



BEFORE THE UNITED STATES COPYRIGHT OFFICE

**REPLY COMMENTS OF THE LIBRARY COPYRIGHT ALLIANCE ON
SECTION 1201 OF THE DIGITAL MILLENNIUM COPYRIGHT ACT**

The responses submitted by various associations representing rights holders to the Notice of Inquiry’s Question 1 concerning the role and effectiveness of the prohibition on circumvention of technological protection measures (TPMs) in section 1201(a) reflect the same leap of logic that has characterized section 1201 since its inception. That leap of logic—discussed in our opening round comments—is that TPMs would fail but for the legal prohibitions on their circumvention and the creation and distribution of circumvention tools.

The joint comments of the Association of American Publishers, the Motion Picture Association of America, and the Recording Industry Association of America (Joint Comments) make the uncontroversial observation that TPMs “support the continued growth of licensed services.” Joint Comments at 4. The Joint Comments then assert that “as a direct consequence, the protections of Chapter 12 have enabled an enormous variety of flexible, legitimate digital business models to emerge and thrive...” *Id.* But the second statement doesn’t follow from the first.

Just because TPMs are important for a particular business model doesn't mean that the TPMs would be ineffective absent legal protection for those TPMs.¹ Indeed, attributing significance to the *legal* protection of *technological* protection measures is completely counter-intuitive. The whole point of TPMs is to physically prevent people from engaging in unlawful conduct. They exist and are used *because* of the failure of legal enforcement mechanisms to insure compliance with the law. Given this recognition of the inadequacy of legal enforcement mechanisms, it makes no sense to add yet another layer of legal protections on top of the technological protections, or to assume that this additional layer of legal protection will have a positive impact. Stated differently, if TPMS are so weak that they must be bolstered by legal protections, then why employ TPMs in the first place?

The rights holders have offered no real evidence that the legal protection of TPMs has contributed to the effectiveness of TPMs. Instead, they observe that TPMs have been effective, and conclude that because TPMs have legal protection, the legal protection must have contributed to the TPMs' effectiveness. They have mistaken correlation for causation.

Moreover, they overlook the fact that TPMs remain effective notwithstanding the widespread availability of circumvention tools on the Internet (and the relative dearth of section 1201 enforcement actions). Evidently, TPMs on their own create a sufficient physical--and perhaps psychological-- obstacle to unauthorized access by a significant proportion of potential users.

¹ The same logical leap is made in the comments of BSA|The Software Alliance, the Copyright Alliance, the Software and Information Industry Association, the Entertainment Software Association, and Microsoft.

Further, the legal protections provided by section 1201 to the innovative TPM-enabled distribution services described by the rights holders are duplicative of other forms of legal protection. These services typically involve downloading or streaming content from a server. Gaining unauthorized access to such servers violates the federal Computer Fraud and Abuse Act (CFAA) as well as state computer crime laws. 18 U.S.C. § 1030(a)(2) prohibits a person from intentionally accessing a computer, or exceeding authorized access, and thereby obtaining information from the computer. The CFAA provides a private right of action as well as criminal penalties. Thus, even if the law has deterred anyone from gaining unauthorized access to the content distribution services, the rights-holders can't prove that it was section 1201(a) of the DMCA, rather than the CFAA, that did so. And while the CFAA has its own over-breadth problems, at least it is targeted at preventing unauthorized access to someone else's computer, while section 1201(a) can restrict access to and use of *one's own* property.

In short, the positive impact of section 1201(a)—in contrast to that of TPMs—is speculative at best. At the same time, the statute's negative impact has been amply demonstrated by the large number and many kinds of entities that have been forced to seek exemptions time and again, or that have been the subject of questionable DMCA enforcement actions. This negative impact justifies revision of section 1201 as proposed in our opening round comments.²

April 1, 2016

² We proposed attaching liability to circumvention only if it enables infringement; broadening the rulemaking so that it applies to the anti-trafficking provisions; shifting the final authority for granting exemptions in the triennial rulemaking from the Librarian of Congress to the Assistant Secretary of Commerce for Communications and Information; and eliminating the Copyright Office's requirement that the renewal of exemptions be considered *de novo*.