

*Before the*  
**U.S. COPYRIGHT OFFICE, LIBRARY OF CONGRESS**  
**In the matter of Section 1201 Study: Notice and Request for Public**  
**Comment**  
**Docket No. 2015-08**  
**Comments of Organization for Transformative Works**

The OTW is a nonprofit organization established in 2007 to protect and defend fanworks from commercial exploitation and legal challenge. “Fanworks” are new, noncommercial creative works based on existing media. The OTW’s nonprofit website hosting transformative noncommercial works, the Archive of Our Own, has over 770,000 registered users and receives over 115 million page views per week.

We represent artists who make works commenting on and transforming existing works, adding new meaning and insights—from reworking a film from the perspective of the “villain” to retelling the story as if a woman, instead of a man, were the hero.

Noncommercial remix cultures provide important benefits to participants and to society at large. Historically, painters have learned to paint by studying, and copying, the work of existing painters, developing their techniques and learning to create their own styles, both building on and diverging from what’s gone before. Composers historically have followed a similar arc; singers also regularly learn their craft from singing existing songs and learning from existing performers’ styles. So too with writers, who often begin with pastiche as they master the relevant skills. And so too with more recent arts, including audio editing and video editing.<sup>1</sup> Section 1201 makes it illegal to use traditional artistic techniques in new media, which is both counterintuitive and destructive. Section 1201’s overbreadth prevents the planting of the seed corn of the next generation of artists and scholars, to the detriment of the vibrant creativity copyright should encourage.

## **I. Subjects of Inquiry**

### ***General***

1. Please provide any insights or observations regarding the role and effectiveness of the prohibition on circumvention of technological measures in section 1201(a).

We have nearly eighteen years of experience with §1201. In that time, it hasn’t prevented the widespread availability of circumvention technology. Copyright infringers don’t pause to ask whether they’re violating a second law, §1201 (of which they are almost certainly unaware). Unfortunately, §1201 therefore is more likely to harm people trying to do the right thing than to deter people trying to do the wrong thing.

The Librarian of Congress has repeatedly determined that circumvention technology has

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<sup>1</sup> For a review of the empirical evidence of the value of remix, politically, culturally, educationally, and otherwise, see the OTW’s 2013 comment to the NTIA Green Paper, available at [https://www.ntia.doc.gov/files/ntia/organization\\_for\\_transformative\\_works\\_comments.pdf](https://www.ntia.doc.gov/files/ntia/organization_for_transformative_works_comments.pdf).

remained readily accessible to anyone with an internet connection.<sup>2</sup> The reason most people don't use circumvention technology if they want to acquire unauthorized copies is that they don't need to: for pure consumption purposes, illegal downloads are widely available. Fortunately, legitimate services are increasingly competing to provide simple and timely access for consumptive uses. Ironically, anticircumvention thus weighs most heavily on remixers and others who need to do more than just consume. Section 1201 is an arrow that has overshot its mark.

2. How should section 1201 accommodate interests that are outside of core copyright concerns, for example, in cases where circumvention of access controls protecting computer programs implicates issues of product interoperability or public safety?

The OTW views the rise of non-copyright concerns to distracting prominence during the rulemaking proceedings as an unfortunate side effect of the overbreadth of §1201, and another reason to reform §1201 so that it is more clearly directed at deterring infringement, not at protecting “digital locks” for their own sake.

It is also worth emphasizing that public safety is expressly safeguarded by other laws and agencies, who bear direct responsibility and have relevant expertise. Safeguarding constitutionally-protected interests like free expression, by contrast, is the responsibility of all laws and agencies (whether those laws are otherwise focused on copyright, public safety, or any other interest). It is therefore the Copyright Office’s responsibility to ensure that §1201 does not hinder free expression, but not the Copyright Office’s responsibility to ensure that §1201 promotes public safety.

#### *Rulemaking Process*

3. 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?

“Meaningful” is a subjective term that invites further strife. There are participants in the process who routinely oppose every exemption, and could be expected to argue in every case that their opposition is “meaningful,” creating yet another issue the Office would have to seek submissions on and then resolve. Instead, at a minimum, there should be a presumption of renewal for all granted exemptions, which could only be overcome by evidence that the exemptions are facilitating substantial infringing uses.

4. Please assess the current legal requirements that proponents of an exemption must satisfy to demonstrate entitlement to an exemption. Should they be

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<sup>2</sup> Indeed, there must be an implied right to make a tool to engage in a privileged circumvention, or else the exemptions granted, either by statute or by the rulemaking process, are meaningless. *See* Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Rules Need to Be Revised*, 14 Berkeley Tech. L.J. 519, 554 (1999). The main reason §1201 is not impeding more lawful uses is because circumvention tools are easy to find.

altered? If so, how? In responding, please comment on the relationship to traditional principles of administrative law.

The Office has, in many instances, imposed additional requirements on exemptions that are not required by the statute. Adherence to the statute would simplify the process for all concerned. Specifically:

- (1) **Substantiality:** The Office has at times imposed a “substantiality” requirement for interference with noninfringing uses. As the NTIA and others point out, this is not dictated by the statute, nor by the legislative history of the bill that was actually passed by Congress. See Section 1201 Rulemaking, 65 Fed. Reg. 64,556, 64,562 (Oct. 27, 2000) (recognizing “NTIA’s observation that the word ‘substantial’ does not appear in section 1201(a)(1)(C)’); Bill D. Herman & Oscar H. Gandy, *Catch 1201: A Legislative History and Content Analysis of the DMCA Exemption Proceedings*, 24 Cardozo Arts & Ent. L.J. 121, 169 (2006).
- (2) **Harm:** Section 1201 requires the Librarian of Congress, assisted by the Office’s recommendation, to determine any and all classes of copyrighted works whose users “are, or are likely to be in the succeeding 3-year period, adversely affected ... in their ability to make noninfringing uses” by Section 1201(a)(1)(A)’s prohibition on circumvention. No further evidence of harm other than that inability to make noninfringing uses is required. The Office often seeks to identify harm other than interference with noninfringing uses, such as potential physical risks associated with inability to modify medical devices; this is unnecessary and unduly burdensome to all concerned.
- (3) **Additional limitations on noninfringing uses:** Similarly, the Office departs from the statutory standard when it insists that it must give “guidance” to the public on the nature of the underlying noninfringing uses, and that the existing Copyright Act is insufficient to define lawfulness.<sup>3</sup> Such a standard presupposes that certain lawful uses, particularly fair uses, will be excluded from the exemption solely because they can’t be defined with tax-code like precision in advance. It also defies the experience of prior rulemakings, which is that the Office’s “guidance” is in fact usually so baroque as to make unclear when a use falls within its scope.<sup>4</sup>

The Office should not create additional requirements for lawfulness that are not in the underlying law authorizing the relevant conduct, such as fair use or face-to-face teaching. Recent rulemaking is an example, where the Office imposed a requirement of criticism or commentary over and above a noninfringing, noncommercial fair use. There is no need to prejudge potential types of transformative fair uses, or to create an extra category that would need to be

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<sup>3</sup> Hearing Transcript, Statement of Jacqueline Charlesworth, May 28, 2015, at 55, available at <http://copyright.gov/1201/2015/hearing-transcripts/1201-Rulemaking-Public-Roundtable-05-28-2015.pdf> (also repeating the insistence on “substantial adverse effects” as a justification for providing “guidance” beyond the requirements of the Copyright Act).

<sup>4</sup> See *id.* at 240-41 (statement of Rebecca Tushnet) (summarizing past panels’ debates over meanings of terms in prior rulemakings).

separately analyzed even after a factfinder determined that a remix was fair use. Rather, imposing such a requirement creates new uncertainties, mandating distinctions that courts have increasingly recognized they are unequipped to make.<sup>5</sup> Transformativeness recognizes the variety of interpretive contexts and wisely exempts the factfinder from having to identify a specific critical message or commentary—something that can be especially hard to reduce to words when it is expressed in sounds and images. Indeed, courts routinely find fair use when there are multiple interpretations of the meaning of a use.<sup>6</sup> Punishing or suppressing work that was transformative fair use, but not “critical” according to an outsider’s view, puts artistic speech and artistic evolution at risk.

5. Please provide additional suggestions to improve the rulemaking process.

The Notice of Inquiry stated that: “the Office has done what it can within the existing statutory framework to streamline the proceedings. For the recent sixth triennial rulemaking proceeding, the Register … adjusted the administrative procedures to make the process more accessible and understandable; facilitate participation, coordination, and the development of the factual record; and reduce administrative burdens on both the participants and the Copyright Office.” Notice of Inquiry at 10.

The aim was admirable. The success was minimal. The OTW, like the other public interest organizations of which we are aware, spent at least as many person-hours on the proceeding as in prior rulemakings, and the schedule was concentrated around particularly difficult periods of the academic calendar. Asking for a short initial proposal did not change the burdens on participants, especially because the Copyright Office then asked proponents to defend every key element of the exemption, rather than narrowing the issues in any noticeable way. (No previous rulemaking, for example, involved any dispute over whether DVD-ripping software is widely available.)

The “more organized and complete administrative record” was not noticeably more organized or complete than previous rounds, which also involved numerous back-and-forth replies. In part, the difficulty is because the Office combines repeated rounds of submissions on an administrative law model with an adversarial approach that treats factual development as solely the job of the contending participants. Advance submission of multimedia evidence is convenient and sensible, but it has no impact on the overall burden in these proceedings.

Specific suggestions:

**(4) De novo review is not a new evidence standard.** De novo review should not be

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<sup>5</sup> *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013) (“The law imposes no requirement that a work comment on the original or its author in order to be considered transformative, and a secondary work may constitute a fair use even if it serves some purpose other than those . . . identified in the preamble to the statute.”; district court erred as a matter of law in requiring criticism or commentary).

<sup>6</sup> See, e.g., *Seltzer v. Green Day*, 725 F.3d 1170 (9th Cir. 2013); *Cariou*, 714 F.3d at 706-07; see also *Rebecca Tushnet, Judges as Bad Reviewers: Fair Use and Epistemological Humility*, 25 L. & Lit. 20 (2013) (discussing relevance of interpretive communities); *Rebecca Tushnet, Worth a Thousand Words: The Images of Copyright Law*, 125 Harv. L. Rev. 683, 754-55 (2012) (discussing fair use and images).

construed to mean that new *evidentiary* submissions are required. Absent some good reason to think that evidence on which a previous exemption was based is no longer relevant, such evidence should be considered still valid, and new evidence of harm may be particularly difficult to develop while an exemption is in force. This is especially important for smaller entities that lack the resources to endure a year-long (sometimes longer, such as the 20 months spanning 2009-2010) process every three years. The negative effects were felt acutely in the 2012 rulemaking, in which the Office initially determined that an exemption for the visually impaired was no longer justified because there was no new evidence in its support. Fortunately, the Librarian recognized the need to renew the exemption, but much controversy could have been avoided by accepting previous evidence as still valid if there was no reason to think that anything else had changed. In addition, the result in 2015 was that entities representing the visually impaired, and the Office, had to do substantial extra work on an exemption that no one opposed, creating a new record not substantively different from the old. Considering evidence to continue to be evidence even if it was previously submitted is also important to provide greater certainty for anyone who relies on an exemption as part of their ongoing operations, such as documentary filmmakers.

(5) **The Office should recognize the widespread misuse of access controls as rights controls.** In theory, no exemptions should be needed to circumvent copy controls. In practice, copyright owners argue that access and rights controls are the same, and thus the very acts that Congress deliberately left unregulated are now illegal.<sup>7</sup> Remixers, for example, have lawful access—they pay for works in order to take clips from them. They don’t circumvent to get access they would otherwise lack; they circumvent so that they can make short clips for their communicative purposes, whether that’s commentary on Washington’s football team or on the absence of nonwhite voices in popular film.<sup>8</sup> The fact that, from the perspective of rights controls, their acts are perfectly lawful should itself indicate an adverse impact on noninfringing uses. One way to correct this problem would be to hold that persistent access controls, such as CSS, are not in fact access controls under §1201(a)(1)(A), but rather rights controls.

(6) **Alternatives to circumvention need to be realistic.** In its substantive

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<sup>7</sup> See R. Anthony Reese, *Will Merging Access Controls and Rights Controls Undermine the Structure of Anticircumvention Law?*, 18 Berkeley Tech. L.J. 619, 650-51 (2003) (explaining how overuse of access control has left rights control provisions a dead letter); Letter from Martine Courant Rife, Researcher, Mich. State University, to U.S. Copyright Office, Library of Congress (July 10, 2009), available at [http://www.copyright.gov/1201/2008/answers/7\\_10\\_responses/final-rife\\_response-to-questions-july-10-2009.pdf](http://www.copyright.gov/1201/2008/answers/7_10_responses/final-rife_response-to-questions-july-10-2009.pdf) (response to Copyright Office post-hearing questions) (arguing that the Copyright Office should treat CSS, the technology that protects DVDs, as a rights control technology such that no exemption is required to allow individual circumvention of CSS); Neil J. Conley, *Circumventing Rights Controls: The Token Crack in the Fair Use Window Left Open by Congress in 1201 May Be Open Wider than Expected—Technically Speaking*, 8 Chi.-Kent J. Intell. Prop. 297, 316 (2009) (arguing that classifying technologies as rights controls rather than access controls has undermined congressional intent to preserve fair use).

<sup>8</sup> See NPR Staff, *He’s Shared ‘Every Single Word’ — But It’s The Silence That Rings Louder*, NPR, July 11, 2015, available at <http://www.npr.org/2015/07/11/421822860/hes-shared-every-single-word-but-its-the-silence-that-rings-louder> (discussing Dylan Marron’s edits of hit films reducing them to every single word spoken by a person of color in the film—often leading to totals under a minute long).

consideration of whether an exemption is needed, the Office considers alternatives to circumvention. In this evaluation, the Office should weigh not just whether alternatives exist in theory, but whether the relevant group understands and practically can and will use those alternatives. Section 1201, which is complicated and counterintuitive, is unknown to most people, leaving users at risk of inadvertently breaking the law if an exemption is not granted. We've had over fifteen years for knowledge of §1201 to permeate ordinary consciousness. It hasn't. It's not going to. Even experienced IP lawyers sometimes don't know about §1201; the drafter of this comment has interacted with highly experienced trademark attorneys who told her that, if a use was fair, anticircumvention law couldn't apply. Denying an exemption because an alternative is theoretically available, when the relevant user group doesn't know about it and won't use it, is inconsistent with the statute, which asks for evidence about harms to noninfringing uses in the real world. Looking at reality on the ground would provide a more innovation-friendly environment.

(7) **The standard should recognize the burdens of participating in the exemption proceeding.** The Office's evidentiary standards should specifically recognize that many applicants for exemptions have limited resources and are often pro se.<sup>9</sup> A more limited evidentiary showing may be appropriate for smaller entities. This issue interacts with the Office's unjustified "substantiality" requirement, as the Office too often dismisses the evidence provided at its hearings—given by the few people who know about the DMCA and have the resources to show up to provide testimony—as anecdotal.

#### *Anti-Trafficking Prohibitions*

6. Please assess the role of the anti-trafficking provisions of sections 1201(a)(2) and 1201(b) in deterring copyright infringement, and address whether any amendments may be advisable.

The OTW has seen no evidence that these provisions deter circumvention itself, let alone copyright infringement. Clear copies of almost any work are available through unauthorized sources, in significant part because, once copy protection is broken once, that copy can seed other copies with no further need for anticircumvention tools. People interested in engaging in or facilitating piracy already have a demonstrated lack of regard for the law, so adding a second law atop the first doesn't deter them. People trying to comply with the law, by contrast, may be over-deterring by the law if and when they learn of it, or, as the OTW routinely experienced before the noncommercial video exemptions were in effect, they may decline to assert fair use or counternotify in the face of abusive DMCA takedowns. Thus, the only thing that §1201 is likely to deter is other otherwise-

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<sup>9</sup> Over time, fewer individuals are even trying to participate in the process, and "[e]ven interested parties, such as copyright holders, advocacy groups, educational and research institutions, must often resort to attorneys and experts in the field to build a case for them. As a result, the notice and comment process, which was intended to have broad public participation, is now dominated by legal experts." Maryna Koberidze, *The DMCA Rulemaking Mechanism: Fail or Safe?*, 11 Wash. J.L. Tech. & Arts 211, 248-49 (2015) (footnotes omitted).

noninfringing conduct.

The idea that it could be unlawful to perform the steps necessary to take a lawful act is mystifying to most people. It is particularly notable that, in six rounds of rulemaking, exemption opponents have developed no evidence that anticircumvention law is known to creators.<sup>10</sup> As researcher Katharina Freund discovered in her empirical work interviewing remixers: “The complexity of copyright law makes it very difficult for non-experts to understand, particularly, the anti-circumvention requirements of the DMCA.”<sup>11</sup> Indeed, as researcher Lucas Hilderbrand observed, “when people learn about the extent of the DMCA restrictions, they respond with shock and outrage, which tends to turn either to pessimism or to willful disregard for the law.”<sup>12</sup>

Many fair users are not part of preexisting artistic or political communities, and have no reason to know about the specialized requirements of §1201. Successful fair users like the anti-abortion group Center for Bio-Ethical Reform<sup>13</sup> or a critic of an anti-Muslim speaker<sup>14</sup> made speech about specific matters, using circumvention to do so, rather than starting from an intent to make transformative works. Likewise, the anti-Redskins video highlighted by the Office in the recent exemption proceeding was made within a political community, not by people who routinely deal with technical copyright issues.<sup>15</sup>

Counterintuitive, unknown laws can’t deter wrongdoers, and they can easily be used to suppress otherwise lawful and fair conduct carried out in good faith.

7. 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?

Yes, for the reasons given above. That which is lawful to do ought to be lawful to get assistance in doing, or large entities with in-house programmers are rewarded over small entities, a particularly egregious discrimination when it comes to First Amendment-protected activities such as journalism and criticism.

The simplest solution would be as follows: Section 1201(a)(1) should allow

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<sup>10</sup> See also Krzysztof Bebenek, Strong Wills, Weak Locks: Consumer Expectations and the DMCA Anticircumvention Regime, 26 Berkeley Tech. L.J. 1457 (2011) (“[B]ecause the DMCA’s anticircumvention regime relies on a combination of complex law and porous technology that fails to reflect consumer expectations, there is good reason to believe that it is also fairly ineffectual.”).

<sup>11</sup> See Katherine Freund “Fair use is legal use”: Copyright Negotiations and Strategies in the Fan-Vidding Community, 17 New Media & Society 1, 5 (2014).

<sup>12</sup> Lucas Hilderbrand, Inherent Vice: Bootleg Histories of Videotape and Copyright 79 (2009).

<sup>13</sup> See Northland Family Planning Clinic, Inc. v. Ctr. for Bio-Ethical Reform, 868 F. Supp. 2d 962, 972, 982-93 (C.D. Cal. 2012) (re-edited video critiquing original video was fair use).

<sup>14</sup> Caner v. Autry, 2014 WL 2002835 (W.D. Va. May 14, 2014). As explained in the EFF/OTW comment, Autry was sued over multiple critical videos, including his remix video, though the court only ultimately ruled on one video. EFF/OTW 2014 Comment, at 9.

<sup>15</sup> Section 1201 Rulemaking: Sixth Triennial Proceeding, Recommendation of the Register of Copyrights 86 (Oct. 2015).

circumvention for the purpose of making a non-infringing use of a protected work. Section 1201(a)(2) and Section (b)(1) should be amended to permit the making and distribution of tools capable of enabling substantial non-infringing use of a work, in order to give those making lawful uses the practical ability to circumvent. In the alternative, TPM users should be required to facilitate access to exempted classes of works.

#### *Permanent Exemptions*

8. 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?

The best result would be a permanent exemption for noninfringing uses, avoiding the extended, wasteful wrangling involved in present discussions. The Copyright Office, copyright owners, and public interest organizations could focus elsewhere, where numerous other copyright issues remain in need of attention. Providing that exemptions that have been granted and then renewed (and thus twice evaluated) become permanent would also at least reduce the burden on the Copyright Office on a long-term basis.

It is important to recall that, just as the MPAA predicted that the VCR would destroy the film industry,<sup>16</sup> the MPAA, along with like-minded organizations, repeatedly claimed that any exemption at all to §1201 would lead to the collapse of TPMs.<sup>17</sup> Indeed, they specifically predicted that the 2006 exemption for college film studies would, like the VCR

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<sup>16</sup> “[T]he VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone.” Jack Valenti, the MPAA lobbyist who made this claim, conceded a few minutes later that he owned and used a video tape recorder. 1982 Home Recording Hearing, Home Recording of Copyrighted Works: Hearing on H.R. 4783, H.R. 4794, H.R. 4808, H.R. 5250, H.R. 5488, and H.R. 5705 Before the Subcomm. on Courts of the H. Comm. on the Judiciary, 97th Cong. (1982), at 8, 10 (testimony of Jack Valenti, Motion Picture Association of America); *see also* Michael A. Carrier, *Innovation for the 21st Century: Harnessing the Power of Intellectual Property and Antitrust Law* 107 (1st Ed. 2009) (recounting the content industries’ grim and inaccurate history of predicting that new technologies—including player pianos and records—would destroy the production of creative works).

<sup>17</sup> Transcript of Testimony at 76, Section 1201 Rulemaking, Docket No. RM 2005-11A (U.S. Copyright Office Apr. 3, 2006), available at <http://www.copyright.gov/1201/2006/hearings/transcript-april03.pdf> (testimony of Fritz Attaway, Motion Picture Ass’n of Am.) (opposing any exemptions as threats to the effectiveness of entire 1201 regime); Comments of Motion Picture Ass’n of Am. (MPAA) at 11, Section 1201 Rulemaking, Docket No. RM 2008-8 (U.S. Copyright Office Feb. 2, 2009), available at <http://www.copyright.gov/1201/2008/responses/mpaa-46.pdf> (same); Comments of DVD Copy Control Ass’n, Inc. at 2, Section 1201 Rulemaking, Docket No. RM 2002-3 (U.S. Copyright Office Feb. 19, 2003), available at <http://www.copyright.gov/1201/2003/reply/028.pdf> (“even . . . ‘limited exemptions’ will essentially render CSS ineffective as a means of protecting copyrighted content”); *see also* Comments of the DVD Copy Control Ass’n, Inc. at 14, Section 1201 Rulemaking, Docket No. RM 2005-11 (U.S. Copyright Office Feb. 2006), available at [http://www.copyright.gov/1201/2006/reply/01taylor\\_DVDCCA.pdf](http://www.copyright.gov/1201/2006/reply/01taylor_DVDCCA.pdf) (nearly identical argument); Comments of Time Warner, Inc. at 10-11, Section 1201 Rulemaking, Docket No. RM 2005-11 (U.S. Copyright Office Feb. 2006), available at [http://www.copyright.gov/1201/2006/reply/18aistars\\_TWI.pdf](http://www.copyright.gov/1201/2006/reply/18aistars_TWI.pdf) (“Granting [an exemption] with respect to any particular [DRM] technology would be tantamount to outlawing the use of that technology.”).

before it, destroy the film industry.<sup>18</sup> They've been wrong each time, and in the 2015 proceedings abandoned opposition to the renewal of many existing exemptions, conceding their prior errors.

Clearer rules are better than murkier ones. But arguments against exemptions "stand[] in stark contrast to the DMCA's actual prohibition on circumvention, which has always been anything but clear or bright."<sup>19</sup>

9. Please assess whether there are other permanent exemption categories that Congress should consider establishing—for example, to facilitate access to literary works by print-disabled persons?

See above.

*Other*

10. To what extent and how might any proposed amendments to section 1201 implicate the United States' trade and treaty obligations?

They would not. The treaties we have signed provide for permanent exceptions, and require only that copyright owners be protected against circumvention that violates their rights, not that anticircumvention law create rights to control otherwise lawful uses.

For example, Article 11 of the WIPO Copyright Treaty requires that "Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law." Under the language of the treaty, the concern is not purely whether access controls are circumvented, but whether anticircumvention is used to prevent acts "which are not authorized by the authors concerned or permitted by law." As Dan Burk explained:

[T]he treaty requires only that signatory states provide 'adequate legal protection and effective legal remedies' against circumvention of technological controls. In the United States, such protection would already have been provided under the doctrine of contributory infringement, which attributes copyright liability to providers of technical devices that lack a substantial noninfringing use....The compliance of U.S. law with the requirements of the treaty was so substantial that the Clinton administration initially considered submitting the WIPO Treaty to the

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<sup>18</sup> Joint Reply Comments of Ass'n of Am. Publishers et al. at 30, Section 1201 Rulemaking, Docket No. RM 2005-11 (U.S. Copyright Office Feb. 2, 2006), available at [http://www.copyright.gov/1201/2006/reply/11metalitz\\_AAP.pdf](http://www.copyright.gov/1201/2006/reply/11metalitz_AAP.pdf) ("[T]he very medium that educators have grown to appreciate and desire to use in their classrooms would be threatened by the recognition of the requested exemption.").

<sup>19</sup> Krzysztof Bebenek, Strong Wills, Weak Locks: Consumer Expectations and the DMCA Anticircumvention Regime, 26 Berkeley Tech. L.J. 1457, 1474 (2011).

Senate for ratification without accompanying implementing legislation.<sup>20</sup>

Subsequent treaties have equally preserved flexibility in implementing anticircumvention rules. For example, TPP Article 18.68: Technological Protection Measures (TPMs) (which, if it comes into force, will supersede various other treaties such as the Australia-US FTA) allows limitations and exceptions on both circumvention and trafficking rules in *any* case where there is an “actual or likely” adverse impact on “non-infringing” uses. Now is the time for the US to evaluate §1201 as a whole and accept that, by definition, when §1201 creates possible civil or criminal liability for noninfringing use, it has had such an impact. This finding, whether made by legislation or administrative proceeding, more than satisfies our treaty obligations.<sup>21</sup>

11. Please identify any pertinent issues not referenced above that the Copyright Office should consider in conducting its study.

The Office should consider the overriding objective of understanding of and respect for the law. As Lucas Hildebrand observed above, the DMCA’s provisions create contempt for the law. One reason so many laypeople are dismissive of copyright law is because it is counterintuitive and arcane, resulting in seeming unfairness and futility. Jessica Litman has explained:

The less workable a law is, the more problematic it is to enforce. The harder it is to explain the law to the people it is supposed to restrict, the harder it will be to explain to the prosecutors, judges, and juries charged with applying it. The more burdensome the law makes it to obey its prescriptions, and the more draconian the penalties for failing, the more distasteful it will be to enforce. The more people the law seeks to constrain, the more futile it can be to enforce it only sporadically. Finally, the less the law’s choices strike the people it affects as legitimate, the less they will feel as if breaking that law is doing anything wrong. In other words, if a law is bad enough, large numbers of people will fail to comply with it, whether they should or not.<sup>22</sup>

The United Kingdom’s Intellectual Property Office surveyed numerous copyright stakeholders, and heard the same point that simple rules promote understanding and compliance:

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<sup>20</sup> Dan L. Burk, *Market Regulation and Innovation: Legal and Technical Standards in Digital Rights Management Technology*, 74 Fordham L. Rev. 537, 558 (2005) (footnotes omitted); *id.* at n. 100 (“the [DMCA’s] anticircumvention provisions contain language very close to that rejected by the treaty Diplomatic Conference as overbroad and detrimental to the public domain.”); Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 27 Va. J. Int’l L. 369, 387 (1997).

<sup>21</sup> A footnote to this provision specifically allows the parties to make permanent, without further factfinding, any existing exemptions at the time of accession; again, at a minimum, this should be done.

<sup>22</sup> Jessica Litman, *Digital Copyright* 195 (2001); see also Joyce E. Cutler, *On Copyright’s 300th Anniversary, Scholars Question Effectiveness of Current Formulation*, 15 Electronic Com. & L. Rep. 641 (2010) (“Copyright law is ‘out of balance’ and action must be taken to restore the public’s respect for copyright, [then-]Register of Copyrights Marybeth Peters said. . . . ‘[W]e have lost the respect of the public in many ways,’ Peters said. . . . Copyright law should be understandable so that people will obey and respect it, Peters said. Further, the way copyright is viewed has changed, and there are lots of new players, including consumers, who Peters said ‘are really key in the copyright debate.’”).

[Some stakeholders] saw the complexity of copyright as the main challenge to lawful use of works. In their view, the current situation online was too confusing to understand and as a result many people gave up trying. Even some long-time professionals in the creative industries indicated a lack of knowledge of all relevant copyright developments in their area.

The copyright system suffers from a marked lack of public legitimacy. . . . The system is often unable to accommodate certain uses of copyright works that a large proportion of the population regards as legitimate fair and reasonable. . . . The problems become more pronounced as people feel a sense of ownership or attachment to material in which the copyright is owned by others. Consumers may have strong ties to material . . . because of the time and effort they have devoted to it . . . .<sup>23</sup>

While they encourage disrespect from some people, incomprehensible rules also deter risk-averse creators from making fair uses. The solution, as the UK IPO report put it, is to “hid[e] the wiring”—to simplify copyright law so that it comes into better alignment with ordinary logic.<sup>24</sup> Reforming §1201 is a significant part of that solution.

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<sup>23</sup> U.K. Intellectual Prop. Office, © the Way Ahead: A Strategy for Copyright in the Digital Age 24, 27 (2009), available at <http://www.ipo.gov.uk/c-strategy-digitalage.pdf> (citations omitted).

<sup>24</sup> U.K. Intellectual Prop. Office, *supra*, at 33 (“Calls have been made for solutions which lessen or remove a non-commercial consumer’s need to understand copyright law. The analysis above would suggest that ‘hiding the wiring’ by simplifying the situation for users could help tackle some of the problems of the copyright system.” (citation omitted)).