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Copyright Reform: DMCA Circumvention

I strongly believe that Section 1201, the Digital Millennium Copyright Act (DMCA), should be amended to allow for the circumvention of an access control if the resulting use is not a copyright infringement. §1201(a)(1) states that “No person shall circumvent a technological measure that effectively controls access to a work protected under this title.” That provision, however, does not consider the many instances in which access to the copyrighted material is necessary for purposes of criticism, commentary, scholarship or the myriad other uses potentially protected under the fair use doctrine.

The authors of the DMCA clearly understood that the new act would create unwanted hardships, and as such, built in a process to allow for exemptions. That being said however, the exemption review process only takes place once every three years, and previously approved exemptions must be considered *de novo* each time. Thus, even though the 2015 rulemaking proceeding adopted an allowance for motion picture access control circumvention for noninfringing uses in documentary films and noncommercial videos, the issue will need to be argued again in 2018.¹ The burden to sustain an exemption at each triennial rulemaking always falls to the *proponents* of the exemption, who must “produce extensive filings to prove anew portions of the exemption that were briefed thoroughly in past proceedings and faced no opposition.”²

¹ “Understanding the Section 1201 Rulemaking,” United States Copyright Office, 3.

² Art Neill, “Fixing Section 1201: Legislative and Regulatory Reforms for the DMCA Anti-Circumvention Provisions,” *Tulane Journal of Technology & Intellectual Property* 19 (2016): 3.

These burdens are particularly cumbersome if we think about which parties are supporters of such exemptions and which are in the opposition. Sticking with the example of motion picture circumvention, we find a situation in which the chronically underfunded documentary community is pitted against, amongst others, the Motion Picture Association of America (MPAA). The differing agendas between these two groups are quite stark, and are on clear display when considering each side's submission to the Copyright Office's 2016 Section 1201 Study and Request for Public Comment. Speaking for the documentary community, a commenting consortium consisting of The International Documentary Association, Film Independent and Kartemquin Educational Films recommended that Section 1201 be amended to "include a requirement that circumvention of an access control is not a violation of section 1201 unless there is a connection between the circumvention and infringing conduct."³ The Comment went on state that: "Our eighteen years of experience with the law is that rather than curb copyright infringement, the DMCA's prohibition on circumvention has instead made it vastly more difficult to make films," and that the rulemaking process "has led to exemptions that are unduly narrow, difficult to apply, and out of sync with the rapid technological innovation."⁴

Commenting from the opposite perspective, a consortium consisting of the Association of American Publishers, MPAA and Recording Industry Association of America called on the Copyright Office *not* to recommend any changes that would "undermine the protections of Chapter 12,"⁵ which, as this group sees it, is exactly what the reform proposed by the documentary commenters would do. The trade association consortium went on:

³ Section 1201 Study, Comment of International Documentary Association, Film Independent, Kartemquin Educational Films, Docket No. 2015-08, 2.

⁴ *Ibid*, 3.

⁵ Section 1201 Study, Comment of Association of American Publishers, Motion Picture Association of America, Recording Industry Association of America, Docket No. 2015-08, 1.

Without the statute's legal prohibitions against circumventing access controls... investment in the creation of digital content and distribution would be curtailed. Copyright owners would face greater risks, which would adversely affect their ability to receive a reasonable return on their investments in creative content.”⁶

One can only assume that the “greater risks” faced by copyright owners are a reference to internet piracy, but “banning the tools that enable fair use will punish the innocent along with infringers.”⁷ This notion of a blanket policy for all is particularly problematic when considering technology such as Google/YouTube's Content ID that only knows *if* copyrighted material has been used in a video, but has no ability to gauge the nature of the use. As Taylor B. Bartholomew argues in his article “The Death of Fair Use in Cyberspace,” YouTube is putting its very model in danger by using Content ID. “Put simply, Content ID is blatantly hostile to users' interests because it shifts the neutral presumption of fair use against them. If reform of Content ID is not effectuated, YouTube risks losing a substantial portion of its user-base, and hence, its main source of content.”⁸ Having no intention of risking its user-base, YouTube has stepped up to the side of would-be 1201 reformers and is “offering legal support to a handful of videos that [they] believe represent clear fair uses which have been subject to DMCA takedowns.”⁹

I think it's important that reform to §1201(a)(1) not simply remove the *de novo* standard for the rulemaking proceedings, and/or create an allowance for fair use (two options some have proposed) but make a definitive ruling that *any* type of noninfringing use be exempted from a circumvention violation. The idea of slowing chipping away at exempted uses (why aren't

⁶ Ibid, 3.

⁷ Fred Von Lohmann, “Unintended Consequences: Twelve Years Under the DMCA,” *Electronic Frontier Foundation*, February 2010, 9.

⁸ Taylor B. Bartholomew, “The Death of Fair Use in Cyberspace: YouTube and the Problem with Content ID,” *Duke Law & Technology Review* 13 (2015): 68.

⁹ Fred Von Lohmann as quoted in Klint Finley, “Google Pledges to Help Fight Bogus YouTube Copyright Claims—For a Few,” *Wired*, November 19, 2015, accessed November 27, 2016, <https://www.wired.com/2015/11/google-pledges-to-help-fight-bogus-youtube-copyright-claims-for-a-few/>

narrative and commercial filmmakers exempted?) or waiting 3 years for permission to circumvent an emerging distribution platform, goes against the very idea of copyright which is to encourage as much intellectual and creative expression as possible. Furthermore, access control circumvention is not only the domain of fair users, but also those who fall under section 108 exemptions, or are hoping to in the future, such as museums. There is no need to continually amend an act, particularly when reform efforts will be fought at each turn by the hard-lobbying trade organizations behind movie studios, publishing giants and the recording industry that believe their rights are continually being eroded.