Before the
United States Copyright Office,

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In the matter of:	)	
	)	
Section 1201 Study	)	Docket No. 2015-8
	)	
Notice and Request	)	
for Public Comment	)	
	)	

COMMENTS BY THE FREE SOFTWARE FOUNDATION

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Background

On December 29th, 2015, the United States Copyright Office (Copyright Office) released a public call for comment, *Section 1201 Study: Notice and Request for Public Comment* (Docket No. 2015-8) in order to assess the operation of Section 1201, Title 17, including the triennial rulemaking process established under the Digital Millennium Copyright Act (DMCA) to adopt exemptions to the prohibition against circumvention of technological measures that control access to copyrighted works. On September 21st, 2016, the Copyright Office issued a request for additional comments regarding proposed new permanent exemptions, modifications to current permanent exemptions, and changes to anti-trafficking provisions. In response to this call, the Free Software Foundation submits the following comment.

About the Free Software Foundation

The Free Software Foundation (FSF) is a charitable 501(c)(3) corporation, founded in 1985, with the mission to expand and defend computer user freedom. The FSF is the largest single contributor to the GNU operating system (used widely today in its GNU/Linux variant), and the FSF's GNU General

Public License (GPL) is the most widely used free software license, covering major components of the GNU operating system and tens of thousands of other computer programs used on hundreds of millions of computers around the world. The FSF has inspired and significantly influenced numerous other initiatives focused on creating free licenses and free works, including Creative Commons and Wikipedia.

The FSF's Licensing and Compliance Lab is the preeminent resource of free licensing information for developers and publishers of free software and free documentation. The Licensing and Compliance Lab provides numerous resources and public services including: no-cost licensing consultation for developers of free works; continuing legal education workshops; certification of devices that run exclusively on free software via the Respects Your Freedom certification program; maintaining a directory of over 15,000 works of free software; and myriad educational publications on choosing and making use of free licenses.

Comment

The DMCA's anti-circumvention provisions should be repealed, and the exemptions process ended. Technological protection measures and Digital Restrictions Management (DRM) play no legitimate role in protecting copyrighted works. Instead, they are a means of controlling users and creating "lock in." Companies use this control illegitimately with an eye toward extracting maximum revenue from users in ways that have little connection to actual copyright law. In fact, these restrictions are technological impediments to the rights users have under copyright law, such as fair use. DRM enables companies to spy on their users, and use that data for profit. DRM requires the use of proprietary software, which exposes users to security vulnerabilities, as was the case in 2005 when Sony infected users' computers with a rootkit as part of their music album DRM system, or last week, when users' locked-down Digital Video Recorder machines were hijacked and used to launch a giant Distributed Denial of Service attack on the Internet.

Companies seek to use DRM to lock down and control users, using potential copyright violations as an excuse. DRM is frequently used to spy on users by requiring that they maintain a connection to the Internet so that the program can send information back to the DRM provider about the user's actions. DRM is used to restrict the ability of users to switch to a competing piece of software on their devices, or to prevent them from switching to a competing digital store for the purchase of software, movies and music. Even if it were about enforcing copyright law, the power given to companies by DRM and the DMCA is unacceptably over broad. We should not give companies the authority to pursue criminal charges against users seeking simply to have full control over their own computer systems and security, just because some users might use that control to violate copyright law.

The FSF is the copyright holder for much of the software that comprises the GNU/Linux operating system, one of the most ubiquitous operating systems in the world. FSF-copyrighted software is found in thousands of devices, from wireless routers to the web servers that run much of the Internet. The FSF

faces numerous copyright violations every day on the software to which it holds copyright, and has a long and successful track record of resolving these violations without resorting to the use of DRM. Thousands of other free software developers likewise do not utilize DRM, and are actually harmed by the DMCA's anti-circumvention rules, which grant anti-competitive advantages to developers who chose to harm their users. Free software has spread all around the world, enriching the lives of users and the bottom lines of developers who understand the value in respecting the rights of everyone by avoiding harmful DRM.

The exemptions process was supposed to address some of these concerns, but it does not. Exemptions are of no value if they cannot be practically enjoyed by average users. Sharing tools and asking third parties for assistance are always required for ordinary users to be able to exercise their rights. The 1201(b) restrictions on sharing tools necessary to exercise their rights should be rescinded, so that users can help each other break free of the control imposed by DRM. Users should be free to ask third parties to disable DRM on their behalf.

All DRM is a violation of the rights of users. The exemptions process as outlined by section 1201 is completely broken beyond repair. No amount of exemptions, except a permanent exemption for all uses, can rectify the situation. Requiring users to continually fight for exemptions in order to maintain them is inherently unfair. The ultimate solution to the problem is not to try and fix a broken process, but to end it. It is unethical and harmful for the law to treat all users as criminals -- which is exactly what DRM does. The DMCA's anti-circumvention provisions do too much harm and should be repealed, so that users may once again enjoy their rights under the law without interference.

Failing a full repeal of the anti-circumvention provisions, extending permanent exemptions to more uses can help alleviate the damage caused by those provisions. Users that rely on assistive technologies should not have the tools they need toyed with by a broken process. Granting a permanent exemption on these tools will ensure at least that these users are not locked out from their everyday lives by restrictive DRM. Additionally, DRM should not be permitted to lock users into abusive contracts by holding their devices hostage. Congress has already had to intervene previously in the DMCA's exemptions process to correct the failure to renew the right to unlock mobile devices. The exemption for unlocking devices should be made permanent, and should extend to all devices, including tablets. The ability to research or repair devices should likewise not be impaired by DRM. The simplest permanent exemption for ensuring the right to research or repair a device is simply to make all uses permanently exempt. Finally, the DMCA's anti-circumvention provisions should not lock away older technologies for all eternity. Users should be able to continue to have full control over their devices regardless of how long they possess them. DRM is malfunctioning software as it does not serve the interests of users; when this malfunctioning software further breaks down and ceases to allow access to the work, users have every right to disable this software to regain access. Exempting the ability to disable broken DRM from the DMCA's anti-circumvention provisions permanently will help to reduce the damage created by this unfair system.

The FSF's previous comment in this study calling for the end of the DMCA's anti-circumvention provisions received over 1200 co-signers. There is a great deal of interest in ending the broken system

brought about by the DMCA, but failing a full repeal of the DMCA's anti-circumvention provisions, we encourage any efforts to limit the damage caused, and granting permanent exemptions would be beneficial to that cause.

Sincerely,

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Copyright and Licensing Associate
Free Software Foundation