

March 3, 2016

Honorable Maria A. Pallante
Register of Copyrights
U.S. Copyright Office
101 Independence Avenue, SE
Washington, DC 20559-6000

<http://copyright.gov/policy/1201/comment-submission/>

Re: Comments Submitted Pursuant to “Section 1201 Study: Notice and Request for Public Comment,” 80 Fed. Reg. 81, 369 (Dec. 29, 2015)

Dear Register Pallante:

The American Intellectual Property Law Association (AIPLA) is pleased to offer comments in response to the above-referenced U.S. Copyright Office Notice of Inquiry regarding the operation of 17 U.S.C. § 1201 et seq. including the triennial rulemaking process established under the Digital Millennium Copyright Act (DMCA).

AIPLA is a national bar association of approximately 14,000 members who are primarily lawyers engaged in private or corporate practice, in government service, and in the academic community. AIPLA members represent a wide and diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the practice of patent, trademark, copyright, trade secret, and unfair competition law, as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property. Our mission includes helping establish and maintain fair and effective global laws and policies that stimulate and reward invention while balancing the public’s interest in healthy competition, reasonable costs, and basic fairness.

Given the scope of the present study, we note at the outset that these comments target particular questions raised by the Section 1201 Study, namely questions 3, 7, 8, and 9. AIPLA has not commented on every issue covered by the Notice of Inquiry, and our decision not to do so for any a particular provision should not be interpreted as agreement or acquiescence to any particular issue. We further note that many of our comments call for additional inquiry into certain topics, which again is a result of the scope and complexity of the issues raised by this study. Based on our review of the notice of inquiry, AIPLA offers the following comments.

Triennial Process of Exemption From 17 U.S.C. § 1201(a)(1)

In response to question 3¹ as contained in the notice of inquiry, AIPLA endorses, in principle, an amendment to the Copyright Act that would adjust the triennial process by which exemptions are renewed. Specifically, we are in favor of a system whereby the grant of an exemption under the triennial rulemaking process would create a regulatory presumption in favor of renewal in cases where there is no meaningful opposition. In so doing, we echo the concerns expressed during the Office’s testimony before the House Judiciary Committee at the April 2015 hearing on copyright review.

More particularly, AIPLA favors a standard by which the presumption favoring renewal would only be effective where there is no meaningful opposition. We note a slight inconsistency regarding the standard in the Notice of Inquiry. Compare 80 Fed. Reg. 81,371 (“the Register has recommended that Congress amend the rulemaking process to create a presumption in favor of renewal when there is no meaningful opposition to the continuation of an exemption.”) with 80 Fed. Reg. 81,369 n.7 (“We are therefore recommending a legislative change to provide a presumption in favor of renewal in cases where there is no opposition.”).

AIPLA believes that the Office should not be burdened with a *de novo* review in response to an opposition that, for example, fails to meet the standards of the rulemaking process or otherwise articulate meaningful grounds for denial. Consequently, we believe that exemptions should enjoy a regulatory presumption that favors renewal unless the opposition is meaningful. To be clear, if there is meaningful opposition, the petitioner would have to go through the review process and meet the standards applied to new applicants, without the benefit of the presumption.

Rulemaking Process: Third Party Assistance and Exemption From 17 U.S.C. § 1201(a)(2)

In response to question 7² as contained in the notice of inquiry, AIPLA encourages the Office to consider conducting a specific inquiry into the anti-trafficking provision of the DMCA. We believe it is important to ensure that the intended beneficiaries of limitations contained in the DMCA, including those benefitting from exemptions granted under the triennial rulemaking process, are able to engage in permitted circumvention activities, and that the anti-trafficking provisions should not unduly hinder such activities. If a study indicates that intended beneficiaries are in fact unable to engage in permissible circumvention activities because of an unavailability of technologies necessary to facilitate circumvention, then AIPLA believes that, in

¹ Should section 1201 be adjusted to provide for presumptive renewal of previously granted exemptions—for example, when there is no meaningful opposition to renewal—or otherwise be modified to streamline the process of continuing an existing exemption? If so, how? 80 Fed. Reg. 81373 (Dec. 29, 2015).

² Should section 1201 be amended to allow the adoption of exemptions to the prohibition on circumvention that can extend to exemptions to the anti-trafficking prohibitions, and if so, in what way? For example, should the Register be able to recommend, and the Librarian able to adopt, exemptions that permit third-party assistance when justified by the record? 80 Fed. Reg. 81373 (Dec. 29, 2015).

principle, this problem that should be remedied, potentially through exemptions to 17 U.S.C. § 1201(a)(2) to facilitate Third Party Assistance.

Accordingly, AIPLA suggests the Office consider broadening the inquiry to determine whether and the extent to which the anti-trafficking provisions of the DMCA have frustrated permitted circumvention activities, and not just exemptions previously granted under 17 U.S.C. § 1201(a)(1).

Anti-Trafficking Provisions: Security Testing Exemption Under 17 U.S.C. § 1201(j)

In response to questions 8³ and 9⁴ as contained in the notice of inquiry, AIPLA encourages the Office to specifically consider the impact of the anti-trafficking, copy control, and access control provisions of the DMCA on the ability of systems operators to conduct security testing.

While several permanent exemptions – including 17 U.S.C. § 1201(j) – attempt to facilitate good-faith security testing efforts, some of our members believe these exemptions have fallen short and frustrated legitimate and critical security testing. Other stakeholders have cited the requirement of prior authorization as burdensome. As you have noted, “the existing permanent exemptions in section 1201 do not cover the full range of proposed security research activities, many of which proponents have established are likely to be non-infringing.”⁵ We believe such non-infringing activities should be encouraged to the extent they bolster the strength of security systems and are carried out in good faith.

At the same time, to avoid widespread abuse, we encourage the Office to consider appropriate limitations on security testing to protect intellectual property owners. For example, in lieu of obtaining prior authorization, perhaps a systems owner could prepare a certification describing the intended testing, and provide prior, written notice to the relevant parties. AIPLA encourages the Office to explore creative solutions to target the problems implicit in striking a difficult-but-necessary balance between the concerns of systems operators and intellectual property owners.

AIPLA will continue to monitor developments relating to the 17 U.S.C. § 1201 rulemaking process as well as the various permanent exemptions to the prohibitions under that title, and we welcome the opportunity to provide the Copyright Office with any assistance and comments on the issue in the future.

³ Please assess whether the existing categories of permanent exemptions are necessary, relevant, and/or sufficient. How do the permanent exemptions affect the current state of reverse engineering, encryption research, and security testing? How do the permanent exemptions affect the activities of libraries, archives, and educational institutions? How might the existing permanent exemptions be amended to better facilitate such activities? 80 Fed. Reg. 81373 (Dec. 29, 2015).

⁴ Please assess whether there are other permanent exemptions categories that Congress should consider establishing—for example, to facilitate access to literary works by print-disabled persons? 80 Fed. Reg. 81373 (Dec. 29, 2015).

⁵ Recommendation of the Register of Copyrights; Section 1201 Rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention at 299, (2015 Register of Copyright Recommendation).

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Respectfully submitted,

A handwritten signature in blue ink that reads "Denise W. DeFranco". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Denise W. DeFranco

President

American Intellectual Property Law Association