireless telephones and software applications;</li> <li>3) Computer programs that are firmware or software, for the purposes of connecting wireless telephones to the telecommunications network;</li> <li>4) Video games on personal computers for the purpose of testing or correcting security flaws or vulnerabilities'</li> </ul>	<a href="#">Final Rule</a>



Year	Case name / Legislation / Event	Decided by / Introduced by	About	Link to further information
			5) Computer programs that make use dongles to prevent access due to malfunction or damage and which are obsolete; and 6) Literary works in e-book format when all existing e-book editions contain access controls preventing the rendering of text into a specialized format.	
	<i>MDY Industries, LLC v. Blizzard Entertainment, Inc and Vivendi Games, Inc.</i> , <a href="#">629 F.3d 928</a> (9th Cir. 2010)	Ninth Circuit	MDY created bots that would control World of Warcraft (WoW) characters on behalf of users, so that users would not need to physically attend games. Blizzard, the creator of WoW sued MDY for, amongst other things, a violation of the DMCA. In part of the ruling, the Court declined to follow <i>Chamberlain v Skylink</i> , and stated that a finding of circumvention under Section 1201 did not also require a finding of copyright infringement (i.e. no requirement of nexus between circumvention and copyright infringement required).	<a href="#">Case text</a>
2012	Fifth Triennial Section 1201 Rulemaking Proceedings	Librarian of Congress	Exempted classes of works: 1) Literary works distributed electronically that prevent the enabling of read-aloud functionality or interfere with screen readers or other applications or assistive technologies for persons who are blind or have other disabilities, subject to remuneration or used by an entity authorized by the Act; 2) Computer programs to allow interoperability between wireless telephones and software applications; 3) Computer programs that are firmware or software, for the purposes of connecting wireless telephones to the	<a href="#">Final Rule</a>



Year	Case name / Legislation / Event	Decided by / Introduced by	About	Link to further information
			<p>telecommunications network, within 90 days from date of exemption;</p> <ol style="list-style-type: none"><li>4) Motion pictures on DVDs for use of short portions for the purpose of commentary for educational uses in schools, documentary films, non-commercial videos, nonfiction multimedia e-books offering film analysis;</li><li>5) Motion pictures via online distribution services for use of short portions for the same purposes as listed above (in #4);</li><li>6) Motion pictures on DVDs where circumvention is used for screen capture technology for the purposes of criticism or comment in schools, documentary films, non-commercial videos, nonfiction multimedia e-books offering film analysis;</li><li>7) Motion pictures via online distribution services where circumvention is used for screen capture technology for the purposes listed above (in #6);</li><li>8) Motion pictures and other audiovisual works on DVDs or distributed by an online service and protected by technological measures that control access to such works to access the playhead and/or related time code information embedded in copies of such works for the purpose of conducting research and development for the purpose of creating players capable of rendering visual representations for persons who are blind, visually impaired, deaf, or hard of hearing.</li></ol>	



Year	Case name / Legislation / Event	Decided by / Introduced by	About	Link to further information
			During this rulemaking, the Librarian denied granting previous exemption which allowed cellphone users to unlock their phones to access other mobile networks.	
2013	Unlocking Technology Act of 2013	Zoe Lofgren (D-CA)	<p>The act would have allowed cellphone unlocking (i.e. circumvention of TPM) so long as there is not intention to infringe copyright.</p> <p>The bill was introduced in 2013, and re-introduced in 2015. It was endorsed by organizations such as Public Knowledge and the Library Copyright Alliance.</p>	
2015	Sixth Triennial Section 1201 Rulemaking Proceedings	Librarian of Congress	<p>Renewed exemptions:</p> <ol style="list-style-type: none"> <li>1) Literary works distributed electronically that prevent the enabling of read-aloud functionality or interfere with screen readers or other applications or assistive technologies for persons who are blind or have other disabilities, subject to remuneration or used by an entity authorized by the Act;</li> <li>2) Motion pictures on DVDs where circumvention is used for screen capture technology for the purposes of criticism or comment in schools, documentary films, non-commercial videos, nonfiction multimedia e-books offering film analysis</li> <li>3) Computer programs to allow interoperability between wireless telephones and software applications</li> <li>4) Computer programs that are firmware or software, for the purposes of connecting wireless telephones to the</li> </ol>	<a href="#">Final Rule</a>



Year	Case name / Legislation / Event	Decided by / Introduced by	About	Link to further information
			<p>telecommunications network, within 90 days from date of exemption;</p> <p>New exempted classes of works:</p> <ul style="list-style-type: none"> <li>5) Computer programs to enable smart televisions to execute lawfully obtained software applications</li> <li>6) Computer programs that control the functioning of motorized land vehicles</li> <li>7) Computer programs on lawfully acquired device or machine</li> <li>8) Lawfully acquired video games requiring server communication</li> <li>9) Computer programs that limit the type of feedstock used in 3D printers</li> <li>10) Literary works consisting of compilations of data generated implanted medical devices.</li> </ul>	
	Unlocking Consumer Choice and Wireless Competition Act 2015	Sen. Patrick Leahy (D-VT)	<p>The bill reversed the Librarian’s decision not to exempt cellphone unlocking from the anti-circumvention laws of the DMCA. With this law, it is no longer illegal for one to unlock their own legally obtained cellphone for the purpose of switching network carriers.</p> <p>Bill was passed into law.</p>	<a href="#">The act</a>
	Breaking Down Barriers to Innovation Act of 2015	Sens. Ron Wyden (D-OR)	<p>The aim of the bill would be to make it easier for petitioners to get exemptions to the anti-circumvention law, and further expanded the exemptions for encryption research, security testing, strengthening privacy, and reverse engineering.</p>	<a href="#">Bill</a>



Year	Case name / Legislation / Event	Decided by / Introduced by	About	Link to further information
			Introduced, not passed.	
2016	<i>Green v. U.S. Dep't of Justice</i> , 392 F. Supp. 3d 68 (D.D.C. 2019)		<p>Two computer scientists enlist EFF to sue the US government alleging Section 1201 violates First Amendment. In particular, they challenge the enforcement of Section 1201 of the DMCA as they feared that they would be prosecuted under the anti-circumvention and anti-trafficking provisions. The pre-enforcement challenge alleges that the provisions violate the First Amendment facially and as applied to their proposed activities. They also claim that the Librarian of Congress's failure to include certain exemptions from the reach of the anti-circumvention provision in the 2015 Final Rule due to the rulemaking procedure under the DMCA violated the First Amendment and the Administrative Procedure Act.</p> <p>Case is pending.</p>	<a href="#">Case text</a>
2017	Report on Section 1201 of Title 17	Register of Copyrights		<a href="#">Report</a>
2018	Seventh Triennial Section 1201 Rulemaking Proceedings	Librarian of Congress	<ol style="list-style-type: none"> <li>1. Short portions of motion pictures (including television shows and videos) for purposes of criticism or comment;</li> <li>2. Motion pictures (including television shows and videos), for the purpose of adding captions and/or audio descriptions by disability services offices or similar units at educational institutions for students with disabilities;</li> <li>3. Literary works, distributed electronically, protected by TPM interfering with screen readers or other assistive technologies;</li> </ol>	<a href="#">Final Rule</a>



Year	Case name / Legislation / Event	Decided by / Introduced by	About	Link to further information
			<ol style="list-style-type: none"><li>4. Literary works consisting of compilations of data generated by patient’s implanted medical devices and personal monitoring systems;</li><li>5. Computer programs that that operate cellphones, tablets, mobile hotspots, and wearable devices to allow connection to a wireless network (“unlocking”);</li><li>6. Computer programs that operate smartphones and all-purpose mobile computing devices, to enable interoperability or removal of software applications (“jailbreaking”);</li><li>7. Computer programs that operate smart TVs for the purpose of enabling interoperability with computer programs on the smart television;</li><li>8. Computer programs that enable voice assistant devices to enable interoperability or removal of software applications;</li><li>9. Computer programs contained and controlling function of motorized land vehicles to allow diagnosis, repair, or modification of a vehicle function;</li><li>10. Computer programs that control smartphones, home appliances, or home systems to allow diagnosis, maintenance, or repair of the device or system;</li><li>11. Computer programs, for purposes of good-faith security research;</li><li>12. Video games in the form of computer programs, where outside server support has been discontinued, to allow individual play and preservation by an eligible library, archive, or museum;</li></ol>	



Year	Case name / Legislation / Event	Decided by / Introduced by	About	Link to further information
			<p>13. Computer programs, except videos games, no longer reasonably available in commercial marketplace, for preservation by eligible libraries, archives, and museums; and</p> <p>14. Computer programs operating 3D printers, to allow use of alternative feedstock.</p>	
2019	Introduction of new initiative in Senate Judiciary Subcommittee on Intellectual Property	Thom Tillis (R-NC)	<p>Announcement by Sen. Tillis about beginning a series of hearings to explore the extent to which the DMCA has addressed the original intent of the DMCA. The outcome of the hearings would include updates to the DMCA.</p> <p>As a result of the hearings, Sen. Tillis released the draft Digital Copyright Act of 2021 (see below) that contained amendments to DMCA.</p>	1. <a href="#">Press release</a>
2020	Section 512 Study	Copyright Office	<p>Public study on the impact and effectiveness of DMCA’s safe harbor provision found in Section 512.</p> <p>Section 512 grants platforms safe harbor immunity against copyright infringements conducted on their platforms by third party users. The report concluded that the operation of the section is “unbalanced” and is not in sync with Congress’s original intent. The CO did not recommend sweeping changes to the section, and instead identified areas in the law for Congress to “fine-tune” in order to “better balance the rights and responsibilities of online service providers and rightsholders in the creative industries”.</p>	<a href="#">Report</a> on Section 512 Study





Year	Case name / Legislation / Event	Decided by / Introduced by	About	Link to further information
	Senate Subcommittee Hearings: <i>How Does the DMCA Contemplate Limitations and Exceptions Like Fair Use?</i>	Presided over by Sen, Thom Tillis (R-NC)	<p>Between February and December of 2020, the Senate Subcommittee on Intellectual Property held six hearings regarding the viability of the DMCA. The hearings involved discussions by industry and academic experts on, amongst other things, issues relating to section 1201 and the fair use doctrine in the context of the Act.</p> <p>Feb 11: <i>The DMCA at 22: What is it, why was it enacted, and where are we now</i></p> <p>Mar 10: <i>Copyright Law in Foreign Jurisdictions: How Are Other Countries Handling Digital Piracy?</i></p> <p>Jun 2020: <i>Is the DMCA's Notice-and-Takedown System Working in the 21<sup>st</sup> Century</i></p> <p>Jul 2020: <i>How does the DMCA Contemplate Limitations and Exceptions Like Fair Use?</i></p> <p>Sept 2020: <i>Are Reforms to Section 1201 Needed and Wanted?</i></p> <p>Dec 2020: <i>The Role of Private Agreements and Existing Technology in Curbing Online Piracy</i></p>	See overview of hearings <a href="#">here</a> (under 'Hearings, Videos and Testimonies')
2021	Eighth Triennial Section 1201 Rulemaking Proceedings	Librarian of Congress	<p>All exemptions from Seventh Triennial Rulemaking were renewed.</p> <p>Additionally, the following exemptions were granted:</p> <ol style="list-style-type: none"> <li>1) Preservation of audiovisual works stored on damaged or deteriorating media by libraries, archives, and museums;</li> </ol>	<a href="#">Final Rule</a>



Year	Case name / Legislation / Event	Decided by / Introduced by	About	Link to further information
			<p>2) Text and data mining techniques used on motion pictures and literary works for the purpose of scholarly research and teaching;</p> <p>3) Restricting access to firmware and related data files on medical devices and systems for the purposes of diagnosis, maintenance and repair;</p> <p>4) Allowing software for 3D printers to use non-manufacturer approved feedstock.</p>	
	Digital Copyright Act of 2021	Thom Tillis (R-NC)	<p>The bill aims to modernize copyright law through amendments of key DMCA provisions. Amongst other things, the bill seeks to address online copyright infringement and issues relating to TPMs. In particular, it would increase permanent exemptions available to users for circumventing TPMs, and streamline the rulemaking process for temporary exemptions.</p> <p>The draft has been supported by the entertainment industry, but has been opposed by free speech activists. Sen. Tillis intends to introduce the bill in Congress.</p>	<p>1. <a href="#">Discussion Draft</a></p> <p>2. <a href="#">Press release</a></p> <p>3. <a href="#">Summary of draft bill</a></p> <p>Support by members of <a href="#">Copyright Alliance</a></p> <p>Opposition by <a href="#">Authors Alliance</a> &amp; <a href="#">online creators (through EFF)</a></p>
2022	Strengthening Measures to Advance Rights Technologies (SMART) Copyright Act of 2022	Senators Thom Tillis (R-NC) and Patrick Leahy (D-VT)	<p>Bill would amend Section 512 by seeking to ensure that big tech is held accountable for facilitation of copyright infringement on their platforms.</p> <p>The bill was <a href="#">supported</a> by a number of industry organizations, but <a href="#">criticized</a> by some free speech activists.</p>	<p>1. <a href="#">Bill</a></p> <p>2. <a href="#">Press release</a></p> <p>3. <a href="#">Bill summary</a></p>
	Request for USPTO and USCO	Senators Thom Tillis (R-NC) and	Sens. Leahy and Tillis sent a letter to the US Patent and Trademark Office and the US Copyright Office requesting that	1. <a href="#">Letter</a>



Year	Case name / Legislation / Event	Decided by / Introduced by	About	Link to further information
	to undertake study of IP issues in NFTs	Patrick Leahy (D- VT)	both institutions undertake a study of IP issues relating to NFTs, including how the DMCA applies and if the DMCA adequately addresses infringement concerns in NFT marketplaces.	