S. 990

To improve the process by which the Librarian of Congress considers requests for exemptions to section 1201(a)(1)(A) of title 17, United States Code, and to ease restrictions on the use of certain statutory exemptions to the Digital Millennium Copyright Act.

IN THE SENATE OF THE UNITED STATES

APRIL 16, 2015

Mr. WYDEN introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To improve the process by which the Librarian of Congress considers requests for exemptions to section 1201(a)(1)(A) of title 17, United States Code, and to ease restrictions on the use of certain statutory exemptions to the Digital Millennium Copyright Act.

1 Be it enacted by the Senate and House of Representa-
2 tives of the United States of America in Congress assembled,
3
4 SECTION 1. SHORT TITLE.
5 This Act may be cited as the “Breaking Down Bar-
6 riers to Innovation Act of 2015”.
7
8 SEC. 2. SENSE OF CONGRESS.
9 It is the sense of Congress that—
(1) the Librarian of Congress (referred to in this section as the “Librarian”) should ensure that noninfringing uses of copyrighted works, as well as activities unrelated to the copyrighted works, are not unduly burdened by the application of section 1201 of title 17, United States Code;

(2) the Librarian should apply section 1201 of title 17, United States Code, in a manner that strikes a balance between the ability of persons to make noninfringing use of copyrighted works and the legitimate protection of intellectual property rights;

(3) the Librarian, in considering whether to grant exemptions to the prohibition on the circumvention of technological protection measures, should recognize that such measures prevent persons from undertaking activities unrelated to the use of copyrighted works; and

(4) the Librarian—

(A) should not impose undue burdens on proponents of exemptions; and

(B) should ensure that the rulemaking process for considering exemptions is responsive to changes in the technological landscape.
SEC. 3. CIRCUMVENTION OF COPYRIGHT PROTECTION SYSTEMS.

(a) Violations Regarding Circumvention of Technological Measures.—

(1) In General.—Section 1201(a)(1) of title 17, United States Code, is amended—

(A) in subparagraph (A), by striking the second sentence;

(B) in subparagraph (C)—

(i) in the matter preceding clause (i)—

(I) by striking “During the 2-year period described in subparagraph (A), and during each succeeding 3-year period,” and inserting “Every 3 years,”; and

(II) by striking “the Librarian shall examine” and inserting “the Librarian shall consider, if applicable”; and

(ii) in clause (i), by striking “the availability for use of copyrighted works” and inserting “any reduction in the availability for use of copyrighted works as a result of the prohibition on the circumvention of technological measures”;
(iii) in clause (iii), by striking “or re-
search” and inserting the following: “re-
pair, recycling, research, or other fair uses,
and on access to information not subject to
copyright protection”;

(iv) by redesignating clauses (iv) and
(v) as clauses (vi) and (vii), respectively;
and

(v) by inserting after clause (iii) the
following:

“(iv) the impact that the prohibition
on the circumvention of technological
measures has on the accessibility of works
and technologies for persons with disabil-
ities;

“(v) the impact that the prohibition
on the circumvention of technological
measures has on the furtherance of secu-
rity research;”;

(C) by redesignating subparagraph (D) as
subparagraph (F);

(D) by striking subparagraph (E);

(E) by inserting after subparagraph (C)
the following:
“(D) In making a determination under subparagraph (C), the Librarian—

“(i) shall consider the totality of the evidence available to the Librarian; and

“(ii) may not assign the burden of proof to a proponent of an exemption.

“(E) The Librarian, at the discretion of the Librarian, may conduct a rulemaking proceeding under subparagraph (C) outside of the 3-year review process described in that subparagraph if the Librarian determines that it is substantially likely that persons who are users of a copyrighted work which is in a particular class of works are, or are likely to be in the succeeding 3-year period, adversely affected by virtue of the prohibition under subparagraph (A) in their ability to make noninfringing uses of that particular class of works under this title.”;

(F) in subparagraph (F), as redesignated—

(i) by striking “The Librarian” and inserting “(i) The Librarian”;

(ii) by striking “adversely affected, and the prohibition” and inserting the following: “adversely affected.

“(ii) The prohibition”; and
(iii) by adding at the end the following:

“(iii) At the end of each 3-year period described in subparagraph (C), the Librarian shall renew for the ensuing 3-year period each exemption granted under subparagraph (C) unless the Librarian determines that, as a result of changed circumstances, it is unlikely that any persons who are users of a copyrighted work in the class of copyrighted works to which the exemption relates will be adversely affected by virtue of the prohibition under subparagraph (A) in their ability to make noninfringing uses of that particular class of works under this title.”; and

(G) by inserting after subparagraph (F), as redesignated, the following:

“(G) For purposes of this paragraph—

“(i) persons are ‘adversely affected’ if a technological measure that effectively controls access to a work which is in a particular class of copyrighted works diminishes the ability of the persons to make noninfringing uses of that particular class of works under this title;

“(ii) if a technological measure inhibits noninfringing uses of a work which is in a particular class of copyrighted works relating to improving accessibility of works or technologies for persons with
disabilities, there shall be a presumption that persons who use that particular class of work are likely to be adversely affected; and

“(iii) the Librarian may find that a use of a work is noninfringing based upon the totality of the circumstances, including—

“(I) the presence of supporting judicial precedent;

“(II) the absence of contrary judicial precedent;

“(III) the intent of Congress; and

“(IV) any other factors relevant to—

“(aa) assessing the applicability of copyright protection; or

“(bb) exceptions to or limitations on copyright protection.”.

(2) REPORT.—Not later than 1 year after the date of enactment of this Act, the Librarian of Congress, in consultation with the Register of Copyrights and the Assistant Secretary for Communications and Information of the Department of Commerce, shall—

(A) conduct a study, including by soliciting public comment, on—
(i) ways to ease the burden on persons requesting an exemption under section 1201(a)(1)(C) of title 17, United States Code, as amended by paragraph (1);

(ii) how the process for requesting and granting exemptions described in clause (i) can be used to foster security research; and

(iii) how the process for requesting and granting exemptions described in clause (i) can be expanded to enable the sale and dissemination of circumvention tools, as described in subsections (a)(2) and (b)(1) of section 1201 of title 17, United States Code, for the sole purposes of enabling circumventions with respect to the classes of copyrighted works that the Librarian has published under subparagraph (F) of subsection (a)(1) of such section, as redesignated by paragraph (1); and

(B) shall submit to Congress a report on the study conducted under subparagraph (A) that includes—
(i) proposed legislation to achieve the
goals described in clauses (i) and (ii) of
subparagraph (A); and

(ii) a description of any obstacles to
the expansion described in clause (iii) of
subparagraph (A) and proposed legislation
for achieving such an expansion.

(b) REVERSE ENGINEERING.—Section 1201(f) of
title 17, United States Code, is amended—

(1) in paragraph (1), by striking “for the sole
purpose” and all that follows through “engaging in
the circumvention” and inserting the following: “for
the sole purpose of undertaking activities aimed at
achieving interoperability of an independently cre-
ated computer program with other programs”;

(2) in paragraph (2), by striking “in order to
enable” and all that follows through “achieve such
interoperability” and inserting the following: “for
the activities described under paragraph (1), or for
the purpose of enabling interoperability of an inde-
dependently created computer program with other pro-
grams”; and

(3) in paragraph (3), by striking “if the per-
son” and all that follows through “other programs,
and”.

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(c) ENCRIPTION RESEARCH.—Section 1201(g) of title 17, United States Code, is amended—

(1) in paragraph (1)(A)—

(A) by striking “activities necessary to identify and analyze flaws” and inserting “activities relating to the identification and analysis of flaws”; and

(B) by striking “to advance the state of knowledge in the field of encryption technology” and inserting “for research purposes”;

(2) in paragraph (2)—

(A) in subparagraph (B), by striking “necessary to conduct” and inserting “undertaken in the course of conducting”; and

(B) in subparagraph (D), by striking all that follows “infringement under this title” and inserting a period;

(3) by striking paragraphs (3) and (5);

(4) by redesignating paragraph (4) as paragraph (3); and

(5) in paragraph (3)(B), as redesignated, by striking “with whom he or she is working collaboratively”.

(d) Protection of Personally Identifying Information.—Section 1201(i)(1)(D) of title 17, United States Code, is amended—

(1) by striking “solely”; and

(2) by striking “who seeks to gain access to the work protected, and is not in violation of any other law”.

(e) Security Testing.—Section 1201(j) of title 17, United States Code, is amended—

(1) in paragraph (2), by striking all that follows “infringement under this title” and inserting a period;

(2) by striking paragraph (3);

(3) by redesignating paragraph (4) as paragraph (3); and

(4) in paragraph (3), as redesignated, by striking “subsection (2)” and all that follows and inserting “paragraph (2)”.

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