

**Before the
U.S. Copyright Office
Library of Congress**

In the Matter of:

Section 1201 Study: Notice and
Request for Public Comment

Docket No. 2015-8

REPLY COMMENTS OF THE ENTERTAINMENT SOFTWARE ASSOCIATION

The Entertainment Software Association (“ESA”) is pleased to provide these Reply Comments in response to the Copyright Office’s Notice of Inquiry (“NOI”) concerning the operation of Section 1201 of the Copyright Act.¹

ESA’s initial comments in this proceeding explained how Section 1201 has benefitted both consumers and creators by providing important legal protection to back up the technological measures that protect creative works and enable new products, services and business models. Section 1201 has been critical in the development of the modern digital marketplace, and that is particularly so within the video game industry. Video game publishers and online game platform providers rely on access and copy controls to limit infringement of their games, and protections applied to video game consoles have allowed them to become platforms for lawful distribution of a wide variety of game-related and non-game content. Confronted with hackers working hard to break every new security measure, and with commercial operators seeking to profit from video game infringement enabled by circumvention, the video game industry has successfully invoked the Copyright Act’s protections against circumvention on numerous occasions.

¹ *Section 1201 Study: Notice and Request for Public Comment*, 80 Fed. Reg. 81,369 (Dec. 29, 2015).

Despite this record of policy success, some of the initial comments in this proceeding seek to undermine Section 1201 in every way possible. Commenters seek a narrower prohibition on circumvention per se,² little or no protection against trafficking,³ broad permanent exemptions,⁴ and lower standards for granting further exemptions in triennial proceedings.⁵ In effect, they seek to render Section 1201 null and void. ESA opposes any amendment to Section 1201, because Section 1201 is fundamentally working.

Other comments seek to relitigate specific issues addressed in previous triennial proceedings. However, the purpose of this proceeding is “to assess the operation of section 1201,”⁶ not to assess the merits of exemptions targeted to specific current products and uses. That is the function of the triennial rulemakings.

Because ESA’s initial comments broadly addressed the issues raised in this proceeding, these Reply Comments address only a few points raised by other commenters that specifically concern video games.

² E.g., Library Copyright Alliance Comments, at 3-27; Owners’ Rights Initiative Comments, at 1-3; Public Knowledge Comments, at 1-3. Among other things, these comments address the question whether Section 1201 does (or should) prohibit circumvention of access controls when the access does not constitute copyright infringement. An important case in that regard is the Ninth Circuit’s decision in *MDY Industries, LLC v. Blizzard Entertainment, Inc.*, 629 F.3d 928 (9th Cir. 2010). ESA disagrees with significant aspects of the decision in that case. For example, when a copyright owner and licensee expressly agree that a license is conditioned on specified limits, exceeding any of those limits ought to be considered an infringement. *See id.* at 937-42. However, ESA believes that the court was right that Section 1201’s prohibition on circumvention is and should be independent of any claim of infringement. *See id.* at 943-52; *see also Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 443 (2d Cir. 2001) (“the DMCA targets the circumvention of digital walls guarding copyrighted material . . . , but does not concern itself with the use of those materials after circumvention has occurred”). Circumvention of access controls undermines new business models and modes of distribution for creative works, regardless whether copying or other infringing activity is involved. Thus, it is important to protect against circumvention as well as infringement.

³ E.g., Consumer Technology Association Comments, at 8-10; Public Knowledge Comments, at 7-8; Organization for Transformative Works Comments, at 6-7.

⁴ E.g., Electronic Frontier Foundation Comments, at 11-12; MIT Comments, at 5.

⁵ E.g., Consumer Technology Association Comments, at 7-8; Electronic Frontier Foundation Comments, at 9-10; Library Copyright Alliance Comments, at 33-35; Organization for Transformative Works Comments, at 8-9; Public Knowledge Comments, at 5-7.

⁶ 80 Fed. Reg. at 81,369.

1. A new exemption for “assistive technology” is not necessary, at least as to video game products.

DIYAbility’s initial comments propose a broad new exemption to allow circumvention of any technological protection applied to any kind of work, if the purpose is to accommodate a disability. DIYAbility justifies this proposal based on “concern[.]” that its project to develop an adaptable video game controller “could implicate” Section 1201.⁷

To be clear, ESA and its member companies are deeply concerned about persons with disabilities, and seek to deliver engaging and innovative video game experiences to all consumers, including individuals with disabilities. Not only is that the right thing to do, but there are good business reasons to do so, because games succeed when they reach the largest possible audience. For that reason, the video game industry is pursuing many initiatives to improve game play accessibility, and communities of gamers are working to assist disabled persons to enjoy video games as well.⁸ While accessibility presents continuing challenges due to the diversity of game products and disabilities, and the fast pace of both technological change and game play, all the major console providers have included significant accessibility features in their systems. These include features such as text to speech, remapping of controller buttons, and high contrast display modes.⁹ On the software side of the industry, the International Game

⁷ DIYAbility Comments, at 1 & 3 n.6.

⁸ See, e.g., AbleGamers Foundation website, <http://www.ablegamers.com/>; D.A.G.E.R.S. website, <http://www.dagersystem.com/>; Accessible Video Gaming - Xbox - Nintendo Wii – Playstation, <http://www.apparelyzed.com/forums/forum/67-accessible-video-gaming-xbox-nintendo-wii-playstation/>.

⁹ See, e.g., Ease of Access settings on Xbox One, <https://support.xbox.com/en-US/xbox-one/games/ease-of-access-settings>; Accessibility, Xbox One, and Kinect FAQ, <http://support.xbox.com/en-US/xbox-one/games/accessibility-faq>; PlayStation4 User’s Guide, Accessibility, available at <https://manuals.playstation.net/document/en/ps4/settings/accessibility.html>; PS4 Accessibility Settings, https://support.us.playstation.com/articles/en_US/KC_Article/PS4-Accessibility-Settings; Craig Kaufman, AbleGamers’ Wii U Accessibility Review (Dec. 12, 2012), <http://www.unstoppablegamer.com/ablegamers-wii-u-accessibility-review/>; Nintendo & Accessibility: An Asset or Liability to Nintendo’s Game Design?, <http://www.ign.com/boards/threads/nintendo-accessibility-an-asset-or-liability-to-nintendos-game-design.452898373/>.

Developers Association has long had a group devoted to game accessibility.¹⁰ Others also provide resources to assist developers in developing accessible games.¹¹ These efforts are bearing fruit. Over 350 games have documented accessibility features.¹² And in announcing its 2015 Accessible Game of the Year, AbleGamers explained that in 2015 “many advances occurred within the gaming industry to further allow gamers with disabilities options to improve their gaming experiences.”¹³ In short, the drive for game accessibility is a major movement among gamers and the game industry, and disabled persons have far greater access to game play today than ever before.

Because the industry is increasingly working to design products for accessibility, independent third-party projects such as DIYAbility’s controller project represent a comparatively small feature on the overall game accessibility landscape. In addition, DIYAbility’s initial comments do not provide sufficient information to know whether what it would like to do would actually violate Section 1201, rather than, for example, being permitted by Section 1201(f). Under those circumstances, there is insufficient justification for a broad new permanent exemption to allow circumvention for accessibility purposes of any protection measure applied to any kind of work. Moreover, this proceeding is supposed to concern the

¹⁰ See IGDA Game Accessibility Special Interest Group website, <http://igda-gasig.org/>.

¹¹ See, e.g., Making Video Games Accessible: Business Justifications and Design Considerations, [https://msdn.microsoft.com/en-us/library/windows/desktop/ee415219\(v=vs.85\).aspx](https://msdn.microsoft.com/en-us/library/windows/desktop/ee415219(v=vs.85).aspx); Game Accessibility Guidelines, <http://gameaccessibilityguidelines.com/>; AbleGamers Foundation Game Accessibility Guidelines, <http://www.includification.com/>.

¹² International Game Developers Association, Game Accessibility Special Interest Group, Building a Manifesto for Game Accessibility, at 26 (2015).

¹³ Announcing the AbleGamers 2015 Accessible Game of the Year (Jan. 21, 2016), <http://www.ablegamers.com/ablegamers-news/announcing-the-ablegamers-2015-accessible-game-of-the-year>.

operation of Section 1201,¹⁴ rather than to involve a searching examination of new proposed exemptions.

2. The Office should not recommend a permanent repair exemption as to video game devices.

Static Control’s initial comments propose a permanent exemption for “repair and interoperability” of manufactured goods.¹⁵ While its focus is on repair and interoperability of printer cartridges, its proposed solution to perceived problems in the printer cartridge market would extend to video game consoles and other devices as well. iFixit similarly argued for broad rights to repair, and specifically asked that a repair exemption extend to “third-party agents.”¹⁶ iFixit focused its comments on tractors, but mentioned ESA,¹⁷ and likewise couched its proposals in terms broad enough to encompass video game devices.

However, in both the fifth and sixth triennial rulemakings, the Librarian rejected proposed exemptions for circumvention of video game console protections that had been justified in part based on claims concerning repair.¹⁸ Even proponents of such an exemption “conceded that consoles can also be repaired without circumvention, including through official repair channels.”¹⁹ In the end, the Register found that the record:

still does not support the need for an exemption. The major game console manufacturers appear to offer repair services for in- and out-of-warranty consoles either for free or at reasonable prices.

¹⁴ 80 Fed. Reg. at 81,369.

¹⁵ Static Control Comments, at 1.

¹⁶ iFixit Comments, at 3.

¹⁷ *Id.* at 2.

¹⁸ 80 Fed. Reg. at 65,961; *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, 77 Fed. Reg. 65,260, 65,272-74 (Oct. 26, 2012).

¹⁹ *Recommendation of the Register of Copyrights in the Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention*, at 196 (Oct. 2015) [hereinafter “2015 Register’s Recommendation”].

Moreover, the record shows that proponents themselves are able to offer repair services without the need to circumvent. Proponents did not provide any examples of an actual inability to repair a console through one of these means.²⁰

The commenters in this proceeding provide no reason for the Office to reverse that finding. Technological measures are critical to the protection of creative works on consoles and other gaming devices, and circumvention of those measures is closely linked to infringement. To protect the security of these measures, the diagnostic repair tools used by device manufacturers' in-house engineers are closely guarded. Static Control and iFixit effectively ask for exemptions that would open up game platforms to infringement, and give anyone who claimed to provide repair services the power to assist others in opening up game platforms to infringement. Such a result cannot be justified.

3. This proceeding is not a proper forum for the Office to consider proposed exemptions targeting games.

Mr. Peter Hunt's initial comments generally criticize the overall structure of Section 1201. However, when those comments get down to specifics, the thrust of Mr. Hunt's argument is that the Librarian should have adopted a broader exemption with respect to video games requiring server communications (Class 23) in the sixth triennial rulemaking.²¹ Mr. Hunt's request to, in effect, reconsider the scope of an exemption the Librarian just adopted is not what this study was intended to accomplish. Moreover, the Register and Librarian specifically rejected exactly these arguments in their consideration of Class 23 only a few months ago. The arguments have no more merit now.

²⁰ *Id.* at 200-01.

²¹ Peter Hunt Comments, at 2-3; see *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, 80 Fed. Reg. 65,944, 65,956-58 (Oct. 28, 2015).

A Mr. or Ms. McKeehen commenting under the name “Starelikemckeehen Poker Club” professes to be a professional game player who wishes to circumvent access controls on unspecified “gaming software or web-based software” both (1) to determine if his or her “personal and non-personal data is being tracked or transmitted to third parties” and (2) to make certain game data “interoperable with other software tools.”²² Based on this commenter’s pseudonym, it appears that the comments may address gambling software and services, and raise regulatory and content protection issues distinct from those raised by the game products and services represented by ESA. Moreover it is it is difficult to discern what kind of activities are being discussed in this comment, and thus not clear to what extent the actions this commenter wishes to take might already be covered by Section 1201(f) or (i). The comment does not seem to raise the kinds of broad policy questions concerning the operation of Section 1201 that this proceeding was intended to address.²³

Conclusion

For the reasons set forth above and in ESA’s initial comments, ESA urges the Office to keep a clear eye on Section 1201’s record of success at reducing infringement and promoting the creation and dissemination of new creative works, and not to recommend changes to Section 1201 that would, as a practical matter, eviscerate its important protections.

²² Starelikemckeehen Poker Club Comments, at 1.

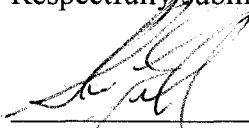
²³ The commenter also has not provided the kind of evidentiary foundation that would warrant serious consideration of an exemption.

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