



BEFORE THE U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY
AND THE INTERNET

HEARING ON H.R. 1123

UNLOCKING CONSUMER CHOICE AND
WIRELESS COMPETITION ACT

WRITTEN STATEMENT OF

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Thank you for this opportunity to present the perspectives of leading copyright industry organizations on H.R. 1123.

One of the most critical provisions that Congress enacted as part of the DMCA in 1998 is section 1201 of Title 17, which protects the technological measures that copyright owners use to control access to their works. Pursuant to section 1201(a)(1), the Copyright Office has held five rulemaking proceedings since 2000 to identify appropriate temporary exemptions to the prohibition on circumvention of effective access control technologies. I have represented copyright industry coalitions in all five of these rulemaking proceedings.¹ I hope that my testimony can help provide some context for the current legislation.

Our coalition took a neutral position on the proposed cellphone unlocking exemption during the most recent rulemaking proceeding, which concluded last October. I am not here to advocate a position on whether the Copyright Office's recommendation on that issue, which was approved by the Librarian of Congress, was right or wrong. I am here to say that, if Congress concludes that the Librarian's decision was not the desired policy outcome, then the bill before you is an appropriate and well-considered way to change it. It restores the status quo ante, without undermining a critically important provision of Title 17 that has done so much to benefit producers, distributors and consumers of copyrighted works.

1. Section 1201 has proven its value, and is now more important than ever.

When Congress enacted Section 1201 in 1998, it explicitly anticipated that technological protection measures could be used, "not only to prevent piracy and other economically harmful unauthorized uses of copyrighted materials, but also to support new ways of disseminating copyrighted materials to users, and to safeguard the availability of legitimate uses of those materials." Staff of House Committee on the Judiciary, 105th Cong., Section-By-Section Analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4, 1998, at 6 (Comm. Print 1998), *reprinted in* 46 J. COPYRIGHT SOC'Y U.S.A. 635 (1999). Looking back 15 years later, we can see that this foresight was remarkable. Today, more

¹ This coalition includes the Association of American Publishers (AAP); BSA | The Software Alliance; the Entertainment Software Association (ESA); the Motion Picture Association of America (MPAA); and the Recording Industry Association of America (RIAA), on behalf of all of whom I appear today.

consumers enjoy authorized access to more copyright works in more diverse ways, and at more affordable price points, than ever before. Technological measures that control and manage access to copyrighted works have been critical to achieving this success. Myriad innovative products and services are currently made available in connection with copyrighted works protected by access controls, and new business models that depend on such controls are emerging and being extended to new markets constantly.

Access controls are at the heart of most of the cutting edge internet-based services that play an increasingly large role in the dissemination of creative content. The advent of cloud services for delivery of copyrighted material – software and games as well as video and music – underscores the importance of protecting access controls against hacking. Access control technologies also play a critical role in the ongoing task of upgrading the security of computer networks and resources and reducing their vulnerability to viruses and other attacks. Thanks to access controls, virtually all commercial software applications can be accessed, downloaded and/or updated online, whether directly from the developer or through third parties.

No innovation in the world of software and information technology is attracting more attention today than cloud computing, which depends upon access controls. Cloud computing has become an increasingly important method of delivering IT functionality to consumers, businesses and governments. As software is increasingly downloaded for use or delivered as an online service in the future, the importance of keys, IDs and passwords in enabling these services while protecting software copyright holders' rights increases accordingly.

U.S. enactment of section 1201 in 1998 blazed a trail that scores of other countries have followed. Seeking for their citizens the same benefits of wider, more secure access to copyrighted materials, nearly every industrialized country, and many of our trading partners in the developing world, have enacted legal protections for access controls. Some follow the U.S. model closely; others take a somewhat different approach more suited to their own legal systems and traditions; but all reflect a recognition that the use of access control technologies should be encouraged, and attacks on these technologies appropriately penalized, in order to foster the healthy growth of online digital marketplaces in works protected by copyright.

2. The 1201 rulemaking process is an essential feature of the legal framework for protecting access controls.

Although Congress' prediction about the overall positive impact of access controls has been borne out over the past 15 years, Congress was also wise enough to realize that not all of the consequences of the new legal protections for technological measures could be anticipated. This realization forms the basis for section 1201(a)(1)(B), which established the triennial rulemaking process that has now unfolded five times. Its purpose is to identify any specific factual situations in which the prohibition against circumventing access controls, far from promoting greater access to copyrighted materials, has the unintended impact of preventing or substantially impeding such access to particular classes of works for the purpose of making non-infringing uses. Congress thus provided a flexible but very useful tool for responding to unforeseen changes in technology and marketplaces, by enabling time-limited exemptions to the prohibition to be recognized in carefully defined cases.

Certainly the copyright industry groups that have participated in the five DMCA rulemakings do not agree with every decision that has resulted from it, nor even with important elements of the approach that the Copyright Office has taken in implementing its statutory mandate to conduct the rulemaking. And no doubt any administrative process could be improved. But overall, we believe the rulemaking process has been a success, and has largely fulfilled the functions Congress intended for it. In particular, the following features of the rulemaking process have been critical to the positive contributions it has made:

- Burden of persuasion. The rulemaking process proceeds from the assumption that the prohibition against circumventing access controls is the rule, and that the burden falls on petitioners to demonstrate the specific situations in which an exception to this rule is justified under the statute. Thus, instead of the Copyright Office ranging afield to regulate uses of access controls that a government official might think are problematic, it relies on private parties to step forward and to present persuasive evidence and legal argument under a defined yet flexible set of criteria drawn from the statute and its legislative history.

- Focus on necessity. Exemptions are reserved for situations in which it is either impossible to make a specified non-infringing use without circumvention, or in which the burdens of using other available means to do so are so significant as to justify allowing individuals to take matters into their own hands by circumventing access controls.
- Time limitation and de novo review. A fundamental feature of all exemptions recognized through the rulemaking process is that they automatically expire after three years, and that each successive rulemaking proceeds de novo. This is one of the most critical decisions Congress made in setting up the rulemaking process, because it reflects an understanding that the rapid and often unpredictable pace of change in both technology and market developments rules out any automatic extension of exemptions unchanged from cycle to cycle. The actual history of the rulemaking process bears out the wisdom of this approach, with several exemptions being recognized for one or two cycles and then falling out of the process as the evidence of the need for them faded or disappeared altogether. Even those exemptions which have, in some form, been recognized in successive rulemaking cycles have been adjusted or modified to take account of new circumstances regarding the need for circumvention and the consequences of granting or denying an exemption for certain uses.
- Detailed explanation of reasoning. Finally, from the inception of the rulemaking process, the Copyright Office has chosen to provide detailed analyses of the evidence presented to it and of the legal justifications for its recommendations to the Librarian on granting, modifying, or denying requested exemptions. As noted, the copyright industry coalition has not always agreed with these analyses, but we find them quite useful both in explaining the decision and in providing guidance for the next cycle, and I believe the same is true for representatives of parties seeking exemptions as well.

3. H.R. 1123 overturns the rulemaking decision on cell phone unlocking without harming section 1201 or the rulemaking process.

The bill before the subcommittee this morning is tightly focused on changing the decision issued by the Librarian of Congress last October on the single issue of cell phone unlocking. It does so without tampering with the structure of section 1201, with the mandate and parameters of the section 1201 rulemaking, or with the key ingredients for success that I have just summarized. In other words, it achieves its authors' stated purpose, without compromising or undermining the enormous value that section 1201 has delivered to copyright owners and users of copyrighted works alike.

In effect, H.R. 1123 simply restores the status quo ante – the cellphone unlocking exemption that the Librarian recognized in 2010, but decided to phase out in 2012. It places this restored exemption back into the existing rulemaking framework. It directs the Copyright Office to initiate a new rulemaking on the limited question of whether the same unlocking exemption ought to apply to other devices besides cell phones. This new rulemaking will be carried out under essentially the same procedures that the Copyright Office has developed, pursuant to Congressional mandate, in five rulemaking cycles under the DMCA. And both the restored cellphone unlocking exemption, and any additional unlocking exemption that might emerge from the “out-of-cycle” rulemaking that the bill requires, would be reviewed again after three years, under the same procedures.

In short, H.R. 1123, if enacted, would be the most effective and focused way for Congress to correct what it considers an erroneous outcome of the last DMCA rulemaking cycle. It would accomplish this while inflicting the least possible disruption on the well-established rulemaking process, and without making any changes to the DMCA provision that has served American creators and consumers so well — section 1201.