

Testimony of

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Before the
Subcommittee on Courts, Intellectual Property, and the Internet
Committee on the Judiciary
United States House of Representatives

Hearing on “Chapter 12 of Title 17”

September 17, 2014

Chairman Coble and Ranking Member Nadler, Chairman Goodlatte and Ranking Member Conyers, and honorable Members of the Subcommittee, my name is Christian Genetski, and I am Senior Vice-President and General Counsel of the Entertainment Software Association (“ESA”). ESA represents the interests of most of the country’s leading video game publishers and console manufacturers. These skilled artists, authors, and developers produce a wide array of highly expressive, interactive copyrighted works, which include audiovisual materials, musical compositions, literary works, artistic works and software. Last year alone, the video game industry contributed more than \$21 billion to the U.S. economy and entertained hundreds of millions of U.S. consumers throughout the country. These gamers are a diverse group; the average gamer is 31 years old, and 48 percent of all gamers are women.

As this Committee examines how Section 1201 of the Digital Millennium Copyright Act (“DMCA”) is operating in today’s digital era, I appreciate the opportunity to share with you today how ESA’s members use technological protection measures (“TPMs”) and the protections afforded under Section 1201 not only to protect their copyrighted works but also to foster the distribution of their game content in new and exciting ways across a variety of different platforms and at a wide range of price points.

Under the leadership of Chairman Coble, Ranking Member Conyers and others, this Committee crafted Section 1201 to meet the primary challenge presented by the widespread consumer adoption of high-speed Internet broadband—namely the unauthorized “rapid dissemination of perfect copies... [by] pirates who aim to destroy the value of American intellectual property.”¹ Although piracy remains a significant concern for the industry, TPMs

¹ H.R. REP. NO. 105-551, pt. 1, at 9 (1998).

have proved critical to frustrating attempts to steal game content. Indeed, TPMs have enabled game publishers to diminish piracy by preventing both the unauthorized copying of copyrighted games as well as the playback of pirated games on game consoles. Perhaps even more importantly, TPMs have been a key tool for game publishers as they endeavor to “compete with free” by ensuring that lawfully obtained games offer a compelling user experience that cannot be replicated with unauthorized copies.

We believe that the structure of the DMCA—which carefully balances prohibitions with exceptions and includes the “safety valve” of the triennial review process—is fundamentally sound. And, as we will discuss today, the results of the last 15 plus years both prove the prescience of this Committee in recognizing how TPMs spur innovation and also demonstrate that Section 1201 is working as intended.

Of course, as with any law, overzealous litigants may push its boundaries or misperceptions may inadvertently suppress some legitimate conduct. The DMCA has not been immune to these phenomena. Such outliers invariably draw attention away from the myriad examples of the law working well to serve its intended purpose. Accordingly, any discussion about how perceived misuses might be addressed must also take into account the much larger public benefit Section 1201 has had in encouraging the launch of new business models to distribute copyrighted content and the vast expansion of the range of content offerings and consumer access to copyrighted works.

Technological protection measures have allowed the video game industry to move beyond packaged goods and embrace new digital technologies and distribution models. As a result, purchases of digital content—including full games, add-on content, mobile apps, subscriptions, and social networking games—accounted for 53 percent of game sales in 2013.

Forty-four percent of gamers play games on their smartphones, and 33 percent play games on other wireless devices, such as tablets.

Consistent with this trend, my testimony today will focus on three points. *First*, I will review the twin goals of Section 1201 and how promoting the use of TPMs furthers these goals. *Second*, I will summarize how TPMs have played a critical role in achieving both of these objectives in the video game industry, as evidenced by the dynamic growth of online game distribution models. *Third*, I will discuss how any consideration of reforming the DMCA to address perceived abuses or unintended consequences should be mindful not to undermine the wave of innovation benefitting both consumers and content creators that TPMs have enabled.

I. THE DMCA HAS TWIN OBJECTIVES OF PREVENTING PIRACY AND PROMOTING BROADER DISSEMINATION OF COPYRIGHTED WORKS.

The DMCA was enacted in order to bring U.S. copyright laws in line with our obligations under certain international treaties.² It was intensely negotiated, and the law is aimed at addressing copyright enforcement in a digital age by both promoting the creation and protection of highly expressive and valuable digital works while also providing strong incentives for copyright owners to make these digital works available to the public.

This Committee explained that Section 1201 of the DMCA sought to encourage copyright owners' use of technological protection measures in service of two distinct, but related, goals: (1) to "prevent piracy and other economically harmful unauthorized uses of copyrighted materials" and (2) to "support new ways of disseminating copyrighted materials to users[,] . . . safeguard the availability of legitimate uses of those materials by individuals [and] . .

² World Intellectual Property Organization, Copyright Treaty, Dec. 20, 1996; World Intellectual Property Organization, Performances and Phonograms Treaty, (Dec. 20, 1996).

. make more works widely available, and the process of obtaining permissions easier.”³ As a result, the DMCA not only encourages the creation of new digital works by providing authors another means of protecting against copyright infringement, but it also promotes the development of new and innovative business models that encourage the distribution of copyrighted works to the public.

To promote these twin goals, the DMCA prohibits trafficking in tools and technologies primarily designed, used or marketed for either of two distinct purposes, each of which threaten the value of the underlying copyrighted works that TPMs seek to protect. These purposes correspond to the two goals the DMCA is intended to promote. First, the prohibition against trafficking in tools and technologies that circumvent TPMs that *protect a copyright owner’s exclusive rights* under the Copyright Act⁴ reinforces those traditional rights by granting authors an additional cause of action against those who traffic in tools or technologies that facilitate infringement. Stated simply, one of the distinct purposes of the DMCA is to deter circumvention that facilitates piracy.

By contrast, the prohibition against trafficking in tools or technologies designed to circumvent TPMs that control *access* to a protected work⁵ has the distinct, and equally important, purpose of making circumvention unlawful in certain instances, without requiring a

³ COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, 105TH CONG., SECTION-BY-SECTION ANALYSIS OF H.R. 2281 AS PASSED BY THE UNITED STATES HOUSE OF REPRESENTATIVES ON AUGUST 3, 1998, at 6 (Comm. Print 1998) [hereinafter “House Manager’s Report”]; *see also* H.R. REP. NO. 105-551, pt. 1, at 10 (“When copyrighted material is adequately protected in the digital environment, a plethora of works will be distributed and performed over the Internet.”).

⁴ 17 U.S.C. §1201(b)(1).

⁵ Section 1201(a)(1), the companion provision to 1201(a)(2), prohibits the *act* of circumventing a TPM that controls access to a copyrighted work. There is no companion “act” provision to 1201(b)(1) because the act of infringing is already unlawful. *See* S. REP. NO. 105-90, at 11.

link to infringement, because Congress recognized and the Courts have affirmed that in the online environment, allowing unauthorized access would undermine the value of copyrighted works and the incentive for the copyright owner to make them more widely available.⁶ For example, circumvention of TPMs restricting access to content on an online streaming service would violate the *access* prohibition, irrespective of whether that circumvention enabled the unauthorized copying of that content, or merely the viewing of it.

Together, these prohibitions on circumvention seek to incentivize copyright owners' use of TPMs both to prevent infringement and to expand the universe of legitimate access to their works.

II. THE DMCA'S ANTI-CIRCUMVENTION PROVISIONS HAVE SERVED THE STATUTE'S INTENDED PURPOSES WELL.

The evolution of the video game industry over the last 15 plus years reflects a DMCA success story for game platforms, game publishers and, most importantly, the hundreds of millions of U.S. consumers who are entertained by video games each year. Since the DMCA was enacted in 1998, ESA's members have continually deployed TPMs in pursuit of both of the DMCA's mutually-reinforcing objectives. Although piracy of video game content and attacks on the integrity of online games remain a significant concern for the industry, there is no question that TPMs have played a pivotal role in reducing piracy, particularly on home console platforms. The more dramatic impact, however, has undoubtedly been the industry's evolution from offering only packaged goods to embracing digital technologies to meet consumer demand

⁶ See S. REP. NO. 105-90, at 8. See also *MDY Industries, LLC v Blizzard Entertainment, Inc.*, 629 F.3d 928, 944 (9th Cir. 2011).

for experiencing video game content across multiple platforms, with increased flexibility, and at a greater range of price points.

Much of the debate about TPMs has focused on their role in preventing piracy. Indeed, in our industry's experience the use of TPMs, coupled with the recognition that circumvention is unlawful, has impacted piracy rates. One need only look at the contrast in piracy rates between personal computer ("PC") games, which are played on a platform that does not employ its own TPMs, and the versions played on game consoles that rely on TPMs to prevent the play of infringing copies. In connection with an unsuccessful attempt to seek an exemption for hacking video game consoles during the most recent 1201 triennial rulemaking, one console game manufacturer described in its comments how the PC game market has been decimated because widespread piracy had diminished publishers' incentives to continue developing games for the PC platform.⁷ Indeed, today the PC game market consists primarily of online multi-player games, which rely on server-based TPMs, or alternate PC versions of games whose production is driven by the console versions of the game. Game piracy rates further underscore the point. Of the top 30 most frequently downloaded infringing games on a popular torrent, 29 are PC games, and over 80 percent of infringing games detected on peer-to-peer networks are PC versions.

But TPMs are about much more than preventing piracy. Indeed, our industry understands that in the long run one of the most effective ways to reduce piracy is to offer consumers a more compelling experience that pirated versions cannot match. Critics reflexively presume that TPMs hinder, rather than advance, that cause, and that any restriction on access to copyrighted

⁷ Comments of Sony Computer Entertainment America LLC in Opposition To Proposed Class #3, *In the Matter of Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, Docket No. RM 2011-07, at 47 (Feb. 10, 2012), available at http://copyright.gov/1201/2012/comments/Jeffrey_P._Cunard.pdf.

works necessarily reduces consumer choice. We disagree. In fact, the underappreciated role of TPMs is how they help game publishers offer more compelling experiences that consumers desire through a proliferation of innovative content and services.

The record in our industry demonstrates that the ability to use TPMs has in fact greatly *expanded* consumer choice by exponentially growing the universe of “authorized uses.” By way of example, TPMs have:

- spurred an explosion of free-to-play game offerings for web browsers, mobile phones, and tablet computers where consumers can play free versions of the game and choose whether to pay to enhance the game experience or unlock additional content or features;
- transformed the major video game consoles into robust online gaming networks that bring together millions of players worldwide each day, and made it possible for console makers to explore creative new services like (i) Sony Computer Entertainment America’s “PlayStation Now” service, which allows gamers to instantly stream a wide variety of games, play them across a variety of devices, and store their game progress in the cloud; (ii) Nintendo’s Virtual Console, which allows gamers to download legacy titles released for prior generations of Nintendo game consoles and handhelds; and (iii) Microsoft’s partnership with Electronic Arts on “EA Access,” a service that allows consumers to access some of EA’s most popular games online through Microsoft’s Xbox One platform for just \$4.99 a month;
- encouraged the development of Massively Multiplayer Online Role Playing Games (“MMORPGs”) that bring together millions of players into a persistent online universe for which content is updated with periodic expansion packs, such as Activision Blizzard’s *World of Warcraft*, which is now in its tenth year and is the most popular MMORPG in history;
- enabled the growth of online stores and digital gaming services like EA’s Origin and Valve’s Steam, which allow users to acquire digital versions of games at lower prices, manage their entire digital library of games, receive free games and game enhancements, and access games across multiple platforms and devices.

All of these examples illustrate the game industry’s consumer-focused approach, and each relies heavily on TPMs. Pursuing these initiatives is sound business practice, irrespective of the scope of copyright. But the DMCA plays an important role nevertheless, because having the rule of law backstopping these technologies sets the expectation for normative behavior. No

technology is impervious to attack. The DMCA has succeeded, however, in establishing both a baseline respect for the integrity of TPMs that protect copyright works and a deterrent to attempts to thwart them.

Although a few perceived “failures” of the DMCA tend to garner attention, we believe it is critical to step back and examine the big picture. The decade and a half since the enactment of the DMCA has been, by any measure, one of unrivaled innovation that bring us to a point where consumers have access to higher quality and more varied content, as well as a greater voice and wider range of choices in how to experience that content, than at any other time in history.

III. ANY CONSIDERATION OF SECTION 1201 REFORM TO ADDRESS OUTLIER CASES SHOULD TAKE CARE NOT TO UNDERMINE THE ACT’S GOALS OF PREVENTING PIRACY AND PROMOTING INNOVATIVE DISTRIBUTION OF CONTENT.

We appreciate concerns that the DMCA’s anti-hacking provisions have been occasionally used for purposes that are inconsistent with the intended objectives of the statute. For example, aggressive litigants who seek to thwart competition by pursuing a Section 1201 claim based on the presence of an insignificant amount of copyrighted code in a product whose “digital lock” actually seeks to preclude a competitive activity as opposed to protect the value of a copyrighted work, do a disservice to the DMCA and to the core copyright interests it seeks to protect. We are wary, however, of reform proposals that provide too much “solution” in a manner which risks undermining all of the accumulated benefits that robust TPMs enable.

For example, some have proposed weakening the DMCA by allowing TPMs to be hacked unless it can be proved that the hacker’s primary purpose or intent is to engage in or facilitate copyright infringement. Although well-intended, these proposals would be ineffective in preventing the majority of unsubstantiated cases, while at the same time might preclude legitimate claims that are currently available and square with the DMCA’s purpose of protecting

copyrighted works. First, they will do little to accomplish their stated purpose about overreaching in areas where core copyright interests are not at stake. Those who perceive a business advantage from suing a competitor will no doubt continue to pursue those claims in some form regardless of whether there is clear evidence of intent. Second, the limitation is under-inclusive and would have the unintended consequence of frustrating legitimate claims. This result would greatly undermine the substantial benefits for content creators and consumers that the DMCA has promoted in industries, like ours, in which copyright is its lifeblood.

Indeed, both the content protection and expanded dissemination goals of the DMCA would be adversely impacted by limiting violations strictly to acts of infringement. First, even though these proposals attempt to encourage only “non-infringing uses,” their real-world, practical effect instead would be to embolden and encourage those who seek to pirate game content online. Indeed, the Copyright Office recognized this fact during the last triennial rulemaking in rejecting a proposed exemption to allow circumventing game console TPMs for “non-infringing uses only.” The record in that proceeding made clear that:

- The steps required to hack a video game for non-infringing uses are the *very same* steps that an individual must take to install and play pirated content.
- Once a video game console is hacked, regardless of the purported purpose or intent of the hacker, *any* content, including pirated games and movies, can be played on that platform, and the hacker also can use the console to make infringing copies of copyrighted games, movies, and television programs and to distribute these unlawful copies online to a large audience.
- The hacking methods and tools that would be permitted to allow circumvention for non-infringing uses are in fact used *overwhelmingly* in the video game context for copyright infringement.

- Infringers routinely attempt to mask their true motives and intentions. These hackers know to market or disclaim their tools and activities as “non-infringing” or “fair use,” even when the hacking or trafficking is for piracy.⁸

Moreover, while addressing copyright infringement is *one* important objective of Section 1201, it is not its *only* objective. This Committee also understood that a prohibition on the hacking of technological protection measures controlling *access* to protected works (even if the hacking does not result in any copyright infringement) was necessary in order to encourage innovation in the online distribution of copyrighted works. Nearly all of the platform and distribution advances in the video game industry discussed previously in my testimony rely on TPMs that protect *access* to copyrighted game content, most typically content stored in the cloud. This is the very type of content, and the precise type of innovative distribution of content, that Congress sought to protect in the DMCA. An all-purpose carve-out for “non-infringing” access would effectively remove such protection from the DMCA’s purview.⁹

Given the successes the core precepts of the DMCA have fostered, we believe the best area of focus is the number of checks on DMCA abuse that currently exist and are designed to protect against misuse of the law. First, the courts can address frivolous or anticompetitive DMCA claims just as they can similar claims brought pursuant to other laws. Second, the

⁸ See 77 Fed. Reg. 65260, 65274 (Oct. 26, 2012) (“[O]n the significant question of market harm, the Register concluded that opponents had provided compelling evidence that circumvention of access controls to permit interoperability of video game consoles—regardless of purpose—had the effect of diminishing the value of, and impairing the market for, the affected code, because the compromised code could no longer serve as a secure platform for the development and distribution of legitimate content. The Register noted that instead of countering this evidence with a factual showing to prove opponents wrong, EFF merely asserted that its proposal would not permit infringing uses. The Register did not believe that this response satisfied proponents’ obligation to address the “real-world impact” of their proposed exemption.”).

⁹ *MDY Industries, LLC v Blizzard Entertainment, Inc.*, 629 F.3d 928, 944 (9th Cir. 2011) (holding that Section 1201(a)(2), but not 1201(b)(1), is violated by hacking the technological protection measures protecting against unauthorized access to online game servers).

market is a powerful force in preventing use of TPMs in a manner that consumers dislike. Video gamers in particular are passionate consumers who are closely attuned to how ESA's members use TPMs in their digital products and service offerings. Gamers expect that TPMs will be seamlessly integrated and consistent with their expectations for use of the content. They speak loudly when a TPM is inconsistent with their expectations, and our industry is responsive to these market demands.

And, of course, the DMCA's current structure is designed to accommodate specific instances where the law may be restraining a legitimate fair use, or at least creating the perception of doing so. Section 1201 already contains a number of statutory exemptions that are designed to permit circumvention of technological protection measures in specific circumstances where Congress has determined that enabling access is necessary to promote the public interest. For example, circumstances in which a person is permitted to circumvent a technological protection measure in order to reverse engineer a computer program to achieve interoperability¹⁰ and certain acts of encryption research¹¹ are exempt.

The other important "safety valve" is the triennial rulemaking process. Every three years, the Librarian of Congress, based on the recommendation of the Copyright Office, has the opportunity to identify additional areas where—whether due to perceived abuses, evolving societal needs, new technologies, or other unforeseen circumstances—additional exceptions are warranted to enable legitimate non-infringing uses. This rulemaking process, which occurs at regular intervals and is targeted at specific, current uses, provides a far better mechanism to evaluate the need for additional exceptions than revisiting the fundamental goals and baselines of

¹⁰ 17 U.S.C. § 1201(f).

¹¹ *Id.* § 1201(g).

Section 1201 liability. We believe that the triennial rulemaking process has proven that it can work well. For instance, ESA participated in the last rulemaking and, in the context of the particular exemption it opposed, found the process fair and reasonable, and the outcome based on a careful examination of a thorough evidentiary record. We recognize, however, perceptions that the process may not have worked as smoothly in every instance. As we now have the accumulated experience of several rulemakings, an examination of what has worked well as well as any perceived flaws makes sense. Targeted efforts to improve the efficacy and efficiency of the triennial rulemaking process may well be worth consideration, and ESA is open to exploring that discussion with you.

IV. CONCLUSION

Thank you again for the opportunity to testify today. ESA's members, like other copyright owners, depend on technological protection measures not only as an effective means to respond to copyright infringement in a digital world, but also to facilitate new and exciting ways to make their highly-valuable and expressive copyrighted works available online. In this regard, ESA's members are realizing precisely what this Committee envisioned when it passed the forward-looking provisions of the DMCA.

We look forward to working with the Subcommittee to further the DMCA's two objectives—combating piracy and promoting innovation—while also ensuring that the public continues to enjoy expanding access to copyrighted works.