



July 24, 2023

The Honorable Darrell Issa
Chairman
House Judiciary Committee
Subcommittee on Courts,
Intellectual Property, and the Internet
2108 Rayburn House Office Building
Washington, DC 20515

The Honorable Hank Johnson
Ranking Member
House Judiciary Committee
Subcommittee on Courts,
Intellectual Property, and the Internet
2240 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Issa and Ranking Member Johnson:

We write today to thank you for holding the recent hearing *Is There a Right to Repair?* and to submit for the record a short paper outlining our positions on right to repair and Section 1201 of the Copyright Act. As the only organization in the United States representing the entire creative community on copyright law issues, we stand ready to work with you and other members of the Congress to ensure that legislation aimed at reducing repair costs and maintaining competition in the marketplace does so in a way that respects the rights and concerns of America's creative community.

The Copyright Alliance is a non-profit, non-partisan public interest and educational organization representing the copyright interests of over 2 million individual creators and over 15,000 organizations in the United States, across the spectrum of copyright disciplines. The Copyright Alliance is dedicated to advocating policies that promote and preserve the value of copyright, and to protecting the rights of creators and innovators. The individual creators and organizations that we represent rely on copyright law to protect their creativity, efforts, and investments in the creation and distribution of new copyrighted works for the public to enjoy.

Section 1201 of the Copyright Act prevents anyone from circumventing technical protection measures (TPMs), or trafficking in circumvention services or devices, that protect copyrighted works, except under certain circumstances. It was enacted as part of the Digital Millennium Copyright Act in 1998 to ensure that copyright owners could distribute their works over the internet without being exposed to massive digital piracy. Section 1201 established a triennial rulemaking process as a "fail-safe" mechanism to allow for limited waiver of the anticircumvention provisions related to approved uses or activities. The rulemaking process and the exemptions that result are meant to be a safety valve that balances the rights of copyright owners and users of copyrighted works, and this balance has played an integral role in the successful development of new business models for disseminating creative expression in the digital age.

As our attached position paper details, Section 1201 access controls must be preserved to protect against the dangers of piracy and to ensure that America's consumers and fans can continue to access their favorite copyrighted works. We are concerned with efforts to weaken copyright protections by advocating for laws that would sidestep the 1201 rulemaking process and establish broad right to repair mandates. These broad mandates would effectively allow for the circumvention of technical protection measures (TPMs) that protect movies, music, video games, software, and other copyright materials.

Section 1201 strikes a balance between the needs of consumers and copyright owners, and it has allowed innovative companies to provide consumers with a wide array of content delivery systems at a variety of price points. The Copyright Office's triennial 1201 rulemaking is a balanced and flexible system that has contributed to consumers today having a wealth of ways to safely access and enjoy all sorts of copyrighted works and creators having many new platforms to reach their audiences. If indistinct exceptions to 1201's anti-circumvention provisions are enacted through right to repair legislation, the carefully administered balance established by Congress in section 1201 would be undermined and piracy of copyrighted works would proliferate.

Therefore, it is critical that any right to repair legislation be narrowly tailored and reflect the following principles:

- The protections afforded by section 1201—which allow copyright industries to make their works widely available to the public while also preventing the growth of illicit enterprises designed to profit from enabling unauthorized access to copyright protected works—must not be compromised by laws that would allow for broad exceptions to section 1201 and result in the widespread availability of tools that would enable mass infringement.
- To the extent exemptions to section 1201 are warranted, stakeholders who support those exemptions should use the existing triennial rulemaking process to enact them.
- Any laws implicating copyrighted works and section 1201 should recognize that the circumvention and trafficking prohibitions contained in section 1201 have been fundamental to the development of today's vibrant digital marketplace in entertainment content, which has evolved to the great benefit of American consumers.

Finally, at the hearing it was suggested that, unlike patent law, copyright law does not grant a right to exclude. We strongly disagree with that position. Section 106 of the Copyright Act lists numerous exclusive rights a copyright owner has, subject to certain statutory limitations. The ability to grant an exclusive license effectively provides the copyright owner with the *right to exclude* all others, including an original owner of the copyright, from exercising the rights that are granted in the license. Accordingly, a copyright owner has the right to exclude others from reproducing, distributing, preparing derivative works, and performing and displaying works

publicly.¹ These rights to exclude are enshrined in the law, unlike the presumed “right” to repair, which is not guaranteed by any statute.

The Copyright Alliance and our members support efforts to reduce repair costs and maintain competition in the marketplace, and we take no issue with legislation that is narrowly targeted to the repair of devices, like tractors and phone batteries. However, we urge that any right to repair legislation address these issues in a way that respects copyright owners’ exclusive rights and ensures that Section 1201 continues to successfully spur the creation and dissemination of expressive works. We once again thank you for your attention to these concerns, and we look forward to working together on these important issues with members of Congress, the U.S. Copyright Office and other stakeholders.

Sincerely,



Keith Kupferschmid
CEO
Copyright Alliance

cc: Members of House Judiciary Committee Subcommittee on Courts, Intellectual Property, and the Internet

¹ In rare instances, the Copyright Act provides for compulsory licenses, in which case the copyright owner does not have a right to exclude. However, such compulsory licensing is an extraordinary exception to the rule that copyright owners should be free to invest, innovate, and develop without artificial constraints, and when Congress has created compulsory licenses, it has done so with great care.



POSITION PAPER

Section 1201 and the Right to Repair

Section 1201 of the Digital Millennium Copyright Act (DMCA) safeguards technological protection measures (TPMs) used in connection with the dissemination of copyrighted works against compromise. TPMs include digital locks that prevent unauthorized access to movies, music, books, articles, software, video games, works of visual art, and other copyrighted materials. Enacted in 1998, as an important part of the DMCA, section 1201 prohibits the circumvention of TPMs as well as trafficking in technologies that allow for circumvention. In addition to numerous statutory exemptions for things like security testing and research, section 1201 also provides for a triennial rulemaking process through which the U.S. Copyright Office routinely considers and adopts exemptions to the section 1201 protections. This balanced and flexible system has contributed to consumers today having a wealth of ways to safely access and enjoy all sorts of copyrighted works and creators having many new platforms to reach their audiences.

Overbroad “right to repair” mandates would open the door to widespread piracy of copyrighted materials.

Some organizations that often push for weakening copyright protections also advocate for laws that would sidestep the 1201 rulemaking process and establish broad “right to repair” mandates. While such mandates purport to make it easier for users of equipment and devices with digital access controls to override those controls and make repairs, the reality is that they would override section 1201 and effectively allow for the circumvention of TPMs that protect movies, music, video games, software, and other copyright materials. Congress must not enact any law that would open the door to widespread piracy and would dramatically alter how the public gets—or does not get access—to these works in the future.

Section 1201 access controls must be protected to preserve intellectual property rights, as well as enable continued public access to their favorite copyrighted works.

Section 1201 strikes a balance between the needs of consumers and copyright owners, and it has allowed innovative companies to provide consumers with a wide array of content delivery systems at a variety of price points. If indistinct exceptions to 1201's anti-circumvention provisions are enacted through "right to repair" legislation, the carefully administered balance established by Congress in section 1201 would be undermined and piracy of copyrighted works would proliferate. We have no issue with legislation that is narrowly targeted to the repair of devices, like tractors and phone batteries. But legislation that is not narrowly targeted would undo the carefully crafted balance in section 1201 and would have a significant negative impact on the creative industries and professional creatives who rely on section 1201 for their livelihoods.

It is critical that any "right to repair" legislation be narrowly tailored and reflect the following principles:

- The protections afforded by section 1201—which allow copyright industries to make their works widely available to the public while also preventing the growth of illicit enterprises designed to profit from enabling unauthorized access to copyright protected works—must not be compromised by laws that would allow for broad exceptions to section 1201 and result in the widespread availability of tools that would enable mass infringement.
- To the extent exemptions to section 1201 are warranted, stakeholders who support those exemptions should use the existing triennial rulemaking process to enact them.
- Any laws implicating copyrighted works and section 1201 should recognize that the circumvention and trafficking prohibitions contained in section 1201 have been fundamental to the development of today's vibrant digital marketplace in entertainment content, which has evolved to the great benefit of American consumers.

